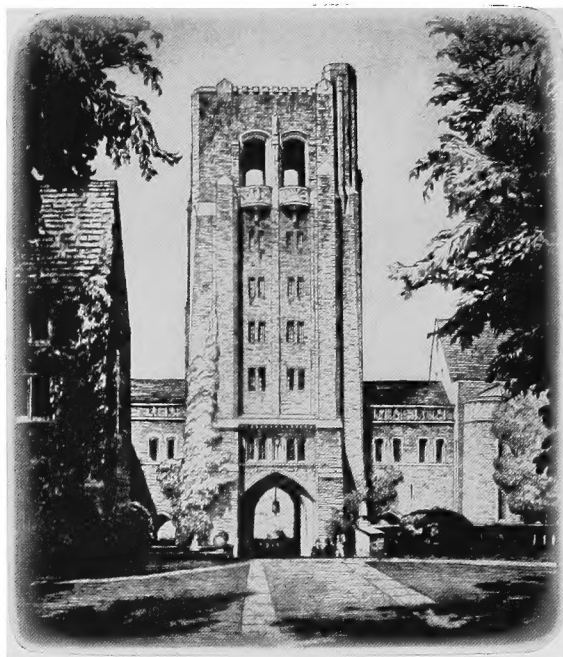


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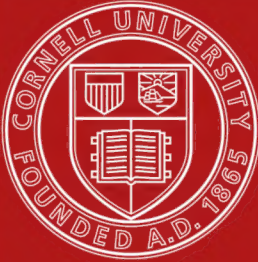
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A TREATISE
ON THE LAW OF
CARRIERS

BY THE
EDITORIAL STAFF OF THE MICHIE COMPANY

UNDER THE SUPERVISION OF
THOMAS JOHNSON MICHIE

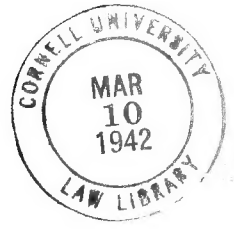
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CARRIERS

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- XIV. Stipulations Requiring Adjustment of Claims, § 1500. ✓

§§ 1105-1121. Power of Carrier and Nature of Right—§ 1105. In General.—To protect themselves against the injustice and hardship of a rule of law which requires them to do a particular thing, whether or not that thing be possible to accomplish by the use of all diligence and every agency available to them, common carriers have adopted the custom of receiving and transporting freight under special contract.¹ Whatever may have been the lack of harmony on this question in the past, the doctrine now almost universally supported in the United States is that a carrier may, in absence of statute prohibiting it, by express or special contract with the shipper, relieve itself from the rule of the common law making it, in absence of contract, an insurer of the safety of goods intrusted to it,² provided such special contract does not attempt to cover losses

1. **Power of carrier and nature of right.**—*Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913, 10 L. R. A. 419.

2. *United States.*—*York Co. v. Central Railroad* (U. S.), 3 Wall. 107, 18 L. Ed. 170; *Railroad Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Pratt* (U. S.), 22 Wall. 123, 134, 22 L. Ed. 827, 49 How. Prac. 84; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 139, 32 L. Ed. 612, 9 S. Ct. 249; *Express Co. v. Caldwell* (U. S.), 21 Wall. 264, 266, 22 L. Ed. 556; *New Jersey Steam Nav. Co. v. Merchants' Bank* (U. S.), 6 How. 344, 12 L. Ed. 465; *Queen of the Pacific*, 180 U. S. 49, 57, 45 L. Ed. 419, 21 S. Ct. 278; *Car v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 13 R. R. 303, 36 Am. & Eng. R. Cas., N. S., 304, 24 S. Ct. 663; *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 507, 44 L. Ed. 560, 20 S. Ct. 385; *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *Constable v. National Steamship Co.*, 154 U. S. 51, 62, 38 L. Ed. 903, 14 S. Ct. 1062; *Liverpool, etc., Co. v.*

Phenix Ins. Co., 129 U. S. 397, 440, 32 L. Ed. 788, 9 S. Ct. 469; *Railroad Co. v. Manufacturing Co.* (U. S.), 16 Wall. 318, 328, 21 L. Ed. 297; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 338, 28 L. Ed. 717, 5 S. Ct. 151; *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 155, 26 L. Ed. 679; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 437, 48 L. Ed. 1054, 24 S. Ct. 671; *The Delaware* (U. S.), 14 Wall. 579, 597, 20 L. Ed. 779.

All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. *Express Co. v. Caldwell* (U. S.), 21 Wall. 264, 22 L. Ed. 556.

Connecticut.—*Camp v. Hartford, etc., Steamboat Co.*, 43 Conn. 333, 334.

Idaho.—A carrier may limit its common-law liability as an insurer. *McIn-*

by negligence or misconduct.³ The liability of a common carrier is twofold in its nature, and involves, when brought in question, two inquiries: 1. Do facts exist which impose upon the carrier an obligation to make compensation for an injury to or loss of freight while in his possession as carrier? The common law determines what facts will relieve a common carrier from liability, and in the absence of these facts, no other law regulating the matter, the carrier is held responsible or liable for loss or injury to goods while in his hands, and any contract which declares the carrier not responsible when that state of facts exists which fixes responsibility under the law, is a contract limiting the carrier's liability. 2. The liability or responsibility of the carrier has relation to the extent to which he is under obligation to make compensation for loss or injury to goods, as well as to the mere existence of obligation.⁴

Power to Divest Itself of Character of Common Carrier.—A common carrier can not, by declaring or stipulating that it shall not be so considered, divest itself of the liability attached to the fixed legal character of that occupation.⁵ Thus a carrier can not, by contract, impose upon the shipper the per-

tosh v. Oregon R., etc., Co., 105 Pac. 66, 17 Idaho 100.

Illinois.—Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451.

Kansas.—Goggin v. Kansas Pac. R. Co., 12 Kan. 416.

Maine.—Hix v. Eastern Steamship Co., 107 Me. 357, 78 Atl. 379.

Michigan.—Feige v. Michigan, etc., R. Co., 62 Mich. 1, 28 N. W. 685; Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329, 12 Am. R. Rep. 279.

Minnesota.—Murphy v. Wells-Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070.

Missouri.—Potts v. Wabash, etc., R. Co., 17 Mo. App. 394.

New Jersey.—Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433.

New York.—Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; French v. Buffalo, etc., R. Co. (N. Y.), 2 Abbott's App. Dec. 196, 41 Keyes 108; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Meyer v. Harnden's Exp. Co. (N. Y.), 24 How. Prac. 290, 1 Daly 227.

Ohio.—King v. De Land, etc., R. Co., 18 Wkly. L. Bull. 39, 10 O. Dec. 8.

Oklahoma.—The responsibility of a common carrier may be limited by an express agreement made with the shipper at the time of its acceptance of the goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound policy. St. Louis, etc., R. Co. v. Phillips, 17 Okla. 264, 22 R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

Tennessee.—Railroad v. Gilbert, etc., Co., 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Johnson v. Friar, 12 Tenn. (4 Yerg.) 48, 26 Am. Dec. 215; Nashville, etc., R. Co. v. Jackson, 53 Tenn. (6 Heisk.) 271; Dillard Bros. v. Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Railroad v. Craig, 102 Tenn. 298, 52 S. W. 164; Deming v. Merchants' Cotton-Press,

etc., Co., 90 Tenn. (6 Pickle) 306, 17 S. W. '89, 13 L. R. A. 518.

The principle may now be considered settled by a great preponderance of authority both in England and America, that the carrier may by express contract, that is, by agreement assented to by the shipper, limit his common-law liability, as an insurer, against everything but loss by act of God or public enemies, to a more restricted liability. Nashville, etc., R. Co. v. Jackson, 53 Tenn. (6 Heisk.) 271.

Texas.—Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949; Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; Texas, etc., R. Co. v. Davis, 2 Texas App. Civ. Cas., § 191; Houston, etc., R. Co. v. Park, 1 Texas App. Civ. Cas., § 332.

Utah.—Benson v. Oregon, etc., R. Co., 35 Utah 241, 99 Pac. 1072, 19 Am. & Eng. Ann. Cas. 803.

Virginia.—Richmond, etc., R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 42 Am. & Eng. R. Cas. 366, 6 L. R. A. 849; see also, Liquid Carbonic Co. v. Norfolk, etc., R. Co., 107 Va. 323, 328, 58 S. E. 569, 13 L. R. A., N. S., 753.

West Virginia.—Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 49 Am. & Eng. R. Cas. 702, 17 L. R. A. 116.

3. See post, "Loss Arising from Negligence," § 1263.

4. Southern Pac. R. Co. v. Maddox & Co., 75 Tex. 300, 12 S. W. 815.

5. **Right of carrier to stipulate against being regarded carrier.**—Bank v. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Railroad Co. v. Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

A common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility. Railroad Co. v. Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Liverpool, etc.,

formance of the carrier's common-law duty.⁶

§ 1106. Effect of Charter Provisions.—A corporation which was made a common carrier by its charter, and required to "transport merchandise and property without showing partiality or favor," has the same power to contract for a limitation of its liability as any other carrier, and no consideration of public policy is contravened by the exercise of such power.⁷

§§ 1107-1111. Effect of Statutory and Constitutional Provisions of the States—§ 1107. Georgia.—See post, "Express or Implied Contract," §§ 1155-1157.

§ 1108. Illinois.—The statute of Illinois (Starr & C. Ann. St. 1896, c. 114, par. 102) prohibiting a carrier from limiting its liability is but declaratory of the common law.⁸

§ 1109. Nebraska.—Under the constitution of Nebraska a common carrier is prohibited from limiting its common-law liability.⁹

§ 1110. Texas.—Common carriers under the statutes of Texas can not limit¹⁰ or restrict¹¹ their liability¹² as it exists at common law in any manner whatever, and a special agreement made in contravention of this statutory inhibition is void.¹³ The statute deprives such a carrier of the right to limit their

Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

When the relation of shipper and carrier is shown, the law imposes upon the carrier certain duties from which it can not relieve itself by contract, and for the breach of which it is liable. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

6. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

7. **Effect of charter provisions.**—*Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

8. *Coats v. Chicago, etc., R. Co.*, 134 Ill. App. 217.

9. *Chicago, etc., R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 107 N. W. 758.

10. Common carriers can not limit their liability for goods shipped within the body of the state, as it exists at common law, in any way whatever. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *Texas, etc., R. Co. v. Hamm*, 2 Texas App. Civ. Cas., § 491.

The word "limit" ordinarily means to fix the extent of the subject to which it is applied rather than to fix the duration of time within which a right growing out of the subject may be enforced; and ordinarily it has much the same significance as the word "restrict" but in view of the use of both words in Rev. St., art. 278, prohibiting common carriers of goods from limiting or restricting their liability as it exists at common law the inference is that the words are not used as exact equivalents and the word "limit" as there employed may mean no more than that the carrier shall not relieve himself by contract from obligation to make such further compensation for breach of duty as the common law would impose under

the facts in the given case. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

11. The word "restrict" means "to restrain within bounds;" and, as used in the statute, in connection with the carrier's liability, before declared, was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

12. The expression "liability as it exists at common law" as used in Rev. St., art. 278, prohibiting common carriers from limiting their "liability as it exists at common law" means such state and degree of liability as the common law fixes upon the carrier under a given state of facts. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

13. Rev. Stats. 1895, art. 320. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494; *Hendrick v. Walton*, 69 Tex. 192, 196, 6 S. W. 749; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75; *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62; *Wooldridge & Son v. Fort Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.; *Texas, etc., R. Co. v. Stribling* (Tex. Civ. App.), 34

liability by contract, even as to matters in reference to which they might legally contract under the common law.¹⁴ The common-law duties and liabilities, and not those duties and liabilities as they may be affected by contracts, lawful under the common law, are the duties and liabilities of common carriers under the statutes of this state, and they can not be restricted or limited by any contract or agreement whatsoever, in cases to which the statute is applicable. The rule may seem a harsh one, but be that as it may, the legislature of this state has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize.¹⁵

Effect of Statute.—The statute fixes the boundaries of fact which will impose liability on the carrier, by making it to depend on the facts sufficient to create it under the rules of the common law; and a contract which, if given effect, would defeat liabilities thus arising, would be invalid.¹⁶ In case of contract, the facts made necessary by it to the existence of legal obligation become restraints or restrictions on legal liability if, in the absence of contract, liability, under the settled rules of the common law, would be fixed by the existence of facts other than made requisite to liability by the contract.¹⁷ The duties and liabilities imposed on common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and, if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common-law liability would necessarily follow to the extent to which duty existing without contract might be dispensed with by it.¹⁸

Effect of Words "Goods, Wares and Merchandise."—The words "goods, wares and merchandise," as used in the statute do not limit or extend the class of property to be embraced by carriers undertaking to transport goods for hire.¹⁹

Reasonableness of Limitations.—Rev. St., Texas, 1895, art. 320, declaring that agreements made by carriers within the state limiting their common-law liability are invalid, applies to all such agreements without regard to whether they are reasonable.²⁰

S. W. 1002; Texas, etc., R. Co. v. Scrivener, 2 Texas App. Civ. Cas., § 328; Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808; Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 627, 71 S. W. 312; G. C. & S. F. R. Co. v. McGown, 65 Tex. 640, 646.

For reasons of public policy, and having regard, doubtless, to the "inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public," the legislation of this state, and the previous decisions of our courts, hold common carriers liable as at common law, and declare invalid any exceptions or special contract seeking to vary that liability. Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639; Arnold v. Jones, 26 Tex. 335, 337. See, also, Heaton v. Morgan's, etc., Steamship Co., 1 Texas App. Civ. Cas., § 774; Houston, etc., R. Co. v. Burke, 55 Tex. 323, 333, 40 Am. Rep. 808.

A common carrier is liable for all losses of, or injuries to, goods received by him for carriage, not occasioned by the act of God or public enemies, and this liability can not be limited by contract. Texas Exp. Co. v. Scott, 2 Texas App. Civ. Cas., § 72.

Under Rev. St., art. 278, common car-

riers can not relieve themselves from liability by the terms of the bill of lading. Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808; Texas Exp. Co. v. Dupree, 2 Texas App. Civ. Cas., § 318.

14. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 317, 4 S. W. 567, 2 Am. St. Rep. 494, §§ 277-278, Rev. Stat.

15. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 317, 4 S. W. 567, 2 Am. St. Rep. 494.

16. Effect of statute.—Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494.

17. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494.

18. Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 318, 4 S. W. 567, 2 Am. St. Rep. 494.

19. Effect of words "goods, wares and merchandise."—Missouri Pac. R. Co. v. Harris, 1 Texas App. Civ. Cas., § 1257, art. 278 Rev. St. Tex.

20. Reasonableness of limitations.—Pacific Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

Under this statute contracts, whether reasonable or not, can have no standing,

Liability for Negligence.—Common carriers are liable in Texas as at common law for all losses caused by their negligence, regardless of any exceptions or special contracts avoiding such liability.²¹

Additional Liabilities Not Superadded.—The statute does not superadd any additional or more stringent liability than existed at common law, but simply maintains that liability intact, and exempt from the carrier's power to vary it by special agreement or otherwise.²²

Stipulation Not Diminishing Common-Law Liability.—Under the Revised Statutes of Texas, art. 278, any modification of its liability which may be made by a common carrier by special contract can only be such as will not diminish its common-law liability as a carrier.²³

Contracts Not in Character of Common Carrier.—A railroad company when not contracting in its character of common carrier has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of itself and servants.²⁴ As, for instance, for immunity from damage by fire to property not in its possession as carrier,²⁵ for immunity against the negligence of its servants in communicating fire to property adjacent to its right of way,²⁶ or damage on

for the simple reason that the common-law liability of the carrier, and not the liability as the carrier might fix it by contract under the common law, is by the statutes of this state imposed on the carrier. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494. See, also, *S. C.*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

21. Liability for negligence.—*Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 330, 40 Am. Rep. 808; *British, etc., Marine Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 479; *Ryan v. M. K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465.

22. Additional liabilities not superadded.—*Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., §§ 1257, 1259.

23. Stipulations not diminishing common-law liability.—*Texas, etc., R. Co. v. Hamm*, 2 Texas App. Civ. Cas., § 491.

24. Contracts not in character of common carrier.—*Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62.

In order to bring the contract within the terms of the statutory prohibition, it must embrace property for which the railroad company would be liable, as common carrier, at the time of its destruction, where the terms of the contract do not embrace property for which the railroad company could be held liable as common carrier, it is not within the statutory inhibition. *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

25. Damage to property not in possession as carrier.—The statute prohibiting a carrier from limiting its liability by contract has no application to a contract by a railway company for exemption from liability for damage by fire to

property not in its possession as carrier. *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

26. Texas, etc., R. Co. v. Fenwick, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

A contract by which a railway company establishing a switch and shipping point for the proprietor of a private business, at a point where its location is not demanded by the public interest, receives, upon that consideration, an agreement exempting it from liability for fire negligently communicated from its locomotives to the property of such proprietor, is not unlawful as conflicting with general public policy or that of the state. *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

A railroad company, in leasing a part of its right of way to a third person for coal house purposes, does not act in its capacity as a common carrier, and hence may make a valid stipulation in the lease for exemption from loss or damage by fire communicated by sparks from its locomotives or otherwise. *Wooldridge & Son v. Fort Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942.

Assignee bound.—An assignee of such lease would be bound by the stipulation therein exempting the company from liability for damage caused by fires set from locomotives, but a subtenant would not be so bound. *Wooldridge & Son v. Fort Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942.

Where the lessee from the railway company sold the coal house he had placed on the right of way to M., and later M. leased the house to H., no reference being made to the original lease, nor written consent to its assignment obtained as provided therein, and H. having no knowledge of such lease, but making his payments of rent to M., while the

account of injury to or killing stock in consequence of a failure to fence the right of way,²⁷ and for immunity from damage resulting from a land owner allowing a private gate in the right-of-way fence to get out of repair.²⁸ Likewise a railroad company may contract with an express company for exemption from liability for injuries to its goods or its agent in charge of them, although the injuries may be caused by the negligence of its servants; because the contract of carriage is not that of a common carrier.²⁹

Acting as Private Carrier.—It would seem that a railroad company, in doing that which under the law it is not its business to do as a common carrier, has the right to act in the capacity of a private carrier, and to impose immunity from liability for negligence as a condition precedent to its engaging in such undertaking.³⁰

Contracts for Indemnity against Loss.—There is a great difference between contracting for a limit of common-law liability and contracting to be fully liable as at common law, but to have the privilege of indemnifying against loss by reason of such liability.³¹

Stipulations Enlarging Common-Law Liability.—Carriers may under the statutes of Texas enlarge their liability by special contract.³²

Domestic Shipments.—The statutes of Texas will not allow a contract which is to be wholly performed within the state to relieve the carrier of its common-law liability.³³ Railways and other common carriers within this state on land are put, as to transportation, upon the same plane, so to speak, as boats or vessels on the waters entirely within the body of this state. As to transportation within the state, they are forbidden to limit their liability as it exists at common law. The limitation prescribed by the statute, if it be more extended as to railways than to boats or vessels, is so only in the sense that as to the former it is not confined to carriers operating exclusively within the state, while as to the latter it is restricted to carriers plying on waters wholly within the state.³⁴ With reference to its domestic character, no discrimination was intended by the legislature between a shipment by water and by rail. The scope of the limitation is logically the same, whether applied to the carrier as a railway or as a steamboat. Transportation "within this state" is in either case the subject mat-

railway company made no objection to the occupancy of the successive parties and continued delivering cars of coal at the coal house, such facts showed that H. was a subtenant in no way bound by the covenants in the original lease. *Woolbridge & Son v. Fort Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942.

27. "In case of a failure to fence the right of way, when by contract released from damages on account of injury to or killing stock in consequence of such failure, the courts have held generally, that such contracts are valid to the extent of the interest of the adjacent land owner." *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62.

28. *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62.

29. *Missouri, etc., R. Co. v. Carter*, 96 Tex. 461, 68 S. W. 159.

30. **Acting as private carrier.**—*Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op., distinguishing *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

31. **Contracts for indemnity against loss.**—*British, etc., Marine Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475. "Contract for Benefit of Insurance," §§ 1024, 1029.

32. **Stipulations enlarging common-law liability.**—*T. & P. R. Co. v. Schneider*, 1 Texas App. Civ. Cas., § 118; *Texas Exp. Co. v. Dupree*, 2 Texas App. Civ. Cas., § 318.

33. **Domestic shipments.**—*Gulf, etc., R. Co. v. Levi (Tex.)*, 12 S. W. 677; *G. C. & S. F. R. Co. v. Maetze*, 2 Texas App. Civ. Cas., § 631; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; *Gulf, etc., R. Co. v. Wood (Tex. Civ. App.)*, 30 S. W. 715.

Where carriers agreed to deliver money to a steamship company for shipment, shipment of money is not interstate, and bill of lading given consignor by steamship company excusing steamship company from loss by robbers or thieves, applies only to steamship company. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

34. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

ter of the legislation. The legislature seems to have had in mind in the adoption of this statute, art. 1, § 8, of the federal constitution, investing congress with the power to regulate commerce among the states.³⁵

Interstate Commerce.—Common carrier's liability as such on interstate shipment, is to be determined under the law applicable to character of commerce in which it may be engaged at time.³⁶

§ 1111. **Virginia.**—Contracts exempting a common carrier from its common-law liability are void under the Virginia statutes.³⁷

§§ 1112-1116. **Interstate Shipments**—§ 1112. **In General.**—Right of carrier to limit liability on interstate shipments is to be determined by federal law, or in absence of such law, by common law.³⁸ At common law common carriers engaged in interstate traffic could limit to a reasonable extent their common-law liability, but could not exempt themselves from loss or damage caused by their own negligence.³⁹

§ 1113. **Effect of Interstate Commerce Act.**—Under Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), amendatory of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), regulating the liability of common carriers receiving property for transportation from one state to another, and providing that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed," a clause in a bill of lading accepted by a shipper, purporting to exempt the carrier from a liability imposed by the statute, is ineffectual.⁴⁰

"**Caused**" by it or Any Connecting Carrier.—Interstate Commerce Act (Act Feb. 4, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1166), providing that a carrier issuing a bill of lading shall be liable to the owner thereof for any injury to the property "caused" by it or any connecting carrier, and that no contract shall exempt the carrier from such liability, prohibits a carrier from limiting its liability; the word "caused" being coextensive with the measure of the carrier's liability at common law.⁴¹

35. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

36. **Interstate commerce.**—*Houston Direct Nav. Co. v. Insurance Co.*, 89 Tex. 1, 9, 32 S. W. 889, 30 L. R. A. 713, reversing 31 S. W. 560. See post, "Statutes of Texas," § 1115.

37. *Virginia.*—Va. Code 1904, § 1294, c. (24), Chesapeake, etc., R. Co. v. *Pew*, 109 Va. 288, 64 S. E. 35; *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

The purpose of Va. Code 1904, § 1294c (24), is to deprive the common carrier of the right to limit his liability by contract and relegate him to his common-law rights and responsibility, independent of contract, though by the common law a carrier could qualify his liability as quasi insurer under certain conditions. *Southern Exp. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38; Section 12941 of the code of Virginia, 1904, *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

Express company.—An express company, being by Va. Code 1904, § 1294a(2),

declared a transportation company, is within the terms of Va. Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from liability which would exist had no contract been entered into. *Southern Exp. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38.

38. **Interstate shipments.**—*Houston Direct Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, reversing 31 S. W. 560.

39. *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191.

Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; *Houston Direct Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, reversing 31 S. W. 560. See post, "Limitation of Loss Arising from Carrier's Own Negligence," §§ 1123-1132.

40. **Effect of interstate commerce acts.**—*Shidlovsky v. Mallory Steamship Co.*, 111 N. Y. S. 778, 60 Misc. Rep. 67.

41. "**Caused**" by it or any connecting carrier.—*Holland v. Chicago, etc., R. Co.*, 139 Mo. App. 702, 123 S. W. 987.

Georgia.—The rule in force in Georgia that a carrier can not limit its liability for loss of goods resulting from negligence is not affected by the Interstate Commerce Act, as amended June 29, 1906, § 10, nor by the Elkins Act, as amended June 29, 1906.⁴²

Limiting Value of Goods or Amount of Recovery.—See post, "Under Interstate Commerce Act," § 1329.

§§ 1114-1116. Effect of State Statutes—§ 1114. In General.—State statutes prohibiting carriers from making stipulations limiting their common-law liability are valid even as to interstate shipments.⁴³ Such statutes are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. And so long as congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce.⁴⁴

§ 1115. Statutes of Texas.—The provision of the Texas statute, which prohibits common carriers from limiting their liability, as it exists at common law, by stipulations in the bill of lading, is valid as applied to contracts for interstate transportation of property.⁴⁵

Texas Rev. Stat., Art. 278.—Rev. Stat., art. 278, prohibiting domestic carriers on land within the state, or on waters entirely within the body of the state, from limiting their common-law liability by contract, does not apply to interstate carriage or traffic, but only to shipments beginning and ending within the state,⁴⁶ and hence does not apply to a contract restricting a carrier's lia-

42. *Adams Exp. Co. v. Mellichamp*, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913 D, 976.

43. **Effect of state statutes.**—*Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

44. *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. 343 (see 94 Tex. 706, no op.); *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 598, 59 S. W. 949.

45. **Under Texas statutes.**—*Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 598, 59 S. W. 949. See, to the same effect, *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; *Gulf, etc., R. Co. v. State*, 97 Tex. 274, 78 S. W. 495, affirming 73 S. W. 429; *State v. Gulf, etc., R. Co.* (Tex. Civ. App.), 44 S. W. 542, affirmed in 93 Tex. 696, no op. See ante, "Texas," § 1110.

The cases of *Houston Direct Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, reversing 31 S. W. 560, and *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455, 17 L. R.

A. 643, as to the right of railway companies in interstate shipments to make contracts exempting themselves from liability, have been overruled by the later cases of *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289, and *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Texas, etc., R. Co. v. Walker*, 25 Tex. Civ. App. 216, 60 S. W. 796.

46. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 152, 19 S. W. 459; *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., §§ 1257, 1260; *Texas, etc., R. Co. v. Hamm*, 2 Texas App. Civ. Cas., § 491; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 685, 29 S. W. 565. See, also, *Ryan v. M. K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574, and *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765; *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191.

By reason of the peculiar language in which it is framed, it has been definitely settled that Rev. Stat., art. 278, applies only to the local business of the carrier within this state. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 575, 63 S. W. 619, reversing 61 S. W. 410. It is apparent from the opinion delivered in that case that it was not the purpose to dis-

bility, which is to have effect in another state.⁴⁷

Domestic and Foreign Shipment Distinguished.—By a contract of domestic shipment is understood one which contemplates the shipment of goods from one point in a state to another point therein. By a contract of foreign or interstate shipment is understood one which contemplates the transportation of goods from within the state to a foreign country or to a point within another state. Where a railroad extends beyond the limits of the state but goods are carried from one point to another within the state the railroad is a carrier within the state but if the railway by itself or by its connecting lines transports goods from within the state to another state it is an interstate carrier,⁴⁸ although the bill of lading limits the initial carrier's liability to its own line.⁴⁹

turb Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; *Armstrong v. Galveston*, etc., R. Co., 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161, and other like cases, where it was held that such statute was applicable to interstate shipments. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op. See, also, *Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765, 766; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

Article 452, § 1, Pas. Dig., applies only to carriers within the state, and not to interstate shipments. *Houston, etc., R. Co. v. Park*, 1 Texas App. Civ. Cas., § 332.

A contract with an express company for a shipment beyond the state is not within the local statute prohibiting a common carrier from limiting its liability at common law. *Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765.

Contract to carry into another state.—Rev. St., art. 278, prohibiting common carriers within the state from limiting their liability, does not prevent a railroad company, a part of whose line is operated in this state and a part in other states, from limiting its liability by contract for carrying cotton into another state. *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

⁴⁷ *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257.

48. Domestic and foreign shipment distinguished.—*Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

A contract for shipment from a point in one state to a point in another, over connecting lines, is a contract of interstate shipment, in which the carrier may limit its liability for loss not due to its own negligence. *Texas, etc., R. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58.

Plaintiff, in a suit for the value of cotton lost in transitu, alleged that defendant railroad, a Texas corporation, accepted the cotton at G., Tex., and agreed by bills of lading, in consideration of

one hundred and thirty-six cents per one hundred pounds, to carry the cotton upon its lines, and to deliver it to its connecting lines, to be carried to the city of New Orleans, there to be delivered to the W. Steamship Company, to be transported to Liverpool, and there delivered to M. Held, that the contract was for a foreign shipment, and was therefore not within Rev. St. art. 278, forbidding carriers to limit their liability. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

Plaintiffs delivered a car load of cotton to defendant in Texas for transportation to Rhode Island. The shipping receipt provided that neither the defendant nor the connecting carrier handling the cotton should be liable for destruction of the cotton by fire, nor for any damage thereto by causes beyond their control. The cotton burned in the car while being transported. Held, that such condition of the contract of defendant was not prohibited by Rev. St. art. 320, providing that railroad companies and other common carriers of goods for hire "within this state" shall not limit their liability as it exists at common law, by inserting exceptions in the bill of lading or receipt of the goods for transportation, or otherwise, and no special agreement made in contravention of the provisions of such article shall be valid, since the statute by its language purports to apply only to carriers engaged in carrying goods for hire "within this state," and does not prohibit carriers of interstate commerce from limiting their common-law liability. Judgment (Tex. Civ. App.), 61 S. W. 410, reversed. *Texas, etc., R. Co. v. Richmond*, 63 S. W. 619, 94 Tex. 571, citing *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455, 17 L. R. A. 643.

49. Effect of bill of lading limiting liability to carrier's line.—A bill of lading purporting to be a foreign bill of lading, and was an undertaking, by defendant railroad to transport plaintiff's cotton from G., Tex., to Liverpool, for 136 cents per 100 pounds between those points. It contained a provision limiting defendant's liability to its own line, terminating

§ 1116. **Conflict of Laws.**—See post, "What Law Governs," §§ 1117-1120.

§§ 1117-1120. **What Law Governs**—§ 1117. **Validity and Enforcement.**—Where the limitation of liability in the bill of lading receipts or other contracts of a common carrier is not contrary to a fixed public policy, the general rule in cases involving a conflict of laws in respect to contracts for carriage is that their validity and the carrier's liability is governed by the *lex loci contractus*, and not by the *lex fori*,⁵⁰ but the state where it is performed will not

at G., Tex., where the cotton was to be delivered to a steamship company, whose liability therefor should then and there commence. The bill was signed by D., as agent, severally but not jointly, for the railway and steamship companies. Held, that the limitation of defendant's liability did not make the instrument a domestic bill. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

50. *United States*.—Central, etc., R. Co. v. Kavanaugh, 34 C. C. A. 203, 92 Fed. 56, 13 Am. & Eng. R. Cas., N. S., 119; *The Henry B. Hyde*, 82 Fed. 681.

Georgia.—Kavanaugh v. Southern R. Co., 120 Ga. 62, 47 S. E. 526, 1 Am. & Eng. Ann. Cas. 705; Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, 35 Am. & Eng. R. Cas. 602. See, also, Central, etc., R. Co. v. Kavanaugh, 34 C. C. A. 203, 92 Fed. 56, 13 Am. & Eng. R. Cas., N. S., 119.

The contract in the bill of lading limited the liability of the carrier, by providing that it should not be held liable for "any loss or damage arising from * * * fire from any cause, on land or water, * * * freshets, floods, weather, * * * explosions, * * * insufficiency of package in strength or otherwise, rust, dampness," etc. It was held that while such a contract would not be binding in Georgia, it seems that under the laws of Massachusetts, it is a good contract in that state; and that it having been made in the latter state, and being intended to be partly performed there and in several other states, as well as in Georgia, the railroad can avail itself of such limitation of its liability. Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Iowa.—McDaniel v. Chicago, etc., R. Co., 24 Iowa 412; Hazel v. Chicago, etc., R. Co., 82 Iowa 477, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76.

Illinois.—If a special contract with a common carrier for exemption from liability for ordinary negligence is made in a state where it is valid and enforceable, such contract will be enforced in this state. Altland v. Atchison, etc., R. Co., 151 Ill. App. 291.

Where a shipment is made in New York, and no part of the transaction takes place in Illinois, the law of New

York will govern the contract relations of the parties and the right of the carrier to limit its common-law liability unless the law of New York be superseded by the higher authority of a federal enactment. *Cohn v. Adams Exp. Co.*, 170 Ill. App. 174.

If a carrier is permitted by the laws of a sister state to limit its common-law liability, such a limitation of liability will be recognized and enforced in the courts of this state, even though the carrier fail to establish the assent of the shipper to the conditions of limitation imposed by the bill of lading. *Waxelbaum v. Southern R. Co.*, 168 Ill. App. 66.

Kentucky.—Adams Exp. Co. v. Walker, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412; Cleveland, etc., R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A., N. S., 275, 11 R. R. K. 447, 34 Am. & Eng. R. Cas., N. S., 447, 4 Am. & Eng. Ann. Cas. 1102; *Hutchison v. Louisville, etc., R. Co.*, 108 Ky. 615, 22 Ky. L. Rep. 361, 57 S. W. 251.

Massachusetts.—Brockway v. American Exp. Co., 171 Mass. 158, 50 N. E. 626.

Although a stipulation in a contract for carriage relieving the carrier from liability for injuries resulting from the negligence of its servants is against the policy of the law of Massachusetts, if valid in the country where it is made it will be enforced in Massachusetts. O'Regan v. Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

Minnesota.—Powers Mercantile Co. v. Wells-Fargo & Co., 93 Minn. 143, 100 N. W. 735.

Missouri.—Herf, etc., Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346.

Nebraska.—Pennsylvania R. Co. v. Kennard Glass, etc., Co., 59 Neb. 435.

New York.—Grand v. Livingston, 158 N. Y. 688, 53 N. E. 1125.

Pennsylvania.—A contract made in New York, by which, in consideration of the transportation over a railroad in that state, the owner voluntarily agrees to release the railroad company from responsibility for negligence, being valid in New York, will be enforced in Pennsylvania, as it is not contrary to justice or morality and its enforcement will not derogate from the laws or settled policy of Pennsylvania. *Forepaugh v. Dela-*

apply the law of the state where executed when such law conflicts with statutory law or a settled rule of policy that prevails in the state where sought to be enforced.⁵¹ Such contracts are contrary to the fixed public policy of Georgia,⁵² Pennsylvania,⁵³ Texas,⁵⁴ and Virginia,⁵⁵ in so far as they limit the carrier's liability for negligence and are unenforceable in those states; but in Iowa⁵⁶

ware, etc., R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672.

Texas.—Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312; Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949.

Virginia.—Adams Exp. Co. v. Green, 112 Va. 527, 72 S. E. 102.

Express agreement to be governed by law of flag.—In *Lewisohn v. National Steamship Co.*, 56 Fed. 602, the defendant was held liable for damage to freight from its negligent stowage in a vessel, although the ship was English, and the bill of lading contained a stipulation, valid in England, exempting the carrier from the consequences of his negligence, and also provided that, in accepting it, the shipper expressly agreed that the contract should be governed by the law of the flag; the governing principle in this case being that contracts held void because against the policy of the United States can not be made valid even by the express agreement of the parties. See, also, *Monroe v. Iowa*, 50 Fed. 561.

Limitation of amount of recovery or value of goods.—See post, "What Law Governs," §§ 1117-1120.

⁵¹ *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op. See, to the same effect, *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346.

Iowa.—*Hazel v. Chicago, etc., R. Co.*, 82 Iowa 477, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76.

Nebraska.—A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in Nebraska, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of the state of Nebraska. *Chicago, etc., R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 503.

⁵² Where goods are shipped by connecting carriers from New York to Georgia, and suit is brought in Georgia for damages from delay in delivery, in so far as stipulations in the contract of shipment, if there was one, limit the common-law liability of the carrier, as an insurer or for losses occurring by unavoidable accident, they will be enforced by the courts of Georgia; but stipulations arbitrarily limiting the carrier's liability for negligence of its agents will not be enforced, they being contrary to the public policy of the state. *South-*

ern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944.

⁵³ *Pennsylvania*.—*Hughes v. Pennsylvania R. Co.*, 202 Pa. 222, 2 R. R. R. 925, 25 Am. & Eng. R. Cas., N. S., 925, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.

Contract made outside state—Accident within state.—A stipulation in a contract for the carriage of a horse limiting liability in case of injury, from negligence of the carrier to \$100, being against the policy of the state, will not be enforced, where the injury occurs within the state, though the contract is made outside the state, for carriage from a point without to a point within it, by connecting carriers. So held in *Hughes v. Pennsylvania R. Co.*, 202 Pa. 222, 2 R. R. R. 925, 25 Am. & Eng. R. Cas., N. S., 925, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.

⁵⁴ *Texas*.—*St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346. See, also, *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410, 411; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Sanger v. Jesse French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op., distinguishing *St. Louis, etc., R. Co. v. Hambrick* (Tex. Civ. App.), 97 S. W. 1072; *Chicago, etc., R. Co. v. Thompson*, 100 Tex. 185, 97 S. W. 459, reversing 41 Tex. Civ. App. 459; *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257.

⁵⁵ *Virginia*.—*Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

⁵⁶ **Application of Iowa statute.**—*Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa 247; *Hazel v. Chicago, etc., R. Co.*, 82 Iowa 477, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76.

An action against a railroad to recover the value of certain freight shipped over the company's road from a point in another state to a point in Iowa, but which was lost after coming into possession of the company in Iowa, it was held that it was competent for the company to show that the freight was received from plaintiff in the foreign state under a special contract limiting the liability of

and Kentucky⁵⁷ such contracts made in a foreign state and to be performed there will be enforced, notwithstanding the existence of statutory or constitutional provisions declaring contracts limiting the common-law liability of common carriers void.

Interstate and Foreign Shipments.—A stipulation in an interstate contract of affreightment limiting the carrier's common-law liability, if valid where made and reasonable, is valid in the state of the forum.⁵⁸ The validity of such a stipulation depends on the law of the state where the contract was made, as construed by the courts of such state.⁵⁹

the company in case of loss or damage; and that such contract, being legal according to the laws of the state where it was made, will be enforced by the courts of Iowa, notwithstanding the provision of section 1308 of the Iowa Code of 1873, which in effect declares such contracts void and that the courts of Iowa will not give extraterritorial effect to such an act of a sister state. *Hazel v. Chicago, etc., R. Co.*, 82 Iowa 477, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76.

Bill of lading drawn in Connecticut—Freight shipped to Iowa—Destroyed by fire in Illinois.—In *Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa 247, it appeared that a bill of lading, providing inter alia for exemption of the carrier from liability from losses by fire, was drawn in Hartford, Conn., where such exemption was lawful, and whence the merchandise was to be shipped, to Des Moines, Iowa, in which state carriers were not permitted to limit their liability. The goods were transported to Chicago, Ill., where they were destroyed by fire without fault on the part of the carrier. It was held that such exemption prevented the consignee from recovering.

57. Kentucky.—*Cleveland, etc., R. Co. v. Druen*, 118 Ky. 237, 11 R. R. R. 447, 34 Am. & Eng. R. Cas., N. S., 447, 80 S. W. 778, 66 L. R. A., N. S., 275, 4 Am. & Eng. Ann. Cas. 1102; *Tecumseh Mills v. Louisville, etc., R. Co.*, 57 S. W. 9, 22 Ky. L. Rep. 264, 108 Ky. 572, 49 L. R. A. 557.

Contract made in Illinois to transport into Kentucky—Destroyed by fire in Illinois.—It appeared that Ky. Const., § 195, declared that no carrier shall be permitted to contract for relief from its common-law liability; that a carrier contracted in Illinois to carry freight into Kentucky, and the contract relieved the carrier from liability for damages caused by fire not arising from its negligence, which limitation of common-law liability was valid under the laws of Illinois, and the freight, while in transit in Illinois, was destroyed by an accidental fire. It was held that in an action in Kentucky against the carrier for the destruction of the freight the limitation of liability was a good defense. *Cleveland, etc., R. Co. v. Druen*, 118 Ky. 237, 11 R. R. R. 447, 34 Am. & Eng. R. Cas., N. S., 447, 80

S. W. 778, 66 L. R. A., N. S., 275, 4 Am. & Eng. Ann. Cas. 1102.

58. Interstate and foreign shipments.—*Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 575, 63 S. W. 619, reversing 61 S. W. 410; *International, etc., R. Co. v. Watt*, 2 Texas App. Civ. Cas., § 781; *Cross v. Graves*, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102.

59. Pacific Exp. Co. v. Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Instances of void limitation.—Where a contract with an express company for the interstate transportation of goods, which limits the liability to the value of the goods as disclosed in the contract, is made in Illinois, where a statute exists prohibiting a common carrier from limiting its common-law liability as to goods received for carriage, it will not limit the company's liability for a loss of the goods without the company's negligence while the goods are in transit in Texas, since the validity of the contract is to be determined by the laws of Illinois. *Pitman v. Pacific Exp. Co.*, 59 S. W. 949, 24 Tex. Civ. App. 595.

Instances of valid limitation.—A condition contained in a contract made in Arkansas, for the shipment of sheep from Arkansas to Texas, that, "should damage occur for which the carrier may be liable, the value of the sheep at the date and place of shipment shall govern the settlement," is valid, the condition being valid in Arkansas. *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191.

A condition contained in a contract made in Arkansas, for the shipment of sheep to Texas, that "the business of the carrier shall not be delayed by the detention of trains to unload and reload the sheep for any cause whatever," is valid, the condition being valid in Arkansas. *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191.

A condition contained in a contract, made in Arkansas, for the shipment of sheep, the sheep to be transported from that state to Texas, that "the carrier is released from all injury, loss, and damages, or depreciation, which the animals, or either of them, may suffer in consequence of either of them being weak, or

Shipment to Foreign Country.—The fact that a contract for transportation of goods to a foreign country is made with a foreign shipping company, the freight to be payable at the end of the trip, does not make the contract one to be governed by the laws of the foreign country, but so far as concerns the obligation to carry the goods in safety, the contract is to be governed by the American law, and not by the law, municipal or maritime, of any other country.⁶⁰

Contract Void under Lex Loci Contractus.—If such contract is void under the lex loci contractus it will not be enforced in a foreign forum.⁶¹

Contracts Made and to Be Partly Performed in the State of Forum.—A contract made and to be partly performed in the state where it is sought to be enforced and partly in another state must be governed by the laws of that state, although it would have been valid if made in the other state.⁶²

escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire, or the burning of any material, while in the possession of the carrier," is valid, the condition being valid in Arkansas. Texas, etc., R. Co. v. Davis, 2 Texas App. Civ. Cas., § 191.

60. Shipment to foreign country.—Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Kensington, 183 U. S. 263, 269, 46 L. Ed. 190, 22 S. Ct. 102.

While as a general rule, the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced, yet both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught; therefore, the courts of the country will hold a contract exempting a carrier from liability for negligence to be void, although the contract contains a stipulation that it shall be governed by the law of a country where such exemptions are permitted. The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102 (holding such a clause in a ticket for ocean transportation to be void, although it contained a provision that it should be governed by the laws of Belgium, where such contracts were valid).

61. United States.—Central, etc., R. Co. v. Kavanaugh, 34 C. C. A. 203, 92 Fed. 56, 13 Am. & Eng. R. Cas., N. S., 119.

Georgia.—Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, 35 Am. & Eng. R. Cas. 602.

New York.—Grand v. Livingston, 4 App. Div. 589, 34 N. Y. S. 490, 73 N. Y. St. Rep. 646, affirmed in 158 N. Y. 688, 53 N. E. 1125.

Instances.—Whether the provision in the bill of lading, releasing the carrier from liability for loss of the goods through fire not caused by its negligence, was part of the contract of shipment, such a provision, under the statutes of Illinois, forming no part of the contract

unless accepted in writing or expressly assented to by the shipper, is to be determined by such laws, though the goods were burned while in transit in New York; the goods being at the time of the contract in Illinois, the shipment taking place there, all negotiations for the contract being there had, the contract being there made and delivered, the shippers having resided there, the action for the loss being brought in their right by plaintiffs as assignees of the bill of lading, and the carrier, which was doing business there, being, for the purpose of the contract, deemed a resident thereof. Valk v. Erie R. Co., 114 N. Y. S. 964, 130 App. Div. 446.

Shipment from Boston to Buffalo.—Exemption void under laws of Massachusetts.—In an action for damages from injuries claimed to have been sustained by certain horses while in transit, against defendant, an express company, it appeared that the horses were shipped from Boston to Buffalo under a contract containing a release void under the laws of Massachusetts, which purported to exempt defendant from liability for the negligence of its servants, and that the property was forwarded entirely at the owner's risk. It was held that the contract must be construed under the law of Massachusetts, where it was executed, unless it could fairly be said that the parties, at the time of its execution clearly manifested an intention that it should be governed by the law of New York; and that the fact that no such intention existed might be presumed from the circumstances that a release, taken from two persons who were to accompany the horses upon their journey expressly provided that any question which arose under that agreement should be determined by the law of New York. Grand v. Livingston, 4 App. Div. 589, 38 N. Y. S. 490, 73 N. Y. St. Rep. 646, affirmed in 158 N. Y. 688, 53 N. E. 1125.

62. Contract made and to be partly performed in Iowa.—Where a railroad company undertook to transport freight from Clinton, Iowa, and deliver it in Chicago, it was held that the shipping contract, being entire, and made and to be

Contracts to Be Performed Partly within State Where Made and Partly in State of Forum.—The safest rule to arrive at intention of parties, where there are no circumstances except execution, delivery and acceptance of bill of lading, is that which upholds, rather than that which defeats, the contract, and the laws of the state under which the contract is valid, where it is to be partly performed in state where made and partly in another, should be applied.⁶³ It will not be presumed that the parties to a bill of lading intended to have the contract governed by different laws according as the loss might occur in one or in another state unless circumstances are proved showing such an intention.⁶⁴ While the state statute by reason of its peculiar language could not affect an interstate shipment, it may be looked to, with the decision of the state courts, as establishing a policy within that state restrictive of the right of the carrier by contract to avoid liability for its negligence.⁶⁵

Contracts to Be Performed Wholly without State of Forum.—A railroad company may, in defense to an action on a contract of carriage to be performed wholly without the state of the forum set up a reasonable provision of the contract limiting its common-law liability.⁶⁶

Stipulations Affecting Only the Remedy.—Stipulations in a shipping contract affecting the remedy only are controlled by the law of the forum.⁶⁷

Sufficiency of Assent Determined by Lex Loci Contractus.—If a bill of lading be given in one state for the carriage of freight from a point in that state to a place in another state, and the *lex loci contractus* is that a provision, contained in the bill of lading and limiting the common-law liability of the carrier, is illegal, unless the shipper knew of and assented to such provision, and that the mere acceptance of the bill of lading is not, of itself, evidence of such consent, the sufficiency of the assent is a matter relating to the validity and effect of the contract, and is to be adjudged in a foreign tribunal in accordance with the law of the place of contract, and not the law of the forum.⁶⁸

§ 1118. Construction.—Where a contract of a common carrier containing

partly performed in Iowa, must be governed by the laws of Iowa as to its validity, and, therefore, where such contract contained a condition limiting the liability of the company which, under chapter 112 of the Iowa Laws of 1866, was in operative and of no effect, such restriction was void. *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412.

63. Contracts to be performed partly within state where made and partly in state of forum.—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

International, etc., R. Co. v. Vandeventer, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

Where a contract under which a common carrier seeks to limit his liability is made in Missouri for the carriage of goods from Missouri to Texas, and such a contract is valid under the Missouri law but not under the Texas law, the law of Missouri prevails. *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

The liability of a common carrier who undertakes in Mexico to convey goods from the territory of that government into Texas, is to be determined according to the laws of Mexico. *Cantu v. Bennett*, 39 Tex. 303.

In *St. Louis, etc., R. Co. v. Hambrick* (Tex. Civ. App.), 97 S. W. 1072, and *Chicago, etc., R. Co. v. Thompson*, 41 Tex.

Civ. App. 459, 93 S. W. 702, contracts were executed out of the state and loss occurred in another state, and the mere fact that suits were brought within this state did not require an application of the policy that prevails here. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

64. Ryan v. M., K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589.

65. Right to look to statute.—*International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

66. Contracts to be performed wholly within state of forum.—*Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.), 28 S. W. 98.

67. Stipulations affecting only the remedy.—*St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 609, 110 S. W. 529; *Missouri, etc., R. Co. v. Godair Comm. Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.; *St. Louis, etc., R. Co. v. Hambrick* (Tex. Civ. App.), 97 S. W. 1072, 1073. See, also, *Chicago, etc., R. Co. v. Thompson*, 41 Tex. Civ. App. 459, 93 S. W. 702; *Missouri, etc., R. Co. v. Cooreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

68. Missouri.—*Hartmann v. Louisville, etc., R. Co.*, 39 Mo. App. 88.

a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, the contract is to be construed in accordance with the law of the state where an injury, arising from negligence, occurs.⁶⁹ Where the evidence does not show where the loss occurred, plaintiff can not raise the question whether the contract of interstate carriage should be construed according to the laws of the state where the breach occurred, rather than the laws of the state where made.⁷⁰

§ 1119. Right of Carrier Incorporated in a State to Contract under Laws of Another State.—A statutory or constitutional provision to the effect that no common carrier shall be permitted to contract for relief from its common-law liability, does not prohibit a carrier incorporated in such state from contracting in another state for exemption from liability for loss by fire, where the goods are in that state, and are not even to pass through the state of incorporation.^{70a}

§ 1120. Stipulations as to What Law Governs.—A stipulation on the back of a contract of carriage, that any question arising under the contract shall be determined by the laws of the state of New York, does not govern the contract of carriage.⁷¹

§ 1121. Property Carrier Not Required to Transport.—A railroad charter only binds the company as a common carrier to transport such property as was usually transported by railroad companies at the time the charter was granted; and it may enter into special contracts in respect thereto.⁷²

Explosives.—As a carrier is not bound to accept powder for transportation it may accept it upon such terms as it may think necessary, and may make a special contract for its carriage releasing the carrier from liability for loss occasioned by fire from any cause whatever.⁷³

§§ 1122-1153. Liabilities Subject to Limitation—§ 1122. General Rule.—A common carrier may, at common law, by an agreement to that effect, based on proper consideration, limit its liability for loss or for damage to goods of a shipper, except such as may be caused by its own negligence,⁷⁴ or mis-

69. **Construction.**—*Geyer v. United States Exp. Co.*, 50 Pa. Super. Ct. 301, 306; *Zahloot v. Adams Exp. Co.*, 50 Pa. Super. Ct. 238; *Fairchild v. Philadelphia, etc., R. Co.*, 148 Pa. 527, 24 Atl. 79.

70. *Carpenter v. United States Exp. Co.*, 120 Minn. 59, 139 N. W. 154.

70a. **Right to contract in state other than that of incorporation.**—*Tecumseh Mills v. Louisville, etc., R. Co.*, 108 Ky. 572, 22 Ky. L. Rep. 264, 57 S. W. 9, 49 L. R. A. 557.

71. **Stipulations as to what law governs.**—*Brockway v. American Exp. Co.*, 171 Mass. 158, 50 N. E. 626.

In an action for negligence in the transportation of plaintiff's horses from a point in the state of Illinois, through several other states, to a point in Massachusetts, there was evidence that the contract was made in Illinois, on a printed blank form in general use by defendant express company, and which in terms exempted defendant from liability arising "from any fault, negligence, or carelessness, gross or otherwise, on the part of said company, its agents or serv-

ants." On the back of this contract was another for the transportation of a custodian of the horse, containing a stipulation that "any question arising under this contract shall be determined by the law of the state of New York," in which state the alleged act of negligence occurred. It was held that they were separate contracts, and the stipulation of the second above quoted did not apply to the first, or indicate an intention that it should be governed by the law of New York; that evidence of the validity under the law of the state of New York of the provisions of the first contract exempting the defendant from liability was properly excluded; and that the first contract was governed by *lex loci contractus*. *Brockway v. American Exp. Co.*, 171 Mass. 158, 50 N. E. 626.

72. **Property carrier not required to transport.**—*Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

73. **Explosives.**—*California Powder Works v. Atlantic, etc., R. Co.*, 4 Am. & Eng. R. Cas., N. S., 301, 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648.

74. **General rule.**—*Santa Fe, etc., R.*

conduct or that of its servants. This doctrine prevails in the Federal courts; ⁷⁵ in the courts of Alabama, ⁷⁶ Arizona, ⁷⁷ Arkansas, ⁷⁸ California, ⁷⁹ Colorado, ⁸⁰ Connecticut, ⁸¹ Georgia, ⁸² Illinois, ⁸³ Indiana, ⁸⁴ Iowa, ⁸⁵ Kansas, ⁸⁶ Kentucky, ⁸⁷ Louisiana, ⁸⁸ Maine, ⁸⁹ Maryland, ⁹⁰ Massachusetts, ⁹¹ Michigan, ⁹² Minnesota, ⁹³ Mississippi, ⁹⁴ Missouri, ⁹⁵ Nebraska, ⁹⁶ New Hampshire, ⁹⁷ New Jersey, ⁹⁸ New

Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467.

75. United States.—Leitch *v.* Union R. Transp. Co., Fed. Cas. No. 8,224; Muser *v.* Holland, 1 Fed. 382, 17 Blatchf. 412; New York Cent. R. Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Ormsby *v.* Union Pac. R. Co., 4 Fed. 706, 2 McCrary 48; Seller *v.* Pacific, Deady 17, 1 Ore. 409, Fed. Cas., No. 12,644; York Co. *v.* Central Railroad (U. S.), 3 Wall. 107, 18 L. Ed. 170; New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278.

76. Alabama.—Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Rep. 607; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Nashville, etc., Railway *v.* Hinds, 5 Ala. App. 596, 59 So. 670.

77. Arizona.—Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467.

78. Arkansas.—Taylor *v.* Little Rock, etc., R. Co., 32 Ark. 393, 29 Am. Rep. 1, 18 Am. & Eng. R. Cas. 590; Pacific Exp. Co. *v.* Wallace, 60 Ark. 100, 29 S. W. 32; St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 297, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

79. California.—California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648, 4 Am. & Eng. R. Cas., N. S., 301.

80. Colorado.—Merchants' Dispatch, etc., Co. *v.* Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

81. Connecticut.—Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333; Welch *v.* Boston, etc., R. Co., 41 Conn. 333.

82. Georgia.—Purcell *v.* Southern Exp. Co., 34 Ga. 315; Southern Exp. Co. *v.* Barnes, 36 Ga. 532.

83. Illinois.—Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Illinois Cent. R. Co. *v.* Jonte, 13 Ill. App. 424; Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Oppenheimer & Co. *v.* United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1; Chicago, etc., R. Co. *v.* Chapman, 133 Ill. 96, 24 N. E. 417, 42 Am. & Eng. R. Cas. 392, 8 L. R. A., N. S., 508; affirming 30 Ill. 504; Ellison *v.* Adams Exp. Co., 245 Ill. 410, 92 N. E. 277.

84. Indiana.—Bartlett *v.* Pittsburgh, etc., R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; Indianapolis, etc., R. Co. *v.* Forsythe,

4 Ind. App. 326, 29 N. E. 1138; St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409.

85. Iowa.—Hazel *v.* Chicago, etc., R. Co., 82 Iowa 47, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76; McCoy *v.* Keokeek, etc., R. Co., 44 Iowa 424.

86. Kansas.—Kallman *v.* United States Exp. Co., 3 Kan. 205; Kansas Pac. R. Co. *v.* Reynolds, 17 Kan. 251.

87. Kentucky.—Louisville, etc., R. Co. *v.* Crozier, 13 Ky. L. Rep. 175; Rhodes *v.* Louisville, etc., R. Co. (Ky.), 9 Bush. 688.

88. Louisiana.—Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Simon *v.* Steamship Fung Shuey, 21 La. Ann. 363; Thomas *v.* Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

89. Maine.—Willis *v.* Grand Trunk R. Co., 62 Me. 488.

A carrier, in the absence of statute to the contrary, may, by special contract, limit its liability, at least, against all risks but its own negligence or misconduct. Hix *v.* Eastern Steamship Co., 107 Me. 357, 78 Atl. 379.

90. Maryland.—Baltimore, etc., R. Co. *v.* Brady, 32 Md. 333; McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498.

91. Massachusetts.—Buckland *v.* Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

92. Michigan.—McMillan *v.* Michigan, etc., Railroad, 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

93. Minnesota.—Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360, Gil. 110; Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Hull *v.* Chicago, etc., R. Co., 41 Minn. 510, 5 L. R. A. 587, 43 N. W. 391, 40 Am. & Eng. R. Cas. 104, 16 Am. St. Rep. 722.

94. Mississippi.—Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725; Southern Exp. Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385.

95. Missouri.—Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487; Duvenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550; Hance *v.* Wabash, etc., R. Co., 56 Mo. App. 476; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; Oxley *v.* St. Louis, etc., R. Co., 65 Mo. 629; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394.

96. Nebraska.—Atchison, etc., R. Co. *v.* Washburn, 5 Neb. 117.

97. New Hampshire.—Durgin *v.* American Exp. Co., 66 N. H. 277, 9 L. R. A. 453, 20 Atl. 328; Hall *v.* Cheney, 36 N. H. 26.

98. New Jersey.—Ashmore *v.* Pennsyl-

York,⁹⁹ North Carolina,¹ Ohio,² Oklahoma,³ Pennsylvania,⁴ South Carolina,⁵ Tennessee,⁶ Texas,⁷ Utah,⁸ Vermont,⁹ Virginia,¹⁰ West Virginia,¹¹ Wisconsin,¹² and other states; and in England.¹³

Public Policy.—A carrier, within the limits allowed by public policy and considerations of right and justice, by special contract, may limit and qualify its liability as an insurer of goods.¹⁴

vania Steam-Towing, etc., Co., 28 N. J. L. 180; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433.

99. *New York*.—Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, reversed in 51 Barb. 69, 34 How. Prac. 421; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Boswell v. Hudson River R. Co., 18 N. Y. Super. Ct. 699, 10 Abb. Prac. 442; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Moore v. Evans (N. Y.), 14 Barb. 524; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith 115; Lee v. Marsh (N. Y.), 28 How. Prac. 275, 43 Barb. 102; Landsberg v. Dinsmore (N. Y.), 4 Daly 490, Slocum v. Fairchild (N. Y.) 7 Hill 292; Stoddard v. Long Island R. Co., 7 N. Y. Super. Ct. (5 Sandf.) 180; Sunderland v. Wescott, 40 How. Prac. 468, 32 N. Y. Super. Ct. 260.

1. *North Carolina*.—Lee v. Raleigh, etc., R. Co., 72 N. C. 236.

2. *Ohio*.—Erie R. Co. v. Lockwood & Son, 28 O. St. 358; Gaines v. Union Transp., etc., Co., 28 O. St. 418; Graham & Co. v. Davis & Co., 4 O. St. 362, 62 Am. Dec. 285; Pittsburgh, etc., R. Co. v. Barrett, 36 O. St. 448, 3 Am. & Eng. R. Cas. 256; Davidson v. Graham, 2 O. St. 131.

3. *Oklahoma*.—Chicago, etc., R. Co., v. Wehrman, 25 Okla. 147, 105 Pac. 328; St. Louis, etc., R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470, 22 R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201.

4. *Pennsylvania*.—American Exp. Co. v. Sands, 55 Pa. 140; Farnham v. Camden, etc., R. Co., 55 Pa. 53; Gordon v. Little (Pa.), 8 Serg. & R. 533, 11 Am. Dec. 632; Whitesides v. Russell (Pa.), 8 Watts & S. 44; Buck v. Pennsylvania R. Co., 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800.

While in Pennsylvania a carrier may not by contract exempt itself from liability for a loss caused by its own negligence, yet if it shows that a loss has resulted from other causes, there exists no reason why it may not by contract exempt itself entirely from liability, or limit the extent thereof as any ordinary individual could do. Penn Clothing Co. v. United States Exp. Co., 48 Pa. Super. Ct. 520.

5. *South Carolina*.—Levy v. Southern Exp. Co., 4 S. C. 234; Swindler v. Hilliard (S. C.), 2 Rich. L. 286, 45 Am. Dec. 732; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40.

6. *Tennessee*.—Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518; Dillard

Bros. v. Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Railroad v. Craig, 102 Tenn. 298, 52 S. W. 164; Railroad v. Gilbert, etc., Co., 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Johnson v. Friar, 12 Tenn. (4 Yerg.) 48, 26 Am. Dec. 215; Nashville, etc., R. Co. v. Jackson, 53 Tenn. (6 Heisk.) 271.

A common carrier may for sufficient consideration limit its liability for injury or loss of property, except where such loss occurs through its own or its servant's negligence. Mobile, etc., R. Co. v. Brownsville, etc., Live Stock Co., 123 Tenn. 298, 130 S. W. 788.

7. *Texas*.—Galveston, etc., R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; Houston, etc., R. Co. v. Park, 1 Texas App. Civ. Cas., § 332; Missouri Pac. R. Co. v. Harris, 1 Texas App. Civ. Cas., § 1257; Texas, etc., R. Co. v. Davis, 2 Texas App. Civ. Cas., § 191.

8. *Utah*.—Larsen v. Oregon, etc., R. Co., 38 Utah 130, 110 Pac. 983.

A common carrier may limit its common-law liability for loss of property as an insurer. Homer v. Oregon, etc., R. Co. (Utah), 128 Pac. 522.

9. *Vermont*.—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

10. *Virginia*.—Richmond, etc., R. Co. v. Payne, 6 L. R. A. 849, 86 Va. 481, 10 S. E. 749, 42 Am. & Eng. R. Cas. 366; Wilson v. Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

11. *West Virginia*.—Baltimore, etc., R. Co. v. Skeels, 3 W. Va. 556; Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas., N. S., 103, 67 Am. St. Rep. 781; Brown v. Adams Exp. Co., 15 W. Va. 812.

12. *Wisconsin*.—Detroit, etc., R. Co. v. Farmers', etc., Bank, 20 Wis. 122; Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599.

13. *England*.—Lowe v. Booth, 13 Price 329.

14. **Public policy.**—Barron v. Mobile, etc., R. Co., 2 Ala. App. 555, 56 So. 862.

Alabama.—Barron v. Mobile, etc., R. Co., 2 Ala. App. 555, 56 So. 862.

Idaho.—A limitation of a carrier's common-law liability as insurer must not be opposed to public policy. McIntosh v. Oregon R., etc., Co., 17 Idaho 100, 105 Pac. 66.

Missouri.—Potts v. Wabash, etc., R. Co., 17 Mo. App. 394.

Ohio.—"No principle of public policy would seem to be contravened by a spe-

Certain Named Risks and "Any and All Other Causes Whatever."—

A clause of a shipping contract entirely relieving the carrier from damages resulting from certain named risks and from "any and all other causes whatever," is contrary to public policy.¹⁵

§§ 1123-1132. Liability for Loss Arising from Carrier's Own Negligence—§ 1123. Power to Limit in General.—A carrier can not even by express contract¹⁶ relieve itself in whole or in part¹⁷ from liability for loss or injury arising from its own negligence or that of its servants in transporting goods which it receives for carriage,¹⁸ though not inhibited from making such exemption by statute.¹⁹ This doctrine prevails in the federal courts,²⁰ and has

cial contract restricting the liability of the common carrier from losses not arising from any neglect or fault on his part. Here he would not be stipulating for his own carelessness, or providing impunity for misconduct or any omission of duty on his part. And it would appear reasonable that he should be allowed the means of protection to himself against misfortune, by limiting his liability as an insurer. Besides, the owner may prefer selecting his own insurer. The carrier may be unable to respond in case of loss. And if no restriction of this kind on his liability can be made by agreement, the owner would be subjected to the necessity of paying the carrier for his risk as insurer, and also for paying a premium to another for protection against the same loss for which the carrier is liable." *Davidson v. Graham*, 2 O. St. 131.

15. Certain named risks and "any and all other causes whatever."—*Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410, 411. See *Pecos, etc., R. Co. v. Evans-Snider-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

16. An express contract will not protect a common carrier from the results of its own negligence in running its trains. *Georgia R. Co. v. Gann*, 68 Ga. 350.

17. Partial exemption.—The rule that the carrier can not, by special contract, exempt itself from liability for loss occasioned by negligence, holds good as well where the contract provides for a partial or limited exemption as where it contemplates total exemption from liability. *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Central, etc., R. Co. v. Murphy*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

The public policy that avoids a contract for total exemption will hold a contract void that provides for partial exemption in such case. *United States Exp. Co. v. Bachman*, 28 O. St. 144; *Pennsylvania Co. v. Yoder*, 1 O. C. C., N. S., 283, 15 O. C. D. 32; *Ambach v. B. & O. R. Co.*, 4 O. Dec. 467. See, also, *Baltimore, etc., Co. v. Hubbard*, 1 O. C. C., N. S., 611, 15-25 O. C. D. 477.

18. *McConnell Bros. v. Southern R. Co.*, 144 N. C. 89, 56 S. E. 559.

19. At common law.—*St. Louis, etc., R. Co. v. Wallace*, 90 Ark. 138, 118 S. W. 412, 22 L. R. A., N. S., 379.

This was the rule at common law. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366.

20. Exemption from negligence.—*Railroad Co. v. Lockwood (U. S.)*, 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Pratt (U. S.)*, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; *Express Co. v. Kountze Bros. (U. S.)*, 8 Wall. 342, 343, 19 L. Ed. 457; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 44 L. Ed. 560, 20 S. Ct. 385; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303; *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 44 L. Ed. 84, 20 S. Ct. 33; *The Kensington*, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; *Compania, etc., La Flecha v. Brauer*, 168 U. S. 104, 42 L. Ed. 398; *New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.)*, 6 How. 344, 12 L. Ed. 465; *York Co. v. Central Railroad (U. S.)*, 3 Wall. 107, 18 L. Ed. 170; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; *Walker v. Transportation Co. (U. S.)*, 3 Wall. 150, 18 L. Ed. 172; *Flint v. Christall*, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831; *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415, 4 S. Ct. 420; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588; *Constable v. National Steamship Co.*, 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; *The Great Western*, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 33 L. Ed. 730, 10 S. Ct. 365; *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; *Express Co. v. Caldwell (U. S.)*, 21 Wall. 264, 22 L. Ed. 556; *Bank v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612, 9 S. Ct. 249; *Central Trust*

been adopted by the courts of Alabama,²¹ Arkansas,²² California,²³ Colorado,²⁴ Georgia,²⁵ Idaho,²⁶ Illinois,²⁷ Kansas,²⁸ Minnesota,²⁹ Mississippi,³⁰ Missouri,³¹ New Jersey,³² North Carolina,³³ North Dakota,³⁴ New York,³⁵ Ohio,³⁶ Ore-

Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 763; New York Cent. R. Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; Southern Exp. Co. *v.* Caldwell (U. S.), 21 Wall. 264, 22 L. Ed. 556; Inman & Co. *v.* Seaboard, etc., R. Co., 159 Fed. 960.

This is the rule that is recognized by the supreme court of the United States, qualified, however, by the decisions of the court to the effect that an agreement as to the value of the article shipped, if reasonable and fairly entered into, will be enforced, but that in such a case no federal question arises, as congress has not legislated upon that subject and brought it within the purview of that provision of the constitution which authorizes congress to legislate concerning commerce between the states; and, for this reason, the federal courts will follow the decisions of state courts where the question is to be determined. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op.

21. *Nashville, etc., Railway v. Hinds*, 5 Ala. App. 596, 59 So. 670, decided in conformity to answers to certified questions (Sup.) Id. 669; *Central, etc., R. Co. v. Merrill & Co.*, 153 Ala. 277, 45 So. 628.

22. *St. Louis, etc., R. Co. v. Wallace*, 90 Ark. 138, 118 S. W. 412, 22 L. R. A., N. S., 379; *St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

23. *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

24. A carrier may not, by contract, limit its liability for loss occasioned by negligence of its employees. *Colorado, etc., R. Co. v. Manatt*, 22 Colo. App. 593, 121 Pac. 1012.

25. *Berry v. Cooper*, 28 Ga. 543; *Purcell v. Southern Exp. Co.*, 34 Ga. 315; *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 35 Am. & Eng. R. Cas. 602, 2 L. R. A. 102; *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Wood v. Southern Exp. Co.*, 95 Ga. 451, 22 S. E. 535; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Atlanta, etc., R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944; *Brannon v. Atlanta, etc., R. Co.*, 4 Ga. App. 749, 62 S. E. 468.

26. *McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 106 Pac. 66.

27. *Wabash R. Co. v. Foster*, 127 Ill. App. 201. See, also, *Blair v. Wells Fargo & Co. (Iowa)*, 135 N. W. 615.

28. *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821.

29. *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

30. *Southern Exp. Co. v. Moor*, 39 Miss. 822; *Chicago, etc., R. Co. v. Alber*, 60 Miss. 1017.

31. *Libby v. St. Louis, etc., R. Co.*, 137 Mo. App. 276, 117 S. W. 659; *Leas v. Quincy, etc., R. Co.*, 157 Mo. App. 455, 136 S. W. 963.

A carrier governed by the law of Missouri is entitled to contract for a limitation of its liability for nonnegligent injuries only. *Blair v. Wells Fargo & Co. (Iowa)*, 135 N. W. 615.

32. Though common carriers may limit their common-law liability by special contracts, they can not thus protect themselves against the consequences of their own negligence. *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180; *Gibbons v. Wade*, 8 N. J. L. 255; *Kinney v. Central R. Co.*, 32 N. J. L. 407; *Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278.

33. *McConnell Bros. v. Southern R. Co.*, 144 N. C. 89, 56 S. E. 559; *Kime v. Southern R. Co.*, 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617; *Kissenger v. Fitzgerald*, 152 N. C. 247, 67 S. E. 588.

A carrier can not contract to be relieved, in whole or in part, from liability for damages caused by its negligence. *Stringfield v. Southern R. Co.*, 67 S. E. 333, 152 N. C. 125.

A common carrier can not exempt itself by contract from partial or complete liability for damage from its negligence. *Pace Mule Co. v. Seaboard, etc., R. Co.*, 160 N. C. 215, 76 S. E. 513.

34. *Hanson v. Great Northern R. Co. (N. Dak.)*, 121 N. W. 78.

35. *Greenwald v. Weir*, 111 N. Y. S. 235, 59 Misc. Rep. 431.

36. Common carriers can not, by express notice brought home to shippers, or even by express contract, exonerate themselves from liability for negligence or omission of duty, of themselves or their agents. *Jones v. Voorhees*, 10 O. 145; *Graham & Co. v. Davis & Co.*, 4 O. St. 362, 62 Am. Dec. 285; *Welsh v. Pittsburgh, etc., R. Co.*, 10 O. St. 65, 75 Am. Dec. 490; *United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144; *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481; *Union Exp. Co. v. Graham*, 26 O. St. 595; *Stevenson v. Wells*

gon,³⁷ Pennsylvania,³⁸ South Carolina,³⁹ Tennessee,⁴⁰ Texas,⁴¹ Virginia,⁴² Washington,⁴³ West Virginia,⁴⁴ Wisconsin,⁴⁵ and Wyoming.⁴⁶

Fargo & Co. (S. Ct.), 33 W. L. Bull. 247; Cincinnati, etc., R. Co. v. Pontius, 19 O. St. 221, 2 Am. St. Rep. 391; Cleveland, etc., R. Co. v. Curran, 19 O. St. 1; Pittsburgh, etc., R. Co. v. Sheppard, 56 O. St. 68, 46 N. E. 61; Ambach v. B. & O. R. Co., 4 O. Dec. 467; Pennsylvania Co. v. Yoder, 1 O. C. C., N. S., 283, 15 O. C. D. 32; Jacobson & Co. v. Adams Exp. Co., 1 O. C. C. 381, 1 O. C. D. 212; Telegraph Co. v. Griswold, 37 O. St. 301, 41 Am. Rep. 500; Knowlton v. Erie R. Co., 19 O. St. 260; Express Co. v. Schwab, 53 O. St. 659, 44 N. E. 1135; Baltimore, etc., R. Co. v. Hubbard, 1 O. C. C., N. S., 611, 15-25 O. C. D. 477. But see contra, C. C. & St. L. R. Co. v. Simon, 15 O. C. C. 123, 8 O. C. D. 540.

It is not permissible in this state for a common carrier by custom or special contract to exempt himself from the consequences of his own negligence. Lake Shore, etc., R. Co. v. Gibson, 8 O. C. C., N. S., 345, 18-28 O. C. D. 538.

A carrier can not thus exempt itself from losses caused by any neglect of that degree of diligence pertaining to his peculiar character as bailee. Davidson v. Graham, 2 O. St. 131.

37. Wells v. Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

38. Farnham v. Camden, etc., R. Co., 55 Pa. 53; Howard v. American Exp. Co., 47 Pa. Super. Ct. 416; Solomon v. Adams Exp. Co., 47 Pa. Super. Ct. 423.

39. Black v. Atlantic, etc., R. Co., 82 S. C. 478, 64 S. E. 418.

40. A common carrier can not lawfully stipulate for exemption from liability for the consequences of its own negligence. Such a contract is void because contrary to public policy. Dillard Bros. v. Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Coward v. East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227; Merchants', etc., Transp. Co. v. Bloch, 85 Tenn. (2 Pickle) 392, 397, 6 S. W. 881; Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Railroad v. Gilbert, etc., Co., 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Railway Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Bird v. Railroads, 99 Tenn. (15 Pickle) 719, 726, 42 S. W. 451; Johnson v. Friar, 12 Tenn. (4 Yerg.) 48, 50, 26 Am. Dec. 215; Nashville, etc., R. Co. v. Jackson, 53 Tenn. (6 Heisk.) 271, 275; Railroad v. Craig, 102 Tenn. 298, 52 S. W. 164; Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518; Mrar v. Western Union Tel. Co., 85 Tenn. (1 Pickle) 529, 3 S. W. 496.

"Common carriers will not be permitted, under any circumstances or in

any manner, to protect themselves against the consequences of their own negligence in the carriage of either goods or passengers. They may become the carriers of goods gratuitously, and the law will then hold them only liable as mandatories; that is, only for losses occurring through gross negligence. But so long as they are compensated for the carriage, they are common carriers, contract or no contract. Hutchinson on Carriers, § 44." Coward v. East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 228, 57 Am. Rep. 227.

Common carrier, whether of live animals or other property, can not validly stipulate for exemption to any extent, either in whole or in part, from liability for losses caused by its negligence. Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311.

41. International, etc., R. Co. v. Vandeventer, 48 Tex. Civ. App. 366, 107 S. W. 560; Texas, etc., R. Co. v. Richmond, 94 Tex. 571, 576, 63 S. W. 619, reversing 61 S. W. 410; Building, etc., Ass'n v. Griffin, 90 Tex. 480, 39 S. W. 656; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 110, 17 S. W. 834; Galveston, etc., R. Co. v. Ball, 80 Tex. 602, 605, 16 S. W. 441; Houston, etc., R. Co. v. Park, 1 Texas App. Civ. Cas., § 332.

42. Liquid Carbonic Co. v. Norfolk, etc., R. Co., 107 Va. 323, 328, 58 S. E. 569, 13 L. R. A., N. S., 753.

By the better rule and weight of authority the carrier can not make a valid contract to exempt itself from liability for loss or damage arising from its own negligence. Virginia, etc., R. Co. v. Sayers, 67 Va. (26 Gratt.) 328; Richmond, etc., R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 42 Am. & Eng. R. Cas. 366, 6 L. R. A. 849; Johnson v. Richmond, etc., R. Co., 86 Va. 975, 11 S. E. 829; Norfolk, etc., R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

43. Jolliffe v. Northern Pac. R. Co., 52 Wash. 433, 100 Pac. 977.

44. Maslin v. B. & O. R. Co., 14 W. Va. 180, overruling Baltimore, etc., Railroad v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 49 Am. & Eng. R. Cas. 702, 17 L. R. A. 116.

45. Black v. Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

46. Oregon, etc., R. Co. v. Blyth, 19 Wyo. 410, 118 Pac. 649, Ann. Cas. 1913 E, 288, rehearing denied 119 Pac. 875.

Public Policy.—Public policy forbids a common carrier from exempting itself by contract from damages for loss by its own negligence,⁴⁷ such contract being contrary to public policy, as tending to induce want of care by the carrier in the performance of its duties.⁴⁸

Unreasonable.—Such a contract would be unjust and unreasonable in the eye of the law.⁴⁹

47. Public policy.—*United States.*—In the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carrier was established—the securing of the utmost care and diligence in the performance of their important duties to the public. *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; *Railroad Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; *Compania, etc., La Flecha v. Brauer*, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12.

Arkansas.—*Kansas, etc., R. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932.

Georgia.—*Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944; *Atlantic, etc., R. Co. v. Goodwin*, 1 Ga. App. 351, 57 S. E. 1070; *Atlanta, etc., R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355.

Iowa.—Under Iowa Code, § 2074, a contract by a carrier limiting its common-law liability for negligence is contrary to public policy. *Blair v. Wells Fargo & Co. (Iowa)*, 135 N. W. 615.

Pennsylvania.—Public policy requires of a common carrier the exercise of constant care over its vehicles or means of transportation, and over his servants and employees in charge of them; and, therefore, it is against the public good that it should be allowed to contract for immunity from the consequences of its own negligence or fraud, or the negligence or fraud of its employees, and stipulations to that effect are incapable of enforcement, because unjust and unreasonable. *Willock v. Pennsylvania R. Co.*, 166 Pa. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

Texas.—*Southern Kansas R. Co. v. Burgess Co. (Tex. Civ. App.)*, 90 S. W. 189; *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121 S. W. 161, citing *Pacific Exp. Co. v. Darnell (Tex.)*, 6 S. W. 765, 766; and *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354. See numerous Texas cases cited to proceeding text paragraph.

Any agreement with a carrier that

diminishes or destroys its liability as to either its duty to safely carry the goods or to make reparation in damages to the fullest extent is contrary to public policy and void, if the loss is attributable to the negligence of the carrier. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

Provisions of the Revised Statutes of Texas do not indicate the policy or disposition to favor railroad companies, or other carriers, in the matter of their liability for negligence, but rather the contrary. They are generally held, in this respect, to a rigid accountability and are expressly prohibited by statute from restricting by contract their liability at common law. (Rev. Stat., art. 278.) It is not consistent with the policy thus manifested to render all others liable for the ordinary neglect of their agents and to exempt common carriers under like circumstances. *Hendrick v. Walton*, 69 Tex. 192, 196, 6 S. W. 749.

Since the constitution of Texas (art. 10, § 2) declares all railway companies common carriers, and the statute (Rev. Stat., art. 319) provides that the duties and liabilities of carriers in this state shall be the same as at common law, and also (art. 320) that railway companies shall not in any manner whatever limit or restrict their liability as it exists at common law, a railway company can not, by a release taken in advance and in consideration of permitting one to be carried as a passenger on a freight train, exempt itself from liability for damages resulting from its own negligence. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366.

48. Atkinson v. New York Transfer Co., 76 N. J. L. 608, 71 Atl. 278.

49. Unreasonable.—*Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161, citing *Pacific Exp. Co. v. Darnell (Tex.)*, 6 S. W. 765, and *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354. See post, "Reasonableness of Limitation," § 1195.

In an action against a railroad company for injuries to freight shipped, an instruction that "so much of the written contract of shipment as seeks to relieve the defendant from liability as common carrier, and to relieve it from the consequences of negligence on the part of its agents or employees, is unreasonable and void," is not erroneous. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

Negligence of Less Degree than Intended by Terms Used.—A common carrier can not, by contract, relieve itself from liability for an injury to a shipment resulting from negligence of itself or servants, though such negligence be of a degree less than was intended by the term used.⁵⁰

Willful Negligence.—A common carrier can not by contract be exempted from liability for an injury resulting from negligence, though not willful, of itself or its servants.⁵¹ The words, by "willful negligence," in a special contract by which a carrier sought to limit its liability to such injury as resulted from the "willful negligence" of its agents, means some gross omission of duty involving intentional or willful misconduct.⁵²

Gross Negligence.—If the loss was occasioned by negligence, whether slight or gross, it is not, within what can be made by contract, an exception to the liability of the carrier.⁵³

In the Federal Courts There Is No Distinction between Ordinary and Gross Negligence.—A provision of a bill of lading exempting the carrier from all liability for loss or damage to the property shipped, unless proved to have been caused by its fraud or the "gross negligence" of itself or its servants is not contrary to public policy; there being no distinction between gross negligence and ordinary negligence under the decisions of the federal courts.⁵⁴

Private Carriers.—A private carrier is one who does not engage in the business of carrying, or does not hold himself out to carry, certain kinds of property, and therefore, respecting the carriage, enjoys the full freedom of the right of contract, and may stipulate for relief from liability for every kind of accident resulting from negligence or otherwise.⁵⁵

§ 1124. Effect of State Statutory and Constitutional Provisions.—In Georgia a carrier is prohibited by statute from exempting itself from liability for negligence.⁵⁶ The common-law rule that a carrier can not make a contract

50. Negligence of less degree than intended by terms used.—Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

51. Willful negligence.—Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

Limitation of liability to such as arose from "willful negligence."—Under Rev. St., art. 278, a contract relieving the carrier of all liability for loss or damage, except such as arose from the willful negligence of its servants, is invalid. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; Texas, etc., R. Co. v. Hamm, 2 Texas App. Civ. Cas., § 491; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

A railroad company is liable for delay in transporting freight accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence. Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312; Gulf, etc., R. Co. v. Vaughn, 4 Texas App. Civ. Cas., § 182, 16 S. W. 775.

52. Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

53. Gross negligence.—Graham & Co. v. Davis & Co., 4 O. St. 362, 62 Am. Dec. 285; Welsh v. Pittsburgh, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490.

A carrier can not by express contract, exempt himself from liability for gross negligence or willful misconduct of himself or his servant, nor can he limit his liability in amount in such cases. Chicago, etc., R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 42 Am. & Eng. R. Cas. 392, 8 L. R. A., N. S., 508, affirming 30 Ill. App. 504.

54. There is no distinction between ordinary and gross negligence in federal courts.—Pierce Co. v. Wells Fargo & Co., 110 C. C. A. 645, 189 Fed. 561.

55. Private carriers.—Judgment (App. 1907) 80 N. E. 636, reversed. Cleveland, etc., R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710.

The private carrier is at least liable for his negligence, as it is not to be supposed that a man of ordinary prudence will be guilty of that degree of negligence about his own affairs as to do himself or his property a serious injury; and he is held to the same degree of care that a prudent man would exercise about his affairs. Moss v. Bettis, 51 Tenn. (4 Heisk.) 661, 665, 13 Am. Rep. 1.

56. Effect of state statutory and constitutional provisions.—Civ. Code 1895, § 2264, provides that a carrier is bound to use extraordinary diligence, and that in case of loss all presumption of law is against him, and no excuse avails him

which exempts it from negligence is abrogated by statute in California⁵⁷ and North Dakota.⁵⁸ Such statutes prescribe the limit within which a carrier may exempt itself from liability for negligence by special contract.

§ 1125. Effect of Interstate Commerce Act.—See post, "Under Interstate Commerce Act," § 1329.

§ 1126. Effect of Harter Act.—The Harter Act regulating carriers by water prohibits exemptions from liability for negligence.⁵⁹

§ 1127. Effect of Exemption from Special Causes.—Where there is an exception from liability for loss or damage due to certain causes, it does not exempt the carrier from liability for negligent loss or damage due to such cause.⁶⁰ The only effect of such an agreement is to relieve the carrier from the

unless the loss was occasioned by the act of God or the public enemies of the state. Section 2265 provides that for a carrier to avail himself of the act of God or exemption under the contract as an excuse he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto. Section 2276 provides that a carrier can not limit his legal liability by any notice given either by publication or by entry on the receipts given or tickets sold but that he may make an express contract and will then be governed thereby. Held, that as a general rule a carrier may relieve itself by express contract from its common-law liability as an insurer, but can not relieve itself from liability for damages resulting from its own negligence. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 68 S. E. 1039.

Negligence imputed by statute.—The carrier can not stipulate for exemption from the consequences of the negligence imputed to it by Ga. Civil Code, § 2318, under which a carrier failing to comply with the requirements of § 2317, as to tracing freight which has been lost, damaged or destroyed and giving information with respect thereto becomes liable for the negligence of a connecting carrier. *Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

57. The common-law rule that a carrier can not make a contract which exempts it from liability for any kind of negligence is abrogated by Civ. Code, § 2174, providing that the obligations of a common carrier may be limited by special contract, and the prohibition against a carrier limiting its liability applies, by § 2175, only to limitation for gross negligence. *Donlon Bros. v. Southern Pac. Co.*, 91 Pac. 603, 151 Cal. 763, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

Under Civ. Code, § 2175, providing that a carrier can not be exonerated by any agreement from liability for gross negligence, a contract which attempts to re-

lieve a carrier from liability for gross negligence is void. *Donlon Bros. v. Southern Pac. Co.*, 91 Pac. 603, 151 Cal. 763, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

58. *North Dakota.*—Under Rev. Codes of North Dakota 1905, §§ 5677, 5678, the obligation of a common carrier may be limited by special contract signed by the parties, but it can not exonerate itself from loss resulting from negligence, fraud, or willful wrong, and prior to the enactment of Laws 1907, p. 83, c. 57, it could by special contract be exonerated from liability except for gross negligence, fraud, or willful wrong. *Hanson v. Great Northern R. Co. (N. Dak.)*, 121 N. W. 78.

59. **Effect of Harter act.**—The limitation in a bill of lading that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or goods of any description which are above the value of \$100 per package unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made is a clear attempt on the part of the carrier to exonerate itself from all responsibility for the goods, and such an exemption is prohibited by the Harter act and is invalid. *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588.

Operation and effect of Harter act on carrier by water.—See post, "Carriers by Water," part VII.

60. **Exceptions do not include negligence.**—*Compania, etc., La Flecha v. Brauer*, 168 U. S. 104, 119, 42 L. Ed. 398, 18 S. Ct. 12; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Railroad Co. v. Lockwood (U. S.)*, 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Pratt (U. S.)*, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Arthur v. Texas, etc., R. Co.*, 204 U. S. 505, 514, 51 L. Ed. 590, 27 S. Ct. 338; *New Jersey Steam Nav.*

liabilities imposed by the common law where he is free from fault or neglect.⁶¹ If a loss arises from the carelessness, neglect or omission of duty on the part of the carrier, the case is not within the purview of the restriction, and a recovery can be had on account of such negligence, the same as if no such term were contained in the bill of lading or shipping contract.⁶² Thus carriers can not exempt themselves from liability for negligence by stipulations in their contracts of carriage against loss by act of God,⁶³ enemies of the government, or damages incidental to time of war,⁶⁴ by dangers of navigation,⁶⁵ or from unavoidable dangers;⁶⁶ against loss by defects in car,⁶⁷ by default of subcarriers;⁶⁸ or by a bill of lading, etc., excluding loss by collision,⁶⁹ by delay,⁷⁰ by decay of perishables,⁷¹ by fire,⁷² by floods,⁷³ by jettison, ice, riots, strikes, leakage, break-

Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; *Express Co. v. Kountze Bros.* (U. S.), 8 Wall. 342, 19 L. Ed. 457; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 33 L. Ed. 730, 10 S. Ct. 365.

61. *Union Exp. Co. v. Graham*, 26 O. St. 595; *Ambach v. B. & O. R. Co.*, 4 O. Dec. 467.

62. *Cincinnati, etc., B. Co. v. Pontius*, 19 O. St. 221, 235, 2 Am. St. Rep. 391; *United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144.

63. Act of God.—*Louisville, etc., R. Co. v. McKenzie*, 5 Ala. App. 605, 59 So. 345.

64. Loss by war.—In *Express Co. v. Kountze Bros.* (U. S.), 8 Wall. 342, 19 L. Ed. 457, where the carriers were sued for the loss of gold dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law. *Railroad Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627.

65. Dangers of navigation.—A stipulation in a bill of lading, that the carrier shall not be liable for loss or damage by fire, collision, or the dangers of navigation, or from any other cause, does not protect them from liability for any loss occasioned by their own negligence. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Railroad Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Pratt* (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; *Bank*

v. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Arthur v. Texas, etc., R. Co.*, 204 U. S. 505, 514, 51 L. Ed. 590, 27 S. Ct. 338; *New Jersey Steam Nav. Co. v. Merchants' Bank* (U. S.), 6 How. 344, 12 L. Ed. 465.

66. Unavoidable dangers.—*Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disn. 480, 12 O. Dec. Reprint 745.

67. Defects in cars.—*Railroad v. Dies*, 91 Tenn. 177, 18 S. W. 266.

68. Defaults of subcarriers.—*Merchants', etc., Transp. Co. v. Bloch*, 86 Tenn. (2 Pickle) 392, 6 S. W. 881.

69. Collision.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

70. Delay.—A stipulation in a shipping contract that the carrier shall not be liable for injury, whether occasioned by the goods being transported or by delay after transportation, does not relieve the carrier from liability for loss or damage caused by negligence. *Taylor v. Pennsylvania R. Co.*, 8 N. J. L. J. 149; *Gulf, etc., R. Co. v. Dunman* (Tex. Civ. App.), 81 S. W. 789.

71. Decay.—*Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

72. Fire.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

A stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability for loss by fire occurring through the negligence of a railroad company which it had employed as a carrier. *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872. See, also, *Marande v. Texas, etc., R. Co.*, 184 U. S. 173, 46 L. Ed. 487, 22 S. Ct. 340; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 339, 28 L. Ed. 717, 5 S. Ct. 151.

An exception in a bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," does not excuse the company from liability for

73. Floods.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

age, or any human agency in which their negligence or that of their servants may be a factor, or any other causes, where their operation to cause loss or injury might be avoided by the exercise of extraordinary care and diligence.⁷⁴ And conditions requiring a claim for damages to be filed within a given time after delivery,⁷⁵ an agreement fixing the value of property,⁷⁶ a stipulation that goods are shipped at "owner's risk,"⁷⁷ or a contract to ship goods "released"⁷⁸ will not exempt the carrier from liability for its own negligence.

Shipment of Machinery upon Open Cars.—If the shipper agreed that the machinery might be transported upon open cars, the carrier would not be liable for damages caused by its being so transported; but if ordinary diligence required the carrier to cover the cars during a detention on the road, and it failed to do so, it would be liable for damages from such failure.⁷⁹

Stipulation That Laborers Loading and Unloading—Employees of Shipper.—A provision in a contract of shipment that, when the carrier furnishes the shipper with laborers to assist in loading and unloading his goods, they shall be deemed the shipper's servants while so engaged, and that the carrier shall not be responsible for their acts, is void, as an attempt to release the carrier from responsibility for the negligence of his own servants.⁸⁰

§ 1128. As to Interstate Commerce.—As to interstate commerce, a common carrier can not contract for exemption from liability for injuries resulting from his own negligence.⁸¹

the loss of such package by fire, if caused by the negligence of a railroad company to which the former had confided a part of the duty it had assumed. *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872.

A stipulation in a carrier's bill of lading, exempting it from loss or damage by fire from any cause whatsoever occurring, was invalid, as contrary to public policy, in so far as it attempted to exempt the carrier from liability for loss resulting from fire caused by the negligence of the carrier's agents or servants. *Garvan v. New York, etc., R. Co.*, 96 N. E. 717, 210 Mass. 275.

74. Inman & Co. v. Seaboard, etc., R. Co., 159 Fed. 960.

75. Time within which claim must be made.—*Richardson v. New York, etc., R. Co.*, 106 N. Y. S. 702, 122 App. Div. 120. See post, "Requirement of Notice of Loss and Presentation of Claims," §§ 1384-1470.

76. Fixing value.—*Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944. "Limitation of Amount of Liability," §§ 1323-1383.

If an agreed valuation was merely a cloak to limit liability to a sum less than the real value, the contract is not valid as against a loss due to negligence. *McElvain v. St. Louis, etc., R. Co.*, 151 Mo. App. 126, 131 S. W. 736.

77. At "owners risk."—*Nashville, etc., R. Co. v. Jackson*, 53 Tenn. (6 Heisk.) 271.

78. Goods shipped released.—*Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807.

79. Shipment of machinery upon open cars.—*Western, etc., R. Co. v. Exposi-*

tion Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, 35 Am. & Eng. R. Cas. 602.

80. Stipulations that laborers loading and unloading—Employees of shipper.—*Missouri Pac. R. Co. v. Smith (Tex.)*, 16 S. W. 803.

81. As to interstate commerce.—A carrier can not limit its liability for loss or damage to an interstate shipment from negligence of its own or any connecting line. *Robertson v. Southern R. Co.*, 59 So. 232, 4 Ala. App. 385; *Gilliland v. Southern Railway*, 85 S. C. 26, 67 S. E. 20; *Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191.

A stipulation by a common carrier for exemption from the consequences of its negligence will not be enforced in either a domestic or interstate shipment. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 368, 107 S. W. 560, affirmed, no op.; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 303, 12 S. W. 815; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; *Southern Kansas R. Co. v. Burgess Co. (Tex. Civ. App.)*, 90 S. W. 189, 193, affirmed in 101 Tex. 659, no op.; *Pacific Exp. Co. v. Darnell (Tex.)*, 6 S. W. 765, 766; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176.

Validity of Statute Prohibiting Exemption from Negligence.—A statute of a state providing that "no contract, receipt, rule or regulation shall exempt any corporation negligent in transporting persons or property by railway from liability of common carrier or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into," is not in conflict with the constitution of the United States as applied to a contract for interstate transportation.⁸²

§ 1129. Contracts for Transportation Over Connecting Roads.—See post, "Connecting Carriers," Part V.

§ 1130. Property Placed on Right of Way by Owner for His Own Convenience.—Where property is placed on a railroad right of way for carriage by request of the owner, and for his convenience, and by permission of the railroad, under a contract by which the owner, in consideration of the permission, releases the railroad from all liability for injury to the property while on such right of way, whether attributable to the negligence of the company or otherwise, the contract is valid; and, if the property is destroyed by fire while on the right of way, the company is not liable, except for gross negligence or willful misconduct.⁸³

§ 1131. Carrier under No Legal Duty to Move Train as Agreed.—Where the railroad is under no legal duty to move a train in the manner specified in a special contract, the limitations of liability therein contained are not against public policy.⁸⁴

§ 1132. Release of Damages from Prior Negligence.—A shipper may by the written contract of shipment release for a valuable consideration the carrier from damages from its prior negligent delay in providing cars or loading the shipment.⁸⁵

§ 1133. Loss by Act of God.—A common carrier can limit its liability against loss occasioned by an act of God, where there is no concurring or intervening negligence on its part.⁸⁶

Retaining Freight Money.—A carrier of freight is not precluded from asserting release of liability for damage to a shipment through an act of God by accepting and retaining the freight charges paid.⁸⁷

§ 1134. Loss Due to Inevitable Accident or Casualty.—A carrier may specially contract with the shipper that it shall not be liable for loss happening from accident or from dangers from navigation that no human skill or diligence can guard against.⁸⁸

82. Validity of statute prohibiting exemption from negligence.—Chicago, etc., R. Co. v. Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289.

83. Property placed on right of way by owner for his own convenience.—Ashley v. Central, etc., R. Co., 7 Ga. App. 711, 68 S. E. 56.

84. Carrier under no legal duty to move train as agreed.—A circus company, owning its own cars, contracted with a railroad company for the hire of motive power and the use of tracks and trainmen, to be considered as the circus company's servants, for the transportation of the train from one place to another; the contract exempting the railroad company from liability for injuries to any person or persons using the train from whatsoever cause. Held that, the

railroad company being under no legal duty to move the circus company in the manner specified, the contract was not contrary to public policy. Clough v. Grand Trunk, etc., R. Co., 155 Fed. 81, 11 L. R. A., N. S., 446.

85. Release of damages from prior negligence.—Holland v. Chicago, etc., R. Co., 139 Mo. App. 702, 123 S. W. 987.

86. Loss by act of God.—Louisville, etc., R. Co. v. McKenzie, 5 Ala. App. 605, 59 So. 345; Southern Exp. Co. v. Glenn, 84 Tenn. (16 Lea) 472, 1 S. W. 102.

87. Retaining freight money.—Louisville, etc., R. Co. v. McKenzie, 5 Ala. App. 605, 59 So. 345.

88. Loss due to inevitable accident.—Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 397, 441, 32 L. Ed. 788, 9 S. Ct. 469.

Loss from Causes Over Which Carrier Had No Control.—A common carrier, by special contract with the owner of goods intrusted to him, may so far restrict his common-law liability as to exonerate himself from losses arising from causes over which he has no control, and to which his own fault or negligence in no way contributed.⁸⁹

§ 1135. Loss Due to Public Enemy.—A carrier may provide in its contract of shipment that it shall not be liable for loss caused by the public enemy.⁹⁰

§ 1136. Loss Caused by Thieves or Robbers.—See post, "Persons Bound and Carriers Benefited," § 1261.

§ 1137. Loss by Mistake or Accident.—A common carrier may by special contract restrict his liability so far as he is an insurer against losses by mistake or accident.⁹¹

§ 1138. Regulations as to Delivery and Entry of Packages.—A common carrier may so limit its common-law liability by a contract requiring reasonable regulations relating to manner of delivery and entry of packages, information as to their contents, etc., as to be liable only according to the terms of such contract.⁹²

§ 1139. Stipulations against Liability for Loss of Valuables unless Value Disclosed.—A carrier may stipulate that it shall not be liable for loss of money or other valuable articles, liable to be stolen or damaged, unless informed of their character or value.⁹³

§ 1140. Failure to Furnish Suitable Cars.—Duty of a common carrier can not be limited by a bill of lading stating that cars were accepted, where it is shown that the cars actually furnished were not suitable.⁹⁴

§ 1141. Risk of Loading and Unloading.—The provision of a contract of carriage, based on a reduced rate, that the shipper will load and unload at his own risk, is valid.⁹⁵

§ 1142. Loss by Breakage.—A contract with a railroad company, ex-

89. Loss from causes over which carrier had no control.—*Graham & Co. v. Davis & Co.*, 4 O. St. 362, 62 Am. Dec. 285.

90. Loss due to public enemy.—*Southern Exp. Co. v. Glenn*, 84 Tenn. (16 Lea.) 472, 1 S. W. 102.

91. Loss by mistake or accident.—*Davidson v. Graham*, 2 O. St. 131; *Wilson v. Hamilton*, 4 O. St. 722; *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490; *Cleveland, etc., R. Co. v. La Tourette*, 2 O. C. C. 279, 1 O. C. D. 486; *United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22; *Pittsburgh, etc., R. Co. v. Barrett*, 36 O. St. 448, 3 Am. & Eng. Cas. 256; *Paddock v. Toledo, etc., R. Co.*, 21 O. C. C. 626, 11 O. C. D. 789.

92. Regulations as to delivery and en-

try of packages.—*Kallman v. United States Exp. Co.*, 3 Kan. 205.

93. Stipulation against loss of money or valuables unless informed of value.—*Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Rathbone v. New York, etc., R. Co.*, 140 N. Y. 48, 35 N. E. 418.

94. Duty to furnish suitable cars.—*Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

A stipulation in a contract of shipment that the shipper would accept the cars furnished him by the carrier, etc., is unreasonable and invalid. The carrier can not relieve himself from liability for loss and injury caused by his negligence of the duty to furnish suitable cars by special contract. *G., C. & S. F. R. Co. v. Wilhelm*, 3 Texas App. Civ. Cas., § 458.

95. Risk of loading and unloading.—*St. Louis, etc., R. Co. v. Burgin*, 82 Ark. 502, 104 S. W. 161.

empting it from liability for damages to goods transported by it caused by breakage, is void, as against public policy.⁹⁶

§§ 1143-1145. Delay or Failure to Transport—§ 1143. In General.—It is questionable whether a carrier's liability for failure to carry articles received for transportation can be limited by contract.⁹⁷

Delay.—Stipulation that carrier shall not be liable for delay occasioned by cause beyond its power to control by use of all means reasonably available is valid.⁹⁸ But a stipulation that a carrier will not be liable for delay except that due to the willful negligence of the company's servants, is void.⁹⁹

Texas.—Under the Texas statutes a railroad company can not maintain the defense that, under its contract with the shipper, it acted only as a mere forwarder or private carrier for hire, and was released from any liability to the shipper for delay in receiving or forwarding.¹

§ 1144. Delay Caused by Mobs and Strikes.—A stipulation of a bill of lading that the carrier should not be liable for delay by reason of strikes is just, reasonable, and not inconsistent with public policy,² whether the contract of shipment be considered as interstate or intrastate;³ but it is invalid in so far as it undertakes to exempt the carrier from liability for negligent delay.⁴

§ 1145. Loss of Market.—A stipulation that the carrier shall not be liable for loss of market, or other delay arising from detention, is reasonable.⁵

96. Loss by breakage.—*Heaton & Bro. v. Morgan's, etc., Steamship Co.*, 1 Texas App. Civ. Cas., § 774.

97. Delay or failure to transport.—*Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256.

98. Delay.—*Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

Independent of special contract, carriers are not liable for damages resulting from delay occasioned by any cause beyond their power to control by the use of all means reasonably available to them. If such defense is available without being stipulated for by special contract, they certainly may claim such exemption under a special contract. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

99. Missouri Pac. R. Co. v. Harris, 1 Texas App. Civ. Cas., § 1257.

1. Texas, etc., R. Co. v. Hamm, 2 Texas App. Civ. Cas., § 491.

Under Texas Rev. St., art. 278, a stipulation exempting it from all risk of damage, because of any delay in transportation not resulting from willful negligence of its servants, is invalid. *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257.

2. Delay caused by mobs and strikes.—*Leavens v. American Exp. Co.*, 86 Vt. 342, 85 Atl. 557.

3. Interstate and intrastate shipments.—In an action for delay in the transportation of cattle, it appeared that the cattle were received for transportation from a point in Texas to Chicago, the bill of

lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that the provision releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

4. Negligent delay.—*International, etc., R. Co. v. Server*, 3 Texas App. Civ. Cas., § 441.

5. Loss of market.—*White v. Great Western R. Co.*, 2 C. B., N. S., 7, 26 L. J. C. P. 158; *Webb v. Great Western R. Co.*, 26 W. R. 111.

A fish merchant delivered fish to a railway company to carry upon a signed contract, relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. Held, that upon the facts the merchant had a bona fide option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within

§ 1146. **Decay or Injury to Perishables.**—A stipulation in a bill of lading which stated that the carrier shall be exempt from liability for the decay of or injury to perishable fruit unless “the direct result of the carrier’s negligence; and the shipper, owner, and consignee hereby assume the burden of proving such negligence,” does not exempt the carrier from liability for loss by its negligence, but merely provides that the negligence shall not be presumed but must be affirmatively proved.⁶

§ 1147. **Loss by Rust.**—A stipulation that a carrier will not be liable for rust is void.⁷

§ 1148. **Loss by Fire.**—A common carrier, unless forbidden by statute, may exempt itself from liability for loss by fire. Unless caused by negligence of itself or its servants, such a limitation is reasonable.⁸ Such limitations are not

§ 7 of the Ry. & C. Tr. Act 1854, and covered the delay; and that the company were not liable for the loss. *Manchester, S. & L. R. Co. v. Brown*, 8 App. Cas. 703, 53 L. J. Q. B. D. 124, 4 Ry. & C. T. Cas. xviii.

6. **Decay or injury to perishables.**—*Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

7. **Loss by rust.**—*Heaton & Bro. v. Morgan’s, etc., Steamship Co.*, 1 Texas App. Civ. Cas., § 774.

8. **Loss by fire.**—*United States.*—*York Co. v. Central Railroad (U. S.)*, 3 Wall. 107, 18 L. Ed. 170; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 13 R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 S. Ct. 663; *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *Arthur v. Texas, etc., R. Co.*, 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338; *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 437, 48 L. Ed. 1054, 24 S. Ct. 671; *Constable v. National Steamship Co.*, 154 U. S. 51, 62, 38 L. Ed. 903, 14 S. Ct. 1062; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 339, 28 L. Ed. 717, 5 S. Ct. 151; *New Jersey Steam Nav. Co. v. Merchants’ Bank*, 6 How. 344, 12 L. Ed. 465; *Railroad Co. v. Manufacturing Co. (U. S.)*, 16 Wall. 318, 21 L. Ed. 297; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 75, 1176; *Van Schaach v. Northern Transp. Co.*, 3 Biss. 394, Fed. Cas. No. 16,876; *Eells v. St. Louis, etc., R. Co.*, 52 Fed. 903.

Thus, where a contract for the transportation of cotton from Memphis to Boston was in the form of a bill of lading containing a clause exempting the carrier from liability for losses by fire, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part. *York Co. v. Central Railroad (U. S.)*, 3 Wall. 107, 18 L. Ed. 170.

A stipulation in the bill of lading that the carrier should not be liable for a fire happening after unloading the cargo, is reasonable and valid. *Constable v. National Steamship Co.*, 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

Arkansas.—*Little Rock, etc., R. Co. v. Talbot & Co.*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26, 11 S. W. 958.

Illinois.—*Chicago, etc., R. Co. v. Chapman*, 113 Ill. 96, 24 N. E. 417, 42 Am. & Eng. R. Cas. 392, 8 L. R. A., N. S., 508, affirming 30 Ill. App. 504; *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140.

Kentucky.—*Louisville, etc., R. Co. v. Brownlee (Ky.)*, 14 Bush 590.

Louisiana.—*New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302.

Massachusetts.—*Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Judson v. Western R. Corp. (Mass.)*, 6 Allen 486, 83 Am. Dec. 646; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106.

Minnesota.—*Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 442, 619.

New Hampshire.—*Rand v. Merchants’ Dispatch Transp. Co.*, 59 N. H. 363.

New York.—*Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Platt v. Richmond, etc., R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 15 N. E. 393; *Shelton v. Merchants’ Dispatch Transp. Co.*, 59 N. Y. 258, 48 How. Prac. 257.

Pennsylvania.—*Adams Exp. Co. v. Sharpless & Sons*, 77 Pa. 516; *Farnham v. Camden, etc., R. Co.*, 55 Pa. 53; *Scott v. Allegheny Valley R. Co.*, 172 Pa. 646, 33 Atl. 712.

South Carolina.—*Levy v. Southern Exp. Co.*, 4 S. C. 234.

Tennessee.—*Denning v. Merchants’ Cotton-Press, etc., Co.*, 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518; *Lancaster Mills v. Merchants’ Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. (5 Pickle) 1, 14 S. W. 317.

Texas.—*Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 132, 19 S. W. 455, 17 L. R. A. 643.

Vermont.—*Davis v. Central Vermont*

against public policy.⁹ But a carrier can not exempt itself from the consequences of fires due to its own or its servants' negligence.¹⁰

What Law Governs.—Carrier whose contract is not governed by laws of Texas may stipulate against loss by fire, and Texas courts will uphold such stipulation when read with condition which law attaches, that loss be not result of carrier's negligence.¹¹

Interstate and Foreign Shipments.—In contracts of interstate¹² and foreign shipment,¹³ the carrier has the right to contract against liability for loss occasioned by fire, not caused by its own negligence; although such contracts as to domestic shipments are invalid under the local law.¹⁴

§ 1149. Damages from Conduct or Running of Trains.—Whether a contract to release the company from damages resulting from the conduct or running of its trains would be contrary to public policy, *quære?*¹⁵

§ 1150. Notice of Arrival.—What notice a shipper or consignee should have as to the arrival of goods at destination is a matter as to which parties to the bill of lading may contract at their pleasure.¹⁶

§ 1151. Safety of Goods after Arrival.—In view of § 196, Constitution of Kentucky, forbidding a common carrier to contract for relief from its common-law liability, a common carrier can not, by any stipulation in the contract or bill of lading, reduce its liability as an insurer of the safety of goods till the consignee has had a reasonable time to remove them after their arrival.¹⁷

§ 1152. Liability as Warehouseman.—A carrier acted as a warehouseman in receiving goods in its parcel room for safe-keeping, and had a right to limit its liability to a specified sum in case of loss of the goods, so that a receipt containing such limitation was binding upon the owner, and limited his recovery to that amount.¹⁸

R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

Canada.—*Dionne v. Canadian Pac. R.*, 1 Montr. L. R. (Sup. Ct.) 168; *Armstrong v. Grand Trunk R. Co.*, 18 New Bruns. 445.

9. Not against public policy.—*Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481.

10 Negligent fires.—*Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *Constable v. National Steamship Co.*, 154 U. S. 51, 52, 38 L. Ed. 903, 14 S. Ct. 1062; *York Co. v. Central Railroad (U. S.)*, 3 Wall. 107, 18 L. Ed. 170; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 S. Ct. 663; *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 437, 48 L. Ed. 1054, 24 S. Ct. 671; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 132, 19 S. W. 455, 17 L. R. A. 643; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308, affirmed in 88 Tex. 593.

11. What law governs.—*Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 28, 14 S. W. 785. See, also, *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465.

12. Interstate shipments.—*Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366.

13. Foreign shipments.—*Houston, etc., R. Co. v. Bath*, 17 Tex. Civ. App. 697, 710, 44 S. W. 595, affirmed in 93 Tex. 731, *no op.*

14. Where a railway company, on receiving a car load of cotton in Texas for carriage to Rhode Island, stipulated that it should not be liable for destruction of the cotton by fire, or for any loss thereof by causes beyond its control, and the cotton was burned while being transported, in the absence of a statute controlling or limiting the right to contract, such right was controlled by the common law, and the burden was on the company to show that the fire did not result from its negligence or that of its servants. Judgment (Tex. Civ. App.), 61 S. W. 410, reversed. *Texas, etc., R. Co. v. Richmond*, 63 S. W. 619, 94 Tex. 571.

15. Damages from conduct or running of its trains.—*Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75.

16. Notice of arrival.—*Southern R. Co. v. Adams Machinery Co.*, 165 Ala. 436, 51 So. 779.

17. *Lewis v. Louisville, etc., R. Co.*, 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

18. Liability as forwarder or warehouseman.—*Terry v. Southern R. Co.*, 81 S. C. 279, 62 S. E. 249, 18 L. R. A., N. S., 295. See post, "Connecting Carriers," Part V.

Liability as Warehouseman at Flag Station.—A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot nor agent; and when the consignee is fully advised, at the time of shipment that the company has no depot nor agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at that place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman.¹⁹ Thus a custom that a railroad should deliver freight on the platform of minor stations, whose business would not justify a warehouse, to be received there by the consignee on discharge from the car controls the general law of liability of carriers and relieves the carrier from liability as a warehouseman.²⁰

§ 1153. Release of Damages Accrued before Execution of Written Contract.—A provision in a bill of lading in an interstate shipment releasing a railroad company from any damages a shipper may have sustained under a prior verbal contract for failure to supply cars is an unreasonable and oppressive limitation of its common-law liability.²¹ An agreement to release damages accruing before the signing of the written contract, can be enforced, if there be any consideration for it.²²

§§ 1154-1247. Manner of Limiting Liability—§§ 1154-1234. Special Contract—§ 1154. In General.—A common carrier may limit his common-law liability by special contract, as to certain causes of loss or damage, if assented to by the consignor of the goods.²³

§§ 1155-1157. Express or Implied Contract—§ 1155. In General.—A carrier may, by an express contract which is reasonable and just, limit its liability as an insurer of goods intrusted to it for transportation.²⁴

19. Liability as warehouseman at flag station.—*South, etc., R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419. See, also, *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

20. McMaster v. Pennsylvania R. Co., 69 Pa. 374, 8 Am. Rep. 264.

21. Release of damages accrued before execution of written contract.—*Cross v. Graves*, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102.

22. San Antonio, etc., R. Co. v. Barnett, 12 Tex. Civ. App. 321, 322, 34 S. W. 139; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

23. Right to limit liability by special tract.—*United States*.—*New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.)*, 6 How. 344, 12 L. Ed. 465; *York Co. v. Central Railroad (U. S.)*, 3 Wall. 107, 18 L. Ed. 170; *Railroad Co. v. Manufacturing Co. (U. S.)*, 16 Wall. 318, 319, 21 L. Ed. 297; *Railroad Co. v. Pratt (U. S.)*, 22 Wall. 123, 134, 22 L. Ed. 827, 49 How. Prac. 84; *Compania, etc., La Flecha v. Brauer*, 168 U. S. 104, 119, 42 L. Ed. 398, 18 S. Ct. 12; *Insurance Co. v. Railroad Co.*, 104 U. S. 146, 155, 26 L. Ed. 679; *The Majestic*, 166 U. S. 375, 384, 41 L.

Ed. 1039, 17 S. Ct. 597; *Baltimore, etc., R. Co. v. Doyle*, 74 C. C. A. 245, 142 Fed. 669.

Colorado.—A carrier accepts shipments subject to the liabilities imposed by law, except as limited by special contract. *Estes v. Denver, etc., R. Co.*, 49 Colo. 378, 113 Pac. 1005.

Georgia.—*Brannon v. Atlanta, etc., R. Co.*, 4 Ga. App. 749, 751, 62 S. E. 468.

North Carolina.—*Kime v. Southern R. Co.*, 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

Ohio.—Such special exception to the defendant's liability may be lawfully created by special contract between the parties. *Davidson v. Graham*, 2 O. St. 131 (qualifying and explaining *Jones v. Voorhees*, 10 O. 145); *Cleveland, etc., R. Co. v. La Tourette*, 2 O. C. C. 279, 1 O. C. D. 486; *United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22.

24. Express contract.—*United States.*—*Merriman v. May Queen*, Newb. 464, Fed. Cas. No. 9,481.

Delaware.—*Carpenter v. Baltimore, etc., R. Co. (Del.)*, 6 Pen. 15, 20 R. R. R.

§ 1156. Necessity for Express Contract.—Nothing short of an express stipulation by parol or in writing should be permitted to discharge the carrier from duties which the law has annexed to his employment.²⁵

Georgia.—Under the statutes of Georgia²⁶ a common carrier can not limit its common-law liability except by an express contract, entered into between the parties. Any other limitation of its liability is void and in contravention of law.²⁷

§ 1157. Implied Contract.—Under the laws of Delaware²⁸ and formerly in Georgia²⁹ a carrier could limit its liability by implied contract.

§§ 1158-1183. Form of Limitation—§ 1158. Necessity for Written Contract.—In the absence of statute a written contract is not necessary to limit a carrier's common-law liability, but the issuance of a bill of lading or shipping receipt containing such stipulations may be made essential by the state statutes.³⁰

679, 43 Am. & Eng. R. Cas., N. S., 679, 64 Atl. 252.

Oklahoma.—Chicago, etc., R. Co. v. Wehrman, 25 Okla. 147, 105 Pac. 328.

Oregon.—Wells v. Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Utah.—A common carrier, in absence of statute, may, by express contract, limit his liability for the loss of or damage to property transported, but such limitation must be just and reasonable, and receive the shipper's assent. *Benson v. Oregon, etc., R. Co.*, 35 Utah 241, 99 Pac. 1072, 19 Am. & Eng. Ann. Cas. 803.

25. Necessity for express contract by parol or in writing.—New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Railroad Co. v. Pratt (U. S.), 22 Wall. 123, 134, 22 L. Ed. 827, 49 How. Prac. 84; The Majestic, 166 U. S. 375, 384, 41 L. Ed. 1039, 17 S. Ct. 597; Railroad Co. v. Manufacturing Co. (U. S.), 16 Wall. 318, 319, 21 L. Ed. 297; York Co. v. Central Railroad (U. S.), 3 Wall. 107, 18 L. Ed. 170; Express Co. v. Caldwell (U. S.), 21 Wall. 264, 266, 22 L. Ed. 556; Adams Exp. Co. v. Adams, 29 App. D. C. 250; McGregor v. Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668; Wells v. Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

26. Central, etc. R. Co. v. City Mills Co., 128 Ga. 841, 58 S. E. 197; Seaboard, etc., Railway v. Atlantic Exp. Co., 135 Ga. 413, 69 S. E. 566; Georgia Railroad v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Georgia R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; Central R. Co. v. Bryant, 73 Ga. 722.

27. Georgia R. Co. v. Gann, 68 Ga. 350.

Regulation based on public policy.—The carrier's liability as a common carrier being regulated by law upon grounds of public policy, he will not be permitted by his own act to limit the effect and operation of the law and thereby defeat the requirements of public policy, but must obey the law as laid down in regard to his liability as a common carrier without attempting to alter it for his

own protection. *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

Purpose of enactment.—This provision of the Code of Georgia is a wise and salutary provision, intended to protect the public from imposition and surprise, in the hurried transaction of business with carriers in the forwarding of small parcels, as well as valuable packages by all sorts of people, some of whom might not be able to read the printed stipulations annexed to the receipt given for the goods, and if they could read them, would not be able to comprehend the legal effect thereof. *Mosher & Co. v. Southern Exp. Co.*, 38 Ga. 37.

28. Implied contract.—*Carpenter v. Baltimore, etc., R. Co.* (Del.), 6 Pen. 15, 20 R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679, 64 Atl. 252.

29. A common carrier may, by special contract, limit his liability. It is not required in every case that the contract be expressed, but he may limit his liability by acts from which a contract is to be implied, such as public notice, known to the person for whom he carries, that he will not be answerable for loss of goods committed to him except on compliance with certain terms. *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468.

Implied from usage.—Usage is a fact which may be restored to, to show that a contract limiting a common carrier's liability is to be implied to establish a usage on the part of carriers it must be known, certain, uniform, reasonable and not contrary to law. So if carriers in a particular district or if one particular carrier, sometimes gave bills of lading containing an exemption from loss by fire and at other times containing no such exemption, then there is no usage as there has been a want of uniformity. Even if in a majority of cases the bills contain such clauses, still the usage is not sufficiently proven to make it the law of the contract between the parties. *Berry v. Cooper*, 28 Ga. 543.

30. Pub. Acts 1909, No. 300, § 40, provides that, whenever property is received by a carrier subject to the provision of the act, it shall, on demand of the shipper,

§§ 1159-1163. Instruments in Which Stipulation Incorporated—

§ 1159. Bill of Lading.—Stipulations limiting a carrier's common-law liability are ordinarily inserted in the bill of lading,³¹ but in Georgia,³² the insertion of such stipulation is forbidden by statute, and in Illinois the insertion of such stipulation in the receipt part of the contract is prohibited.³³

§ 1160. Freight Receipts.—A carrier can not limit its common-law liability safely to deliver consigned property at the place of destination by any limitation expressed in its receipt for the property.³⁴

Printed Form of Receipt Generally Used by Carrier.—A printed form of receipt, generally used by the carrier, but not used upon the occasion in question, and not shown to have been known to the shipper, does not raise the question of the power of a carrier to restrict his liability by contract.³⁵

issue a receipt or bill of lading therefor, naming the classification, and that no carrier shall limit or change its common-law liability by contract or otherwise as to its responsibility for the negligent acts of its agents, etc., with reference to property in its custody, providing that nothing contained in the act shall be construed to abridge or lessen the liability of any such carrier as it is under existing laws. Held, that such act did not change the common-law liability of carriers, and that the mere failure of a shipper to demand a receipt containing a limited liability clause did not relieve the carrier from the obligation of giving such receipt in case it desired to limit its common-law liability, etc. *Farnsworth v. National Exp. Co.*, 166 Mich. 676, 132 N. W. 441.

31. Bill of lading.—*Bolles v. Lehigh Valley R. Co.*, 86 C. C. A. 562, 159 Fed. 694.

32. In Georgia an attempt on the part of the carrier to limit its liability by the insertion of the stipulation to that effect in the bill of lading is forbidden by the statute. Civil Code, 1895, § 2276; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53; *Mosher & Co. v. Southern Exp. Co.*, 38 Ga. 37; *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473; *Wallace v. Sanders*, 42 Ga. 486; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609; *Central R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; *McElveen v. Southern R. Co.*, 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

33. 3 Starr & C. Ann. St. Ill. 1896, p. 3285, c. 114, par. 102, providing that, whenever any property is received by any railroad corporation to be transported, it shall not be lawful for the corporation to limit its common-law liability safely to deliver such property at the place to which the same is to be transported by any

stipulation or limitation expressed in the receipt given for the safe delivery of such property, as construed by the courts of that state, does not apply to restrictions contained in that part of the bill of lading which constitutes a contract. *Bolles v. Lehigh Valley R. Co.*, 159 Fed. 694, 86 C. C. A. 562.

34. Freight receipts.—*United States.*—*Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872.

A carrier's common-law liability can not be limited by the terms of a receipt for the goods. *Inman & Co. v. Seaboard, etc.*, R. Co., 159 Fed. 960.

Georgia.—*Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170, 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 741, 4 Am. & Eng. Ann. Cas. 128; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Central, etc., R. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197.

By the Georgia statute notice by entry on receipts is not sufficient to create a contract limiting the carrier's liability. *Georgia Railroad v. Spears*, 66 Ga. 485; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75; *Central R. Co. v. Bryant*, 73 Ga. 722.

Illinois.—*Pennsylvania R. Co. v. John Anda Co.*, 131 Ill. App. 426.

Missouri.—*Levering v. Union Transp., etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320.

Michigan.—*Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

New York.—*Limburger v. Wescott (N. Y.)*, 49 Barb. 283.

Tennessee.—*Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256.

Negligence of carrier.—Public policy demands that the right of the owners of freight to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any condition in the carrier's receipt for the freight. *Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872.

35. Printed form of receipt generally used by carrier.—*Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256.

§ 1161 Express Receipts.—See post, "Acceptance of Express or Freight Receipt," § 1180.

§ 1162. Receipts of Compress Company.—In states where statutes require an express contract between the carrier and the shipper in order to limit the liability of the former a receipt issued by a cotton compress company referring to the bill of lading of the carriers which contain stipulations limiting the common-law liability of such carrier is not binding on the shipper.³⁶

§ 1163. Tickets, Entry of Notice on.—A common carrier can not limit its common-law liability by any notice given on ticket sold.³⁷

§§ 1164-1183. Requisites of Stipulation—§§ 1164-1169. Stipulation Must Be in Body of Instrument—§ 1164. In General.—A railroad company can only relieve itself from its liabilities as a common carrier by a stipulation in the body of the instrument to which the shipper assents.³⁸

§ 1165. Provisions Stamped or Written on Face of Receipt or Bill of Lading.—A railroad company, as a common carrier, can not restrict its common-law liability for goods lost in transit, by any regulation or provision stamped across the face of the bill of lading, unless the shipper assents to it or it is distinctly brought to his attention;³⁹ but stipulations restricting the common-law liability of a carrier stamped on the face of a bill of lading before its delivery to the shipper, and by express terms included therein, become a part of the contract.⁴⁰ Stamping on a bill of lading the words: "Goods to be receipted for on the levee—not responsible for rust, breakage, leakage, cooperage—weight and contents unknown," and the statement of the witness who received the goods "that the vessel would not be responsible for breakage," is not such a certain

36. Receipts of compress company.—A compress company issued to the owner a receipt for cotton to be compressed and loaded for a railroad company, subject to the conditions of a bill of lading to be issued in exchange for such receipt. The owner obtained from the railroad company in exchange for the receipt a bill of lading conditioned that no carrier or person in possession of the cotton should be liable for loss thereto by fire. Held, that there being no express contract between the owner and the railroad company respecting the condition in the bill of lading exempting the carrier from liability for loss by fire, under Civ. Code 1895, § 2276, providing that a carrier can not limit its legal liability by any notice given, either by publication or by entry on receipts given or tickets sold, but must make an express contract, the condition in the bill of lading was not binding on the owner. *Atlantic Compress Co. v. Central, etc.*, R. Co., 135 Ga. 140, 68 S. E. 1028.

A receipt given by a compress company to the owner of cotton delivered to the compress company to be baled for transportation by a named carrier, stating that it was "subject to all conditions of the bill of lading of above-named carrier, which may be issued in exchange for this receipt," and a provision in the printed conditions on the back of the bill of lading that "no carrier or party in possession

of all or any of the cotton herein described shall be liable for any loss therefor or damage thereto by * * * fire," did not constitute such an express contract between the shipper and the carrier as would relieve the carrier from liability for loss by fire, under Civ. Code 1895, § 2276, providing that a carrier can not limit its legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. *Seaboard, etc., Railway v. Atlantic Exp. Co.*, 135 Ga. 413, 69 S. E. 566.

37. Entry of notice on ticket.—*The Majestic*, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597; *Potter v. Majestic*, 9 C. C. A. 161, 60 Fed. 624, 23 L. R. A. 746; *Central, etc., R. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197; *Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170, 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 741, 4 Am. & Eng. Ann. Cas. 128; *Southern Exp. Co. v. Barnes*, 36 Ga. 532.

38. Stipulation must be in body of instrument.—*Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 20 McCrary 48.

39. Provision stamped across face of bill of lading.—*Doyle v. Baltimore, etc., R. Co.*, 126 Fed. 841, affirmed in 142 Fed. 669, 74 C. C. A. 245.

U. S. C. C. Ga.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

40. *Montague v. Henry B. Hyde*, 82 Fed. 681.

and specific contract as is required to restrict the carrier's liability.⁴¹

Clause Impressed in Red Ink upon Corner of Freight Receipt.—A clause purporting to limit the carrier's liability, impressed in red ink upon one corner of the paper upon which a freight receipt is printed in black ink, and at right angles to the text of the receipt, is no part of the contract, unless so brought to the knowledge of the shipper as to imply his assent thereto on his acceptance of the receipt.⁴²

Provisions Stamped on Receipt after Delivery of Goods.—A provision stamped on the face of a receipt by the agent of the carrier after the delivery of the goods to it is not binding on the shipper, it not being shown that he expressly assented to such provisions.⁴³

Limitation Written in Printed Bill of Lading Blank.—Where the carrier has plainly embodied into the contract a clause limiting its liability to a specified amount, as by writing it distinctly in the printed blank used as a bill of lading, with no attempt at concealment, so that it can be read at once by any one reading the contract, the shipper is bound by such restriction, where he accepted the contract or bill of lading without objection, even though he did not read it, and was ignorant of its particular provisions, such a case being distinguishable in principle from those where the carrier has attempted to limit its liability by an obscure notice in fine print, or otherwise concealed, so as to escape the attention of the shipper.⁴⁴

§ 1166. Stipulations on Margin of Contract.—The mere fact that the stipulation was placed upon the margin instead of in the body of the contract of carriage does not forbid its consideration as part of the contract.⁴⁵

§ 1167. Printing Appended to Contract.—A railroad company can not relieve itself from any of its obligations as a common carrier by printing which is appended to or indorsed upon the shipping contract which is executed.⁴⁶

§ 1168. Memorandum on Freight Card or Ticket.—A common carrier can not limit its liability by a memorandum or note on the card or ticket which it delivers on the receipt of goods for transportation.⁴⁷

§ 1169. Notice on Back of Receipt or Bill of Lading.—An unsigned general notice, printed on the back of a freight receipt, or bill of lading, does not amount to a special contract which will exempt the carrier from liability as an insurer, even though the receipt with such notice on it may have been taken by the consignor without dissent,⁴⁸ for a common carrier can not restrict its lia-

41. *Merriman v. May Queen*, Newb. 464, Fed. Cas. No. 9,481.

42. **Clause impressed in red ink upon corner of freight receipt.**—*New York, etc., R. Co. v. Sayles*, 32 C. C. A. 485, 87 Fed. 444.

43. **Provisions stamped on receipt after delivery of goods.**—*American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490.

44. **Limitation written in printed bill of lading blank.**—*Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8,224.

45. **Stipulations on margin of contract.**—*Brown v. Adams*, 3 Texas App. Civ. Cas., § 389.

46. **Printing appended to or indorsed upon contract.**—*Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 2 McCrary 48.

47. **Memorandum printed on freight receipt.**—*Limburger v. Wescott* (N. Y.), 49 Barb. 283.

48. **Notice on back of receipt or bill of lading.**—*Railroad Co. v. Manufacturing Co.* (U. S.), 16 Wall. 318, 319, 21 L. Ed. 297; *The Majestic*, 166 U. S. 375, 384, 41 L. Ed. 1039, 17 S. Ct. 597; *New Jersey Steam Nav. Co. v. Merchants' Bank* (U. S.), 6 How. 344, 12 L. Ed. 465; *York Co. v. Central Railroad* (U. S.), 3 Wall. 107, 18 L. Ed. 170; *Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

Conditions printed upon the bill of lading or other contract of the carrier, unless referred to in the body of the contract and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier. *The Majestic*, 166 U. S. 375, 384, 41 L. Ed. 1039, 17 S. Ct. 597.

The considerations against the relaxation of the common-law responsibility by public advertisements apply with equal force to notices having the same object, attached to receipts given by carriers on

bility by any provisions printed on the back of a bill of lading or freight receipt unless the shipper assents to it or it is distinctly brought to his attention.⁴⁹ And compliance with such conditions is not essential to the right of the shipper to enforce the common-law liability of the carrier.⁵⁰ Whether or not a shipper was negligent in failing to read a condition printed on the back of a bill of lading limiting the valuation of the property in case of loss is immaterial on an issue as to whether he was bound thereby, which depends entirely on whether he assented to the condition.⁵¹ It is "against the policy of the law and a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public, or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case, this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights."⁵²

Bill Referring to Provisions Printed on Back of Bill of Lading or Receipt.—The delivery by a carrier to a shipper, of a shipping receipt, which, upon its face, refers to conditions on the back, defining the terms of the carrier's responsibility, and its acceptance by the shipper, does not constitute a special contract between the shipper and the carrier, by which the liability of the latter is limited by the conditions on the back of the receipt.⁵³

§§ 1170-1171. Stipulation Must Be Legible and Intelligible—§ 1170. In General.—Unless the shipper's attention is expressly called to a condition in a shipping contract purporting to limit the carrier's liability, and it is clearly explained to him, it will not bind him unless it is legible, and calculated to attract the attention of a person of ordinary intelligence and prudence in respect to such matters.⁵⁴

taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. *Railroad Co. v. Manufacturing Co.* (U. S.), 16 Wall. 318, 329, 21 L. Ed. 297; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Unsigned notice on back of receipt.—A receipt for goods given to the shipper by the carrier, upon the back of which is an unsigned notice purporting to limit the

carrier's liability, is not a contract of shipment binding the shipper. *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

49. *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* (U. S.), 16 Wall. 318, 21 L. Ed. 297; *Doyle v. Baltimore, etc., R. Co.*, 126 Fed. 841, affirmed in 142 Fed. 669, 74 C. C. A. 245.

50. *Painkinsky v. Illinois Cent. R. Co.*, 165 Ill. App. 556.

51. *Baltimore, etc., R. Co. v. Doyle*, 74 C. C. A. 245, 142 Fed. 669.

52. *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* (U. S.), 16 Wall. 318, 21 L. Ed. 297.

53. **Bill referring to provisions printed on back of bill of lading or receipt.**—*Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.), 9; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* (U. S.), 16 Wall. 318, 21 L. Ed. 297.

54. **Stipulation must be legible and intelligible.**—*Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

Local carrier's receipt for baggage check—Car dimly lighted—Small type.—A railroad passenger, in a car dimly lighted at one end, delivered his baggage check to an express messenger and re-

Duty to Explain Special Agreement in Writing.—If an alleged special agreement between a carrier and shipper, limiting the liability of the carrier for loss of or injury to the goods, is in writing, it must be expressed in such manner as to be understood by a person of ordinary intelligence, and if not so expressed, it must have been shown to have been explained to the shipper, so as to enable him to understand it.⁵⁵

Provision of Bill of Lading Obscured by Stamps.—In a bill of lading, providing for the carrying of the goods beyond the line of the carrier issuing the bill, a provision in fine print, somewhat obscured by the use of stamps, that in case of injury to the goods only the carrier having custody of the goods at the time of the injury shall be liable, can not be regarded as part of the contract,⁵⁶ although the shipper had often accepted receipts containing the same stipulation.⁵⁷

§ 1171. Inconspicuous Conditions and Type.—A carrier can not limit its liability by an obscure provision in fine print, or otherwise concealed so as to escape the attention of the shipper.⁵⁸ There is no presumption either of law or fact that the shipper had knowledge of a condition in the bill of lading limiting the common-law liability of the carrier for the loss or destruction of goods in shipment, where there is nothing in its position or the color or style of type in which it is printed to render it conspicuous.⁵⁹

Conditions in Body of Bill of Lading Printed in Small Type.—Where the owner of freight had an opportunity to know the contents of conditions inserted in the body of a bill of lading, and the carrier used no unfair means to deceive, the mere fact that they are printed in small type does not render them invalid.⁶⁰ It would have this effect only when from fraud, or undue advantage on the part of the carrier, or other circumstances, the shipper was prevented from acquainting himself with the conditions.⁶¹

§§ 1172-1183. Must Be in Express and Unequivocal Terms—§ 1172. In General.—As a general rule, a limitation of the common-law liability of a carrier can not be implied, and a contract claimed to contain such a restriction must be in express and unequivocal terms.⁶²

ceived in return a card or receipt on which the number of the check was entered, and which also, contained an agreement limiting the liability of the express company, printed in much smaller type than the rest of the card, and so fine as to be illegible where the passenger was sitting. It was held that such printed matter did not enter into or form a contract between the parties. *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

55. Duty to explain special agreement in writing.—*Carpenter v. Baltimore, etc., R. Co.* (Del.), 6 Pen. 15, 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679, 64 Atl. 252.

56. Provision of bill of lading obscured by stamps.—*Perry v. Thompson*, 98 Mass. 249; *Allen, etc., Co. v. Canadian Pac. R. Co.*, 42 Wash. 62, 24 R. R. R. 75, 47 Am. & Eng. R. Cas., N. S., 75, 84 Pac. 620.

57. Acceptance of similar contracts.—Evidence that often, but not invariably, he had given to plaintiff receipts containing a printed clause limiting his liability for goods transported by him, and that, on the occasion in question, after receiving the goods, he gave to a servant of

plaintiff a receipt for them, containing such a printed clause, but that over a part of this clause in this receipt a stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, is not sufficient to warrant a finding that the plaintiff assented to any limitation of the defendant's liability. *Perry v. Thompson*, 98 Mass. 249.

58. Inconspicuous conditions and type.—*Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8, 224.

59. *Baltimore, etc., R. Co. v. Doyle*, 74 C. C. A. 245, 142 Fed. 669.

60. Conditions in body of bill of lading printed in small type.—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

61. *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

62. Must be express and unequivocal.—*California.*—*Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

Massachusetts.—*Gott v. Dinsmore*, 111 Mass. 45.

Ohio.—*Pittsburgh, etc., R. Co. v. Bar-*

§ 1173. Use of General Words.—General words in a contract of carriage are not sufficient to release a carrier from negligence, but, if such a result is intended, it must be expressly provided for; and hence, where a bill of lading in a shipment of glass contained a condition that defendant would not be liable for damages to glass by breakage or for any cause, if it should be necessary or was usual to carry such property upon open cars, and the words "Loaded and secured by shipper, released," were written upon the face of it, the defendant's liability for negligence remained unaffected.⁶³

§§ 1174-1183. What Constitutes an Express Contract under Georgia Statute—§ 1174. In General.—Under Ga. Rev. Code, § 2042, which provides that a common carrier can not limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold, the legal liability of a common carrier, as defined by the law, is one thing; his liability as a common carrier, under an express contract made with the shipper, will depend upon the terms of that express contract, and will be governed by it. But such express contract limiting his legal liability as a common carrier can not be proved by a notice given, either by publication or by an entry on the receipt given for the goods or tickets sold. The express contract made with the shipper of the goods, limiting the legal liability of the common carrier, must be made independently of the receipt given for the goods, and be proved independently thereof, as any other contract is proved, when entered into by two or more parties to it. The common carrier receipts the shipper for the goods, and the law fixes his liability therefor in case of loss; but the common carrier and the shipper may enter into an express contract, outside of the receipt given for the goods, in regard to the carrier's liability, and then, both parties having a fair opportunity to understand the terms of the contract, will be governed by it.⁶⁴

Bill of Lading.—The bill of lading is not such an express contract as the statute prescribes where it is merely a general bill of lading applicable to all manner of freight, and not an express contract entered into between the parties for the particular shipment.⁶⁵

Freight Receipt.—A limitation of its legal liability as a common carrier can not be accomplished by any mere entry on the receipt given.⁶⁶

Contract on Face of Receipt.—The carrier may, with the assent of the owner, make a special contract on the face of the receipt which will limit his liability.⁶⁷ The fact that a special contract limiting the carrier's liability for injuries to a shipment is inserted in the receipt does not render such contract of no effect, the question in such cases being whether there was an express contract and not where it was put.⁶⁸

rett, 36 O. St. 448, 3 Am. & Eng. R. Cas. 256.

Loss by negligence.—A receipt signed by a common carrier for goods intrusted to it for carriage, purporting to limit its liability, will not be construed as exempting it from liability for loss or damage caused by negligence with respect to the agencies employed by it, unless the intention to so exempt the carrier is expressed in the receipt in plain and unequivocal terms. *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

Liability for negligent delay.—A provision in the shipping contract that the carrier will not be responsible for delay in the carriage of the freight, will not relieve it from liability on account of delay by negligence. To constitute such an exemption it must be expressly stipulated for in the contract. *Jennings v.*

Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394.

63. Use of general words.—*Brewster v. New York, etc., R. Co.*, 129 N. Y. S. 368, 145 App. Div. 51.

64. What constitutes express contract under Georgia statutes.—*Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

65. Bill of lading.—*Georgia R. Co. v. Gann*, 68 Ga. 350; *Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

66. Freight receipt.—*Kavanaugh v. Southern R. Co.*, 120 Ga. 62, 47 S. E. 526, 1 Am. & Eng. Ann. Cas. 705.

67. Contract on face of receipt.—*Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473.

68. Georgia Railroad v. Spears, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75.

§ 1175. Parties Who May Make.—Contract between Agents.—An express contract between authorized agents of the shipper and the carrier, outside of the receipt or bill of lading, limiting the liability of the carrier, is binding on the shipper.⁶⁹

§§ 1176-1183. Assent of Parties—§ 1176. In General.—While the carrier can not, by any act of his own to which the other party does not consent, limit his liability, the parties may make an express contract for this purpose, and if both parties have fair opportunity to understand the terms of the contract entered into, and assent to it, they are bound by it.⁷⁰

§ 1177. Necessity for Shipper's Assent.—A carrier can not limit its liability by a stipulation in the bill of lading unless expressly assented to by the shipper.⁷¹ Thus stipulations limiting the carrier's liability to its own line,⁷² which are not expressly assented to by the shipper, do not change the nature of the contract, and are inoperative as limitations of the carrier's liability.

§§ 1178-1183. What Constitutes Assent of Shipper—§ 1178. Acceptance of Bill of Lading.—The mere acceptance of a bill of lading which contains a limitation upon liability will not establish the shipper's assent to the stipulations or amount to an express contract.⁷³

§ 1179. Acceptance of Ticket or Pass.—The mere acceptance of a ticket which contains a limitation upon liability will not establish the shipper's assent thereto or amount to an express contract.⁷⁴

§ 1180. Acceptance of Express or Freight Receipt.—The mere acceptance by the shipper of a receipt for freight containing an entry limiting the liability of the carrier does not establish the shipper's assent to the stipulations or amount to an express contract.⁷⁵

Express Receipt.—The mere insertion in a printed form of receipt used by an express company, of terms limiting its liability, and the delivery of the receipt to a shipper, does not constitute an express contract limiting the company's liability as carrier.⁷⁶

§ 1181. Signing Bill of Lading.—It is sufficient if the special contract be incorporated in the bill of lading and signed by both parties.⁷⁷ Hence where

^{69.} **Contract between agents.**—Georgia R. Co. v. Gann, 68 Ga. 350.

^{70.} **Assent of parties.**—Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

^{71.} **Necessity for shipper's assent.**—Atlantic, etc., R. Co. v. Henderson, 131 Ga. 75, 61 S. E. 1111.

Under Georgia Civ. Code, § 2276.—McElveen v. Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

Georgia Rev. Code, § 2042, is intended to require the assent of the shipper to be given to any modification of the common-law contract of the carrier. Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783.

^{72.} Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609.

A stipulation in such a bill of lading, that no carrier shall be liable for loss or damage not occurring on its own portion of the route, is not binding on the shipper unless he assents to it. At-

lantic, etc., R. Co. v. Henderson, 131 Ga. 75, 61 S. E. 1111.

^{73.} **Acceptance of bill of lading.**—Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Central, etc., R. Co. v. City Mills Co., 128 Ga. 841, 58 S. E. 197.

^{74.} **Acceptance of ticket or pass.**—Central, etc., R. Co. v. City Mills Co., 128 Ga. 841, 58 S. E. 197.

^{75.} **Acceptance of freight receipt.**—Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

^{76.} **Express receipt.**—Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944.

^{77.} **Signing bill of lading.**—Georgia Railroad v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Georgia R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75.

the bill of lading is not signed by the shipper there is no express contract and the carrier's liability is not limited.⁷⁸

§ 1182. Contract Prepared by Shipper.—An express contract entered into between the shipper and the carrier limiting the carrier's liability is binding on both parties where it appears that the contract was one which had been made out by the shipper and by him carried to the carrier, and that he had full notice and a fair opportunity to know the terms of the contract which he thus prepared.⁷⁹

§ 1183. Duress or Compulsion.—The carrier can not compel the owner to agree to a limitation of liability by making exorbitant charges when the shipper refuses to assent to the limitation.⁸⁰ The rule is the same with respect to the acceptance of express receipts.⁸¹

§§ 1184-1194. Consideration—§ 1184-1185. Necessity—§ 1184. In General.—A condition in a shipping contract purporting to limit the common-law liability of the carrier must be supported by a valuable consideration apart from the mere acceptance of the property for transportation. There must be some valid consideration for the right granted the carrier of limiting its common-law liability, other than the mere contractual relation of the parties, moving from the carrier to the shipper for the special contract,⁸² but stipulations which

78. *Central, etc., R. Co. v. Kavanaugh*, 34 C. C. A. 203, 92 Fed. 56, 13 Am. & Eng. R. Cas., N. S., 119.

79. **Contract prepared by shipper.**—*Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473.

80. **Effect of duress or compulsion.**—*Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473.

81. So a receipt of an express company acknowledging the delivery of certain goods "to be forwarded" and expressing in the receipt that the company would not be liable for any loss from any cause whatever, except for fraud or gross negligence and that where the value of the property was not specified in the receipt, the company would not be liable for a sum exceeding fifty dollars, for each package, is evidence only of the reception of the goods by the carrier for the purposes therein specified, and is not evidence of an express contract. The express contract by which the carrier was authorized by statute to limit his liability can not be proved in such a manner, nor does the giving of the receipt and its acceptance by the shipper relieve the company from the liability imposed by law. *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

82. *Arizona*.—*Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co.*, 13 Ariz. 186, 108 Pac. 467.

Arkansas.—*St. Louis, etc., R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 3 Am. & Eng. Ann. Cas. 582; *St. Louis, etc., R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125.

Connecticut.—*Mears v. New York, etc.,*

R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Idaho.—*McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

Indiana.—*Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, 69 N. E. 138, 63 L. R. A. 948; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89.

Minnesota.—*Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, 59 N. W. 546; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 442, 619.

Mississippi.—*Southern Exp. Co. v. Moore*, 39 Miss. 822.

Missouri.—*Gowling v. American Exp. Co.*, 102 Mo. App. 366, 76 S. W. 712; *Rice v. Wabash R. Co.*, 106 Mo. App. 371, 80 S. W. 974; *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782; *Sloop v. Wabash R. Co.*, 117 Mo. App. 204, 84 S. W. 111; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406; *Simmons Hardware Co. v. St. Louis, etc., R. Co.*, 140 Mo. App. 130, 120 S. W. 663; *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Burns v. Chicago, etc., R. Co.* (Mo. App.), 132 S. W. 1.

Nebraska.—*Pennsylvania Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435, 81 N. W. 372.

North Carolina.—*Gardner v. Southern R. Co.*, 127 N. C. 293, 37 S. W. 328.

Oklahoma.—*Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

Texas.—*Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463,

do not actually limit the common-law liability of the carrier, although they may effect it to some extent, are valid whether any consideration is shown or not.⁸³

§ 1185. Instances.—Risk of Loading and Unloading.—A special consideration is not essential to a stipulation limiting the liability of a common carrier as to loading and unloading.⁸⁴

Loss by Delay.—Stipulation in carrier's contract releasing it from damages caused by delay is not binding on shipper if there was no consideration for it.⁸⁵

Loss by Fire.—A clause in a bill of lading exempting a carrier from liability for loss by fire is valid, although the regular freight rates were charged and no option was given to the shipper to receive any other form of bill of lading.⁸⁶ In other words, no independent consideration need be given or expressed in the contract of carriage for an exemption of a carrier from loss by fire.⁸⁷ But the courts of Arkansas,⁸⁸ Missouri⁸⁹ and Tennessee⁹⁰ have held that contract of exemption of a common carrier, from liability as insurer, for loss by fire must be founded upon some special consideration.

Release of Claims Already Accrued.—Contracts of the carrier containing a stipulation releasing claims for liability already accrued to the shipper must be based on a consideration.⁹¹ A written contract relieving a carrier of its liability under a prior verbal contract, being without consideration, is properly disregarded.⁹²

21 S. W. 399; Texas, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

West Virginia.—Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas., N. S., 103, 67 Am. St. Rep. 781; Lewis v. Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 49 Am. & Eng. R. Cas. 702, 17 L. R. A. 116.

Wisconsin.—Schaller v. Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

83. Wehmann v. Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546, 61 Am. & Eng. R. Cas. 273; Southard v. Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619; Southern Exp. Co. v. Moore, 39 Miss. 822; Hance v. Wabash, etc., R. Co., 56 Mo. App. 476; Kellerman v. Kansas City, etc., R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Crow v. Chicago, etc., R. Co., 57 Mo. App. 135.

84. Risk of loading and unloading.—Crow v. Chicago, etc., R. Co., 57 Mo. App. 135.

85. Loss by delay.—San Antonio, etc., R. Co. v. Barnett, 12 Tex. Civ. App. 321, 322, 34 S. W. 139; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716.

86. Loss by fire.—Judgment (C. C. A. 1905) 139 Fed. 127, reversed. Arthur v. Texas, etc., R. Co., 27 S. Ct. 338, 204 U. S. 505, 51 L. Ed. 590.

87. Cau v. Texas, etc., R. Co., 194 U. S. 427, 431, 48 L. Ed. 1053, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 S. Ct. 663; York Co. v. Central Railroad (U. S.), 3 Wall. 107, 18 L. Ed. 170; Arthur v. Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338; Char-

nock v. Texas, etc., R. Co., 194 U. S. 432, 437, 48 L. Ed. 1054, 24 S. Ct. 671.

88. Taylor & Co. v. Little Rock, etc., R. Co., 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

89. Provision in a bill of lading excepting the carrier from loss of the property by fire is valid only in case a reduced rate or other consideration is allowed the shipper therefor. Scott County Milling Co. v. St. Louis, etc., R. Co., 104 S. W. 924, 127 Mo. App. 80.

90. Tennessee.—A common carrier may stipulate for limitation of or exemption from his common-law responsibility for loss of freight occurring through other cause than his negligence (e. g., accidental fire), provided the contract is supported by a bona fide and not merely colorable consideration. Railroad v. Gilbert, etc., Co., 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

91. Release of claims already accrued.—St. Louis, etc., R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125.

A stipulation in a shipping contract that the shipper releases all causes of action which have accrued to him by any prior contract does not have the effect of releasing the carrier from liability for damages already accrued, unless there is a separate consideration for the release. St. Louis, etc., R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025.

92. St. Louis, etc., R. Co. v. Warren (Tex. Civ. App.), 80 S. W. 537; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

A contract for shipment of cattle from Ballinger, Texas, to Chicago, was agreed upon at \$102.50 per carload. Subsequently, and upon the cattle being taken

Written Contract Exacted Where Oral Had Been Made.—Where an oral contract of shipment had been made and the railroad requires the signing of a written contract limiting liability, there is no consideration for the execution of the written contracts, which are therefore void, and the verbal contract must be looked to in determining the rights of the parties.⁹³ The verbal contract would not be merged into a written contract obtained by fraud or misrepresentation.⁹⁴

§§ 1186-1194. Sufficiency—§ 1186. In General.—Acceptance of goods, and agreement to ship them, is not a sufficient consideration for a waiver by the shipper of the carrier's liability as insurer, but there must be some other consideration, such as a reduced rate.⁹⁵

upon the cars, a freight bill was signed containing waiver of certain claims by the shipper (liability for delay in shipping under a prior verbal contract) in favor of the carrier in consideration of reduced rates. No reduced freight charges were allowed. Held, there being no consideration for the waiver, it would have no effect. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

Had the court charged upon the release of liability for detention of the cattle, as contained in the written agreement, it would have been necessary also to have stated the law, that if it was without consideration it could not have effect, in which case the result under the evidence would have been the same as if he had not submitted the question at all. Under the circumstances, it was not the duty of the court to notice this feature of the written agreement. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 613, 18 S. W. 716.

Release of liability for delay in furnishing cars.—A contract signed by shippers limiting the carrier's liability and releasing it from liability for delay in furnishing a car as the train was about to start at the instance of the station agent without knowledge of what the contract was, is without consideration and void. *Texas Cent. R. Co. v. Fisher*, 15 Tex. Civ. App. 63, 38 S. W. 392.

Where the evidence showed that a carrier was negligent in delaying to furnish cars for a shipment of cattle and there was no consideration for a waiver of a claim to damages for such delay, the waiver, embodied in the shipping contract executed after the damages had accrued, was void. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190.

93. Written contract exacted where oral had been made.—*Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 613, 18 S. W. 716; *Gulf, etc., R. Co. v. Stanley*, 89 Tex.

42, 33 S. W. 109, affirming 29 S. W. 806.

After a common carrier has received property for transportation, a contract limiting its common-law liability is illegal. *Gulf, etc., R. Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715, citing *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; *S. C.*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

A contract signed by a shipper, after he had placed his cattle on the cars of a railway company, limiting the liability of the company, and induced by the refusal of the company to carry the cattle unless it was signed, is void. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Where, after a shipper had made parol contract for the shipment of his cattle and loaded them, he signed a written contract at the agent's request, only looking to see if the rate was as agreed, whereas it limited carrier's liability, carrier could not enforce the written contract. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 688, 29 S. W. 565.

94. Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699. See, also, *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846. The case of *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 519, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

95. Sufficiency.—*McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

Minnesota.—*Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, 59 N. W. 546.

Missouri.—*Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673; *McElvain v. St. Louis, etc., R. Co.*, 151 Mo. App. 126, 131 S. W. 736.

Tennessee.—The performance of an act which a party is under a legal obligation to perform, does not constitute a good consideration for a promise. Ad-

Independent Consideration Not Expressed in Bill of Lading.—It is not necessary that there be an independent consideration apart from that expressed in the bill of lading to support a reasonable stipulation of exemption of the common carrier from liability.⁹⁶

Consideration Proved Must Refer to Provision Relied On.—Where the action against the carrier is for a delay in transportation, and the carrier relies on a provision in the contract exempting it from liability for delay, the provision is invalid where the only consideration therefor was the reduced rate granted, and it further appears that this rate was allowed only in consideration of the goods being shipped at the owner's risk.⁹⁷

Freight Not Transported at Reduced Rate.—A contract limiting a carrier's liability in consideration of a reduction of rates is not enforceable, where the carrier did not transport the freight at the reduced rate.⁹⁸ Where a shipper did not obtain the advantage of a reduced rate, and the arbitrary value of the property in case of loss had no relation to the actual value, and the carrier and the shipper did not agree as to the value, the value named was not binding on the shipper.⁹⁹

Additional Charge for Insurance and Procuring Carriage over Connecting Lines.—If otherwise free from objection, a fire clause exemption contained in a through bill of lading, stipulating for shipment at special rates over several distinct, independent connecting lines, is not void for want of consideration because the contracting carrier charged and received, in addition to usual rates for transportation which restricted liability, compensation reasonable in amount for effecting insurance upon the goods and for procuring carriage beyond his own line.¹

§§ 1187-1192. Reduced Rates—§ 1187. In General.—A reduced freight rate is a sufficient consideration to enable a common carrier to limit its liability for loss or injury to property, during transportation, without the carrier's negligence.² By a reduced rate is meant a rate lower than the first class rate.³ The carrier is required to have a rate, reasonable in its terms, at which those who do not choose to release it from its common-law liabilities may have their goods

dison on Contracts, § 4. Hence a mere agreement by a common carrier to transport goods furnishes no consideration for a stipulation for less than the common-law liability. *Lawson on Carriers*, § 212. *Railroad v. Gilbert, etc., Co.*, 88 Tenn. 430, 436, 12 S. W. 1018, 7 L. R. A. 162; *Dillard Bros. v. Louisville, etc., R. Co.*, 70 Tenn. (2 Lea) 288; *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

96. Independent consideration not expressed in bill of lading.—*Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 24 S. Ct. 663, 48 L. Ed. 1053, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303.

97. Consideration proved must refer to provision relied on.—*San Antonio, etc., R. Co. v. Barnett*, 12 Tex. Civ. App. 321, 34 S. W. 139.

98. Freight not transported at reduced rates.—*Colorado, etc., R. Co. v. Manatt*, 22 Colo. App. 593, 121 Pac. 1012.

A contract limiting liability in the transportation of freight in consideration of a reduced rate is not enforceable against the shipper, unless he received the benefit of the reduced rate. *Lacey v.*

Oregon R., etc., Co. (Ore.), 128 Pac. 999.

99. Lacey v. Oregon R., etc., Co. (Ore.), 128 Pac. 999.

1. Additional charge for insurance and procuring carriage over connecting lines.—*Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518.

2. Reduced rates.—*Alabama.*—*Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602, so held as to an exemption from loss by fire.

Arkansas.—*St. Louis, etc., R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517.

Georgia.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia Railroad v. Spears*, 66 Ga. 485, 42 Am. Rep. 81.

Oklahoma.—*Missouri, etc., R. Co. v. McLaughlin*, 29 Okla. 345, 116 Pac. 811.

Tennessee.—*Dillard Bros. v. Louisville, etc., R. Co.*, 70 Tenn. (2 Lea) 288; *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Mobile, etc., R. Co. v. Brownsville, etc., Live Stock Co.*, 123 Tenn. 298, 130 S. W. 788.

3. Georgia R., etc., Co. v. Reid, 91 Ga. 377, 17 S. E. 934.

transported. If in compliance with this requirement it fixes and publishes such a rate, then there must be some consideration in the way of a concession or reduction from this rate, in order to support contracts releasing it from some of those liabilities imposed by common law.⁴

§ 1188. Reasonableness of Rates.—In order that a reduced rate may be such consideration, it must appear that both rates of transportation offered the shipper were reasonable.⁵

§ 1189. Choice of Rates.—In order that a reduced freight rate may constitute a sufficient consideration for a stipulation in a special contract purporting to limit the carrier's common-law liability, it must appear that the shipper had an actual freedom of choice between two reasonable rates.⁶ Where there is no pretense that a shipper was given a bona fide opportunity to ship at a fair and reasonable rate, without limitation of common-law liability, or, on any consideration for such limitation, or that he was offered more than one rate, but it merely appeared that the contract limiting the liability was made fairly and understandingly by the shipper as governing the shipment and the terms and conditions under which the property was received for transportation, the contract limiting liability is not enforceable against the shipper.⁷

Carrier Having Only One Rate.—Where a carrier had but one regular rate applicable to a given class of property, it is not a reduced or a special rate that will serve as a consideration for an owner's risk contract, as the word "reduced" implies a comparison, and it is not permissible to go outside the subject-matter to seek the comparison; but it must be made with another higher rate on the same class of property, and where there is no such rate there can be no reductions.⁸

Same Rate Charged Everybody Shipping under Like Contracts.—It does not follow that because the rate charged in a given contract is the same rate charged everybody who ships under like contracts it is not a reduced rate, so as to be a sufficient consideration for a restriction of a carrier's liability; for if the

4. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131, citing *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

5. **Reasonableness of rates.**—*Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230; *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

6. *Connecticut.*—*Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Kansas.—*Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *Atchison, etc., R. Co. v. Mason*, 4 Kan. App. 391, 46 Pac. 31.

Mississippi.—*Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 21 Am. & Eng. R. Cas., N. S., 840, 30 S. W. 43.

Missouri.—*Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Paddock v. Missouri Pac. R. Co.*, 1 Mo. App. 87, 60 Mo. App. 328.

Tennessee.—*Louisville, etc., R. Co. v.*

Gilbert, 88 Tenn. (4 Pickle) 430, 12 S. W. 1018, 7 L. R. A. 162; *Nashville, etc., R. Co. v. Stone*, 79 S. W. 1031, 112 Tenn. 348, 105 Am. St. Rep. 955.

7. Where a shipper was only authorized to ship on the terms of a particular contract, stipulations therein limiting the liability of the carrier were without consideration. *St. Louis, etc., R. Co. v. Phoenix Cotton Oil Co.*, 115 S. W. 393, 88 Ark. 594; *Pittsburgh, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

Under *Burns' Ann. St.* 1908, § 3919, a contract between a shipper and a carrier with respect to the value of an article to be transported, on the character and value of which a rate may depend, and a contract against loss beyond the carrier's control, must be fairly made on a sufficient consideration after the shipper has been given an opportunity to choose between the common-law right and rate and the special contract rate and limited liability. *Pittsburgh, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673.

8. **Carrier having only one rate.**—*Leas v. Quincy, etc., R. Co.*, 157 Mo. App. 455, 136 S. W. 963.

carrier has in force and for practical application a higher rate for shipments made without contracts than the rate charged in a given contract containing a release, then the given contract has a sufficient consideration to support the release when the reduced rate is given in view of the release.⁹

Option Not Actually Presented to Shipper.—An exemption of a carrier from liability for damages, expressed in the bill of lading, may be valid, although the option or opportunity to ship the goods under the common-law liability was not actually presented to the shipper by the carrier.¹⁰

"Lowest Rates" Asked for by Shipper.—That a shipper asked for the "lowest rates" on certain goods, and accepted the rates offered in reply, sufficiently shows that there was such a reduction in the regular charges as to support a contract restricting the carrier's liability.¹¹

Contract Accepted by Shipper with Knowledge of Its Terms and of Limited Authority of Carrier's Agent.—It is immaterial that the shipper knowingly accepted a bill of lading containing a restriction of the carrier's common-law liability for loss or damage not occasioned by its negligence without demanding a different contract, if he knew the carrier's agents had no authority to make any other kind of contract with him.¹²

Loss from Negligence Vel Non.—Even as to losses not the result of negligence a carrier can not limit its liability unless the shipper is given an actual freedom of choice between the different contracts.¹³ Of course, provisions limiting a carrier's liability for "loss or damage occasioned by wrongful acts or

9. Same rate charged everybody shipping under like contracts.—*Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

10. Option not actually presented to shipper.—*Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 S. Ct. 663, 48 L. Ed. 1053, so held as to an exemption from loss by fire.

Where a contract of shipment stipulated that the shippers waived all claims against the railroad for damages accrued to them by reason of delays prior to the signing of the contract and furnishing cars, etc., it was improper in an action by the shippers against the railroad for damages to a shipment of stock to permit plaintiffs to testify that they signed the contract without reading it, and that defendant's agent did not inform them that there was another rate under a contract of unrestricted liability; the agent not being bound to so inform them unless requested to do so, the information being obtainable from other sources provided by law. *St. Louis, etc., R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125.

A shipping contract limiting the value of the freight may be valid, although the carrier did not actually tender another without the clause as to the value of the freight, if he offered to ship, upon reasonable terms, under a bill of lading containing no limitation as to value, or was ready to do so upon demand being made to the shipper. *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

11. "Lowest rates" asked for by shipper.—*Jennings v. Grand Trunk R.*

Co., 5 N. Y. S. 140, 23 N. Y. St. Rep. 15, 52 Hun 227, affirmed in 127 N. Y. 438, 28 N. E. 394.

12. Contract accepted by shipper with knowledge of its terms and of limited authority of carrier's agent.—*Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, 55 Am. & Eng. R. Cas. 650, 18 L. R. A. 527, 38 Am. St. Rep. 230.

13. Loss from negligence vel non.—*Arkansas*.—*Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230; *Little Rock, etc., R. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245, 31 Am. & Eng. R. Cas. 176.

Where it appeared that the shipper knew of the limitation in the contract which released the carrier from all liability except for losses arising from negligence, and that the defendant carrier had a fixed rate of transportation for cotton shipped between the points concerned, and that no different rates or terms were obtainable; it was held that there had been no freedom of choice afforded the shipper, and that the special contract was invalid as being without any consideration to support it. *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, 55 Am. & Eng. R. Cas. 650, 18 L. R. A. 527, 38 Am. St. Rep. 230.

Kansas.—*Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375.

Michigan.—*Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

Missouri.—*Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

gross negligence¹⁴ is without consideration and void when there is but one contract and one rate open and offered to the shipper.

Breakage and Leakage.—A clause in a bill of lading restricting the carrier's liability by providing that it shall not be liable for breakage or leakage of a stock of drugs shipped, where the regular local tariff rates is charged for transportation, is void for want of consideration.¹⁵

§§ 1190-1191. Recital That Reduced Rate Given—§ 1190. Necessity.—That a shipper received the benefit of a reduced freight rate applicable where the carrier's liability is limited supports a limited liability contract, regardless of a recital in the contract to that effect.¹⁶ Limitation of a carrier's liability in a contract to carry freight is void unless it appears from recitals in the contract or from other competent evidence that a reduced freight rate was given.¹⁷

§ 1191. Falsity of Recitals.—Where a contract limiting the carrier's liability for damages to a shipment is extorted from the shipper by a refusal to ship on any other terms, he may show the falsity of recitals in the contract that opportunity was given him to ship on more favorable terms, but that he elected to accept the restrictive contract upon a lower rate.¹⁸ The mere recital in the bill of lading¹⁹ or shipping contract²⁰ or that a reduction in the usual freight rate

14. Limitation of damages from gross negligence.—Where there is but one contract and one rate open and offered to the shipper by a common carrier, and no option is given him, a special provision limiting the common-law liability of the carrier to "loss or damage occasioned by wrongful acts or gross negligence" is without consideration and void. *Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 21 Am. & Eng. R. Cas., N. S., 840, 30 So. 43.

15. Breakage and leakage.—*St. Louis, etc., R. Co. v. Caldwell*, 89 Ark. 218, 116 S. W. 210.

16. Necessity.—*Mires v. St. Louis, etc., R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

17. *Mires v. St. Louis, etc., R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

Instance where recital sufficient.—Where bills of lading for transportation of cotton abroad showed that the inland charges had been paid, and that a specific rate of twenty-three cents per one hundred pounds ocean freight had been guaranteed by the carriers from Savannah to Bremen, and the bills provided that in consideration of the rate of freight named it was stipulated that the service to be performed should be subject to the conditions contained therein, there was a sufficient consideration to support the limited liability conditions in the bills. *Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

Instances where no consideration shown.—A bill of lading, in terms a receipt, and containing a statement that the contract is limited by the conditions on the back thereof and printed tariffs, and stating on its back that the goods are received subject to the condition that the carrier shall not be liable for loss or damage by fire, does not show any consideration for such exemption, and it is

void. *McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

A shipping contract, reciting that the charge for transportation was at the tariff rate, is a contract for the rate charged for shipments under a nonrelease contract, though it also recites that the rate is less than the rate charged for shipments at the carrier's risk, and hence there is no consideration for a stipulation releasing the carrier from certain liability. *Holland v. Chicago, etc., R. Co.*, 123 S. W. 987, 139 Mo. App. 702.

A railroad, in compliance with the Interstate Commerce Act (Act Cong., Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) placed on file with the interstate commerce commission, a schedule of tariffs, showing two rates. The railroad subsequently contracted to carry goods. No freight rate was agreed to, either verbally or in the bill of lading, the latter not reciting that a reduced rate was charged. Held, that no consideration was shown for a contract limiting the liability of the railroad on account of carrying the property for the lower rate. *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 97 S. W. 256, 120 Mo. App. 566.

18. Falsity of recitals.—*St. Louis, etc., R. Co. v. Wells (Ark.)*, 99 S. W. 534, 22 R. R. R. 774, 45 Am. & Eng. R. Cas., N. S., 774.

19. Recital in bill of lading.—*Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, 69 N. E. 138, 63 L. R. A. 948; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17; *Cross v. Graves*, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102. See ante, "Recital as to Rate and Receipt of Freight," § 477.

20. Recital in shipping contract.—*Gulf,*

has been made and accepted in consideration of a qualification of the carrier's common-law liability is not conclusive.²¹

No Rate Specified nor Talked of.—The stipulation in a bill of lading purporting to limit the carrier's liability will not be held binding on the ground that a reduced rate was intended, where no rate is specified, and none talked of by the parties.²²

§ 1192. Contracts Exacted after Carriage Commenced.—A subsequent written contract purporting to limit the liability of a carrier executed after the delivery of the shipment under a verbal contract for transportation, and when the train is about to start, in which the rate is the same as that agreed upon,²³ or an increased rate,²⁴ is without consideration. Thus, a written contract increasing the freight rate and restricting the liability of the carrier,²⁵ and a special contract at the full rate which the agent demanded that the shipper sign or have his freight unloaded,²⁶ are without consideration and void.

etc., *R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716, see also, *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673.

21. If the special contract recites that "in consideration of reduced rates" the shipper consents to a limitation of the carrier's liability, and it is shown that no reduced rates were in fact allowed the shipper, the limitation is invalid as being without a consideration. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716. See, also, *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

22. No rate specified nor talked of.—*Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 101 Mo. App. 442, 74 S. W. 492.

23. Contracts exacted after carriage commenced.—*Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565. And see *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716. See ante, "Instances," § 1185.

Subsequent written contract signed when train was about to start.—In *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565, it appeared that the shipper agreed with the agent of the railroad company upon terms for transporting his cattle; that the cattle were delivered for carriage, and were loaded upon the train under and in accordance with the parol contract. When the train was about starting, a written contract was presented to the shipper for his signature. He examined it so far as to discover that the rate was as agreed upon, and then signed it, not knowing that it contained onerous conditions in favor of the carrier. There was no consideration for his signing the written contract. It was held that such writing did not supersede the parol contract, and did not affect the shipper's rights.

In *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716, it appeared that a contract for the transportation of cattle was agreed upon at a specified charge per car load. Subsequently, and upon the

cattle being taken upon the cars, a freight bill was signed containing a waiver of certain claims by the shipper in favor of the carrier in consideration of reduced freight rates. No reduced freight charges were allowed. It was held that, there being no consideration for such waiver, it could be allowed no effect.

24. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897.

25. Subsequent written contract increasing rate of freight.—Where a railroad's agent has orally, and without limitation of its common-law liability, contracted to transport cattle at a specified rate per car, and on the faith of which agreement the cattle are loaded on the cars, it can not, as a condition of transporting the cattle, afterwards require the shipper to execute a written contract increasing the price of the cars and restricting the liability of the carrier; and such a contract when executed by the shipper when the train was ready to start with the cattle, and because the railroad agent refused to transport them until it was signed, is without consideration and void because executed under duress. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897.

26. Shipper required to sign special contract—Threat to unload cattle—Full rate exacted.—In *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251, it appeared that the appellant railroad had in fact only one rate at which it carried or offered to carry cattle from O. to S., although it had pasted up in the office of its agent at O. other and higher rates; that an owner of cattle, without anything being said about any special rate, but with the consent of the company, placed his cattle in the company's cars at O. to be carried to S., and the agent of the company at O. then presented to the shipper a special contract for carrying the cattle at the full rate at which the company carried cattle, though less than such posted rate, and with certain limitations as to the company's responsibility, and the agent then demanded that the shipper should sign

§ 1193. Shipper and Employer's Passes.—A pass entitling a shipper to transportation without payment of fare is a good consideration to support a special contract made by him with the carrier limiting the latter's common-law liability.²⁷

§ 1194. Agreement to Transport Over Own and Connecting Lines.—An agreement to transport over its own line and that of a connecting carrier is a sufficient consideration to enable a common carrier to limit its liability for loss or injury to property.²⁸

§ 1195. Reasonableness of Limitation.—A limitation of the common-law liability of a common carrier as an insurer of freight received for transportation must be just and reasonable²⁹ in the eye of the law; otherwise, they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding,³⁰ because the parties are not dealing on an equal footing.³¹ The unequal position of the carrier and shipper, and the public nature of the carrier's business, furnish the grounds on which their right to contract as to them seems proper, in the absence of a statute regulating the matter, ought to be denied, and the only grounds on which the reasonableness of their contracts ought to be inquired into.³²

Interstate Shipment.—A limitation on the common-law liability of a carrier for the proper delivery of articles to a point beyond the limits of the state to be recognized must be reasonable.³³ The state courts interpose their remedial re-

such special contract or have his cattle unloaded, and gave to the shipper no other option, and the shipper then signed the special contract. It was held that the special contract, so far as it purported to limit the liability of the railroad company, was without consideration and void.

27. Shippers and employer's passes.—*Carter & Co. v. Southern R. Co.*, 3 Ga. App. 34, 59 S. E. 209.

28. Mobile, etc., R. Co. v. Brownsville, etc., Live Stock Co., 123 Tenn. 298, 130 S. W. 788; *Dillard Bros. v. Louisville, etc., R. Co.*, 70 Tenn. (2 Lea) 288.

The increased responsibility assumed by the carrier in giving a through bill of lading for shipment of goods over other lines beyond its own terminus is a sufficient consideration to support an exemption from liability. *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

29. Limitation must be reasonable.—*United States*.—*Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 507, 44 L. Ed. 560, 20 S. Ct. 385; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 431, 48 L. Ed. 1053, 24 S. Ct. 663, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303; *Bank v. Adams Exp. Co.*, 93 U. S. 174, 181, 23 L. Ed. 872; *Express Co. v. Caldwell (U. S.)*, 21 Wall. 264, 266, 22 L. Ed. 556; *Railroad Co. v. Lockwood (U. S.)*, 17 Wall. 357, 21 L. Ed. 627.

Colorado.—*Union Pac. R. Co. v. Stupeck (Colo.)*, 144 Pac. 646.

Idaho.—*McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

Mississippi.—*Southern Exp. Co. v. Moor*, 39 Miss. 822.

Missouri.—*McElvain v. St. Louis, etc., R. Co.*, 151 Mo. App. 126, 131 S. W. 736.

New Jersey.—*Taylor v. Pennsylvania R. Co.*, 8 N. J. L. J. 149.

North Carolina.—*Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 10 Am. & Eng. R. Cas. 863, 27 S. E. 73, 58 Am. St. Rep. 795.

Oklahoma.—*Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

Oregon.—*Lacey v. Oregon R., etc., Co. (Ore.)*, 128 Pac. 999; *Wells v. Great Northern R. Co.*, 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Tennessee.—*Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164.

Texas.—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494.

Utah.—*Benson v. Oregon, etc., R. Co.*, 35 Utah 241, 99 Pac. 1072, 19 Am. & Eng. Ann. Cas. 803; *Larsen v. Oregon, etc., R. Co.*, 38 Utah 130, 110 Pac. 983.

30. Baltimore, etc., R. Co. v. Voigt, 176 U. S. 498, 507, 44 L. Ed. 560, 20 S. Ct. 385.

31. Railroad Co. v. Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627.

32. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494. See, also, *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

33. Interstate shipment.—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346.

A common carrier can not place unreasonable restrictions on its common-law liability, though the contract be for

lied to the operation of unreasonable stipulations that the carrier, by the terms of the contract of shipment, seeks to impose upon the shipper,³⁴ and conceding that the statute of a state forbidding any limitation of liability of common carriers, by contract, applies only to contracts of carriage within the state, question of reasonableness of such limitation applies to carriage going beyond limits of the state.³⁵

A stipulation in a contract of shipment that the shipper will be estopped, when no element of estoppel in fact may exist, is unreasonable in the eye of the law, when such a stipulation is urged in defense of a claim for damages arising from the negligence of the carrier. It would be unreasonable and unjust for a carrier to contract away its liability for its negligence in any such manner.³⁶

Particular Limitations.—Thus, limitation of a carrier's liability for loss by fire³⁷ must be fair and reasonable in itself in view of all the surrounding circumstances.

§ 1196. Fairness, Fraud or Duress.—The established rules against fraud, misrepresentation, or duress are applicable to the full extent to limited liability stipulations in bills of lading, and the contract, in order to be sustainable, must be fairly made by the carrier, and freely entered into by the shipper, such contracts not being favored by the law, and the shipper not occupying as advantageous a position as the carrier when entering into the contract.³⁸

Duress.—Common carriers can not avoid usual consequences of undertaking to carry freight by requiring shipper to sign written contract under circumstances of duress.³⁹

the interstate shipment of goods. *San Antonio, etc., R. Co. v. Dolan* (Tex. Civ. App.), 85 S. W. 302.

34. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

35. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574.

36. **Stipulation that shipper estopped.**—*Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565.

37. **Fire.**—*Railroad v. Gilbert, etc., Co.*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

38. **Fairness, fraud or duress.**—*United States.—Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960; *Jennings v. Smith*, 45 C. C. A. 249, 106 Fed. 139.

Illinois.—*Chicago, etc., R. Co. v. Bozarth*, 94 Ill. App. 69.

Indiana.—*Adams Exp. Co. v. Carnaham*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279; *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302. So held under *Burns' Ann. St. of Indiana*, 1908, § 3919. *Pittsburgh, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

Kansas.—*Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375.

Kentucky.—*Adams Exp. Co. v. Nock* (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

Mississippi.—*Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 21 Am. & Eng. R. Cas., N. S., 840, 30 So. 43; *Southern Exp. Co. v. Moon*, 39 Miss. 822.

Missouri.—*Kellerman & Son v. Kansas,*

etc., R. Co., 68 Mo. App. 255; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406.

North Carolina.—*Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675.

North Dakota.—*Hanson v. Great Northern R. Co.* (N. Dak.), 121 N. W. 78.

Ohio.—A contract of shipment, entered into in the state of Ohio, is not so executed as to effect limitations of liability, if it was not "fairly made and understood." *Fuller v. Lake Shore, etc., R. Co.*, 165 Ill. App. 279.

Oklahoma.—*Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

Oregon.—*Lacey v. Oregon R., etc., Co.* (Ore.), 128 Pac. 999.

Texas.—*Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Utah.—*Larsen v. Oregon, etc., R. Co.*, 38 Utah 130, 110 Pac. 983.

Duress—Imposture — Delusion—Understanding of shipper.—Public policy imposes on common carriers a constructive liability peculiarly stringent, and they will not be permitted to limit such liability by special contracts, unless they are fairly made, without duress, imposture, or delusion, and are fully understood by the other party, and are clearly proved. *Adams Exp. Co. v. Nock* (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

39. **Duress.**—*Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

The shipper was in some respects un-

Unequal Positions of Parties.—The unequal positions of the parties in their contractual relations to each other commends the wisdom of the rule that requires the carrier to deal fairly with the shipper, and prevents it from imposing unfair contracts upon him.⁴⁰

Printed Receipts Thrust upon Shipper in Press of Railroad Travel.—A special contract purporting to limit the common-law liability of a common carrier obtained by artfully contrived printed receipts thrust upon the shipper in the hurry and press of railroad travel, or under other circumstances not favorable to a full understanding of the force and effect of the contract, are not binding on the shipper.⁴¹

Bill of Lading Prepared by Shipper.—A shipper can not allege fraud or mistake in bills of lading, prepared by himself.⁴²

Words "Value Asked and Not Given" Stamped on Blank Contracts.—See post, "Fraud or Duress," § 1352.

§ 1197. Choice between Full and Limited Liability.—The public may insist on property being accepted for transportation by carriers without any limitation of their responsibility.⁴³ Though carriers may restrict their liability as insurers, such privilege is for the benefit of the public, as well as of carriers, and does not permit the carriers to impose conditions restricting liability, whether patrons desire such terms or not, but for such a limitation to be valid the carrier must be willing to assume the full responsibility imposed by law, and must allow the owner the privilege of choosing between a restricted and full liability;⁴⁴ for a carrier has no right to demand of the shipper a waiver of his rights as a condition precedent to receiving freight for transportation.⁴⁵ Hence where a shipper had no opportunity to ship under any other than a contract of

der duress as affecting his property when he was forced to the alternative of signing such a contract, or being denied transportation to the desired market, by the carrier. It was the duty of the carrier to give the opportunity to ship under terms such as would hold the carrier to its common-law duties in the premises, or of the verbal contract under which the cattle were delivered. Duress may apply to property as well as to the person. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

40. Unequal positions of parties.—*Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

41. Printed receipts thrust upon shipper in press of railroad travel.—*Southern Exp. Co. v. Moon*, 39 Miss. 822; *Levelling v. Union Transp., etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320.

42. Bill of lading prepared by shipper.—*Bessling & Co. v. Houston, etc., R. Co.*, 80 S. W. 639, 35 Tex. Civ. App. 470.

43. Choice between full and limited contract.—*Robert v. Chicago, etc., R. Co.* (Mo. App.), 127 S. W. 925.

Choice of rates.—See ante, "Choice of Rates," § 1189.

44. Kansas.—*Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375.

Kentucky.—Common carriers are bound to carry articles within the scope of their business without any other contract than such as the law would imply. *Ad-*

ams Exp. Co. v. Nock (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

Michigan.—*McMillan v. Michigan, etc., Railroad*, 16 Mich. 79, 93 Am. Dec. 208.

Missouri.—*Robert v. Chicago, etc., R. Co.* (Mo. App.), 127 S. W. 925.

Tennessee.—*Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164.

A reasonable alternative between a contract with common law liability and nonliability must be offered the shipper. *Marr v. Western Union Tel. Co.*, 85 Tenn. (1 Pickle) 529, 3 S. W. 496.

It is well settled that a common carrier may, by a stipulation in its bill of lading, limit its common-law liability for loss or damage of freight not caused by its own negligence. But this can not be validly done unless the carrier, at the time, holds itself in readiness to transport the freight with or without such limitation and allows the shipper a reasonable and bona fide alternative between the two modes of shipment. *Railroad v. Gilbert, etc., Co.*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164; *Dillard Bros. v. Louisville, etc., R. Co.*, 70 Tenn. (2 Lea) 288.

Texas.—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

45. Missouri Pac. R. Co. v. Fagan. 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

limited liability, he is entitled to recover for the loss of the goods, regardless of the contract.⁴⁶

Loss by Fire.—A bill of lading or receipt exempting from loss by fire is not invalid because no option was given the shipper as between this and a bill without such exemption,⁴⁷ but the Tennessee courts have held that a fire clause in a bill of lading which stipulates that the carrier shall not be liable for loss or damage by fire, is to be deemed just and reasonable only when a reduced rate is made and the shipper is offered the alternative of shipping the goods at full rates under a bill of lading containing no such stipulation.⁴⁸

§ 1198. Meeting of Minds of Parties.—In General.—It must appear that the parties to the contract mutually understood, intended and agreed upon the stipulation limiting the carrier's common-law liability.⁴⁹

§§ 1199-1229. Knowledge and Assent of Shipper—§ 1199. Necessity in General.—A common carrier can not limit its common-law liability by its own act alone.⁵⁰ There can be no limitation of liability without the consent of the shipper.⁵¹

Bill of Lading in Form Adopted by Order of Railroad Commission.—A clause in a bill of lading, the form of which was adopted on an order by the state railroad commission, conflicting with general principles of law, is not binding on a shipper who is not shown to have expressly or impliedly consented to be bound by it.⁵²

46. *Southern Exp. Co. v. Meyer Co.*, 94 Ark. 103, 125 S. W. 642.

47. **Necessity for option to shipper as to acceptance of bill of lading exempting from loss by fire.**—*Cau v. Texas*, etc., R. Co., 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303; *Arthur v. Texas*, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338; *Charnock v. Texas*, etc., R. Co., 194 U. S. 432, 48 L. Ed. 1054, 24 S. Ct. 671.

48. *Tennessee.*—*Louisville*, etc., R. Co. v. *Gilbert*, 42 Am. & Eng. R. Cas. 732, 88 Tenn. (4 Pickle) 430, 12 S. W. 1018, 7 L. R. A. 162.

It appeared that the cotton destroyed by fire had been shipped under a bill of lading containing a fire clause exempting the carrier from liability for loss or damage by fire. The freight agent at the point of shipment testified that he had no authority as freight agent to make a different contract or to ship goods under any other form of bill of lading, and that the company had not supplied him with other forms. He also testified that before he could make a contract for the shipment of goods at tariff rates it was necessary that he should have authority from the general freight agent of the company. It appeared from the evidence that the rate on cotton before the insertion of the fire clause was the same as it was when shipped under a bill of lading containing it. Held, that as the company had not fulfilled its duty at common law, to hold

itself in readiness to transport goods with all the responsibility of a common carrier, in so far as it had not authorized its agent at the point of shipment to make such contracts, no reasonable alternative had been offered to the shipper and that the stipulation in the bill of lading was unjust and unreasonable. *Louisville*, etc., R. Co. v. *Gilbert*, 88 Tenn. (4 Pickle) 430, 12 S. W. 1018, 7 L. R. A. 162, 42 Am. & Eng. R. Cas. 732.

49. **Meeting of minds of parties.**—*St. Louis*, etc., R. Co. v. *McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Missouri*, etc., R. Co. v. *Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

50. **Necessity in general.**—*Merriman v. May Queen*, Newb. 464, Fed. Cas. No. 9,481; *Merchants' Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

51. *Cau v. Texas*, etc., R. Co., 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303. See, also, *New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.)*, 6 How. 344, 382, 12 L. Ed. 465.

A carrier's liability can not be limited without the shipper's assent. *McElvain v. St. Louis*, etc., R. Co., 151 Mo. App. 126, 131 S. W. 736.

Loss by fire.—*Railroad v. Gilbert*, etc., Co., 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

52. **Bill of lading in form adopted by order of railroad commission.**—*Whitehurst v. Texas*, etc., R. Co., 131 La. 139, 59 So. 42.

§§ 1200-1201. Doctrine Requiring Express Assent—§ 1200. In General.—In Illinois,⁵³ Mississippi,⁵⁴ Ohio,⁵⁵ and a few inferior federal courts,⁵⁶ and under the statutes of Georgia⁵⁷ the express assent of the shipper to a limitation of the carrier's liability contained in a freight receipt or bill of lading accepted by him is essential to its validity. Such limitation in order to limit the carrier's common-law liability must have been accepted by the shipper with knowledge of its terms, and such knowledge will not be implied. In these jurisdictions the principles of law, which create obligations *ex contractu* by an implied promise or constructive agreement have no application to contracts limiting the liability of a common carrier.⁵⁸ The implied assent of the owner of the goods to the terms prescribed by the carrier, upon which the English cases are founded, it is very conclusively shown in the American cases, can not be fairly assumed, since the carrier is bound to receive and transport all goods offered for the purpose, subject to all the responsibility incident to the employment, and the owner may quite as fairly be presumed to have intended to insist on the rights he undeniably had as to have assented to qualifications which the carrier had no

53. *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago, etc., R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53, 42 N. E. 382; *Chicago, etc., R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Elgin, etc., R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311, affirmed in 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218; *Erie, etc., Transp. Co. v. Datter*, 91 Ill. 195, 33 Am. Rep. 51; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; *Wabash R. Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A., N. S., 1041; *Pennsylvania R. Co. v. John Anda Co.*, 131 Ill. App. 426; *Wabash R. Co. v. Curtis*, 134 Ill. App. 409; *Peoria Packing Co. v. Nashville, etc., R. Co.*, 164 Ill. App. 646.

54. *Southern Exp. Co. v. Moon*, 39 Miss. 822.

55. *Davidson v. Graham*, 2 O. St. 131; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22; *Pittsburgh, etc., R. Co. v. Barrett*, 36 O. St. 448, 3 Am. & Eng. R. Cas. 256; *P. C. & St. L. R. Co. v. Blakemore*, 1 O. C. C. 42, 1 O. C. D. 26.

In order that a carrier may claim exemption from his common liability as insurer, by virtue of express stipulation to that effect, assent of the shipper to such stipulation must be shown. *American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490; *Gaines v. Union Transp. Co.*, 28 O. St. 418; *Railroad Co. v. Wisner*, 53 O. St. 681, 44 N. E. 1144; *Stevenson v. Wells Fargo & Co.*, 52 O. St. 687, 44 N. E. 1148; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22; *Cleve-*

land, etc., R. Co. v. La Tourette, 2 O. C. C. 279, 1 O. C. D. 486.

56. **Inferior federal court cases.**—*Saunders v. Southern R. Co.*, 62 C. C. A. 523, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, 128 Fed. 15.

57. *Central R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; *Central, etc., R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *Georgia Railroad v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Kavanaugh v. Southern R. Co.*, 120 Ga. 62, 47 S. E. 526, 1 Am. & Eng. Ann. Cas. 705; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

If he desires to limit his legal liability as a common carrier, he must make an express contract outside of, and independent of, his receipt given for the goods, and then there will be some mutuality in the agreement between the parties; at least, both parties will have a much better opportunity of understanding what is the mutual agreement between the shipper and the carrier. *Mosher & Co. v. Southern Exp. Co.*, 38 Ga. 37.

Understanding and deliberate assent on part of shipper essential.—To render a contract of shipment purporting to limit a common carrier's common-law liability binding upon the consignor, he must have understood the import of the receipts or other papers embodying the contract. To give any validity to the matter, it must have been deliberately assented to, with the knowledge and intent that it should be binding as a special contract and control the respective rights of the parties. *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725.

58. **Principle of constructive assent not applicable.**—*Gaines v. Union Transp., etc., Co.*, 28 O. St. 418. And see *Cleveland, etc., R. Co. v. La Tourette*, 2 O. C. C. 279, 1 O. C. D. 486.

right to impose.⁵⁹ Mere notices of restrictions upon the common carrier's liability have not only to be brought home to the shipper's knowledge but, must, in addition, be assented to by him.⁶⁰

§ 1201. Duty of Carrier to Call Shipper's Attention to Stipulation.—In some cases it has been held that a common carrier, seeking to limit its common-law liability for freight, by virtue of a special contract is bound to give explicit information to the other parties of the precise limitation intended;⁶¹ but the better rule seems to be that it is not the duty of the agent of an express company, or other common carrier on giving a receipt for freight purporting to limit the company's liability, to call the shipper's attention to its language, and where such limitations are contained in the body of the receipt, in a way not calculated to escape observation, they compose a part of it, and the paper shows on its face that it is not a mere receipt, and, being accepted by the shipper in the transaction of the business to which it related, it was his duty to read it.⁶²

§§ 1202-1219. Doctrine of Implied Assent—§ 1202. In General.—Stipulations purporting to limit a common carrier's liability as an insurer whether contained in a bill of lading, freight receipt, or other writing, must be brought home to the knowledge of the shipper under such circumstances that his assent to them can be assumed. This doctrine is sustained by the decisions of the courts of the United States,⁶³ and of the states of Alabama,⁶⁴ Maryland,⁶⁵ Massachusetts,⁶⁶ Minnesota,⁶⁷ New Jersey,⁶⁸ New York,⁶⁹ Utah,⁷⁰ and others.

§ 1203. Intention of Parties.—Where the circumstances of a shipment by express themselves repel the idea that the parties intended an instrument delivered by the carrier should represent a contract, the carrier, to establish a limitation of its liability, must show the shipper knew and assented to the terms of

⁵⁹ *Graham & Co. v. Davis & Co.*, 4 O. St. 362, 62 Am. Dec. 285.

⁶⁰ **Mere notice of restrictions.**—*United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144.

A carrier can not as a rule limit its liability by notice, unless brought to the shipper's knowledge within a reasonable time before shipment, and assented to by him, and, in absence of misrepresentations as to the nature and value of the goods, the carrier must make known the value which it proposes to attach at a specified rate, and procure his assent thereto. *Faulk v. Columbia, etc., R. Co.*, 64 S. E. 383, 82 S. C. 369.

⁶¹ **Duty of carrier to call shipper's attention to stipulation.**—*Baltimore, etc., R. Co. v. Doyle*, 74 C. C. A. 245, 142 Fed. 669.

A contract relieving a common carrier from any part of its common-law liability for the loss or destruction of goods in shipment, will not be implied from any condition or regulation contained in the bill of lading, notwithstanding the general knowledge of the shipper, unless such condition or regulation was clearly and distinctly brought to his attention at the time of the shipment. *Baltimore, etc., R. Co. v. Doyle*, 74 C. C. A. 245, 142 Fed. 669; *Singleton v. Hil-liard* (S. C.), 1 Strob. 203.

⁶² *Lake Shore, etc., R. Co. v. Davis*, 16 Ill. App. 125; *Snider v. Adams Exp. Co.*, 63 Mo. 376.

Similar bill of lading previously accepted by shipper.—See post, "Knowledge of Contents and Assent of Shipper," §§ 1319-1320.

Shipping directions similar to conditions in bill of lading.—See post, "Knowledge of Contents and Assent of Shipper," §§ 1319-1320.

⁶³ *Merriman v. May Queen, Newb.* 464, Fed. Cas. No. 9,481; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* (U. S.), 16 Wall. 318, 21 L. Ed. 297.

⁶⁴ *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Exp. Co. v. Armstead*, 50 Ala. 350.

⁶⁵ *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

⁶⁶ *Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462.

⁶⁷ *Murphy v. Wells-Fargo & Co. Exp.*, 99 Minn. 230, 108 N. W. 1070.

⁶⁸ Where the limitation of damages in a receipt for goods shipped was not in any manner called to the attention of the shipper or assented to by him, it is not binding on him. *Higgins v. United States Exp. Co.*, 83 N. J. L. (54 Vr.) 398, 85 Atl. 450.

⁶⁹ *Woodruff v. Sherrad*, 9 Hun 322.

⁷⁰ *Benson v. Oregon, etc., R. Co.*, 35 Utah 241, 99 Pac. 1072, 19 Am. & Eng. Ann. Cas. 803.

the instrument; but where the circumstances show that the parties intended the instrument should represent a contract, the shipper is bound by its terms, though he did not read them, if there was no fraud or concealment; and where the circumstances do not distinctly show the one nor repel the other then the intention of the parties is a question of fact.⁷¹

§ 1204. Constructive Notice Generally.—Actual knowledge of the term of a contract limiting a carrier's common-law liability is not required. It is sufficient if the person accepting the contract has actual notice of circumstances sufficient to put a prudent man on inquiry as to the existence of the limitation, in which case he is chargeable with knowledge thereof by constructive notice.⁷² This is the case under § 2176, of the Civil Code of California, providing for limitation of liability in a contract for carriage, if accepted "with knowledge of its terms."⁷³

Acceptance of Previous Bill Containing Limitation.—Where a shipper for three years had been receiving bills of lading in the same form and terms as one in question, his knowledge of its terms, in the absence of fraud of the carrier, must be conclusively presumed, and he can not escape the presumption by not reading it.⁷⁴

Freight to Be Shipped at Carrier's Convenience.—A bill of lading, advantageous to both shipper and carrier, received by the shipper without objection, stipulating that his cotton was to be shipped "at company's convenience," is evidence of his assent to such restriction of the carrier's liability, equivalent to an express agreement, and charges the shipper with legal notice of its terms.⁷⁵

§ 1205. Duty of Shipper to Read Contract.—It is generally held that the shipper must, at his peril, acquaint himself with the contents of the freight receipt, bill of lading, or other paper containing the shipping contract which limits or restricts the carrier's common-law liability; and if he fail to do so, he will, under ordinary circumstances, be held chargeable with notice of its contents, and is bound by its terms; and prior parole negotiations can not be resorted to vary them. This doctrine prevails in the federal courts⁷⁶ and in Alabama,⁷⁷ Ark-

71. **Intention of parties.**—*Noonan v. Wells-Fargo & Co.*, 123 N. Y. S. 903, 68 Misc. Rep. 322.

72. **Constructive notice generally.**—*Charnock v. Texas, etc., R. Co.*, 51 C. C. A. 78, 113 Fed. 92, affirmed in 194 U. S. 432, 48 L. Ed. 1657, 24 S. Ct. 67; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

Loss by fire.—A shipper is bound by a stipulation in the bill of lading exempting the carrier from liability for loss of the freight by fire where he was chargeable with knowledge that the bill contained such restriction, and made no objection thereto, and it is not shown that the loss was caused by the carrier's negligence. *Charnock v. Texas, etc., R. Co.*, 51 C. C. A. 78, 113 Fed. 92, affirmed in 194 U. S. 432, 48 L. Ed. 1657, 24 S. Ct. 67.

73. *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

74. **Acceptance of previous bills containing limitation.**—*Hix v. Eastern Steamship Co.*, 107 Me. 357, 78 Atl. 379.

75. **Freight to be shipped at carrier's convenience.**—*Whitehead v. Wilmington, etc., R. Co.*, 87 N. C. 255, 9 Am. & Eng. R. Cas. 168.

76. **Must read contract.**—*Charnock v. Texas, etc., R. Co.*, 51 C. C. A. 78, 113 Fed. 92, affirmed in 194 U. S. 432, 48 L. Ed. 1657, 24 S. Ct. 67.

"Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertake to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given not only as evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this he can not be willfully blind and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability, he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services or risk." *Hutchinson on Carriers*, § 240; *McMillan v. Michigan, etc., Railroad*, 16 Mich. 79, 93 Am. Dec. 208.

77. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321.

ansas,⁷⁸ California,⁷⁹ Iowa,⁸⁰ Maryland,⁸¹ Massachusetts,⁸² Michigan,⁸³ Missouri,⁸⁴ New York,⁸⁵ Pennsylvania,⁸⁶ South Carolina,⁸⁷ Wisconsin,⁸⁸ and other states.

Inability to Read.—An express provision in a bill of lading, limiting the carrier's common-law liability, is binding on the consignor, notwithstanding his ignorance and inability to read, when it is not shown that the carrier was informed of such ignorance, or asked to read and explain the bill of lading.⁸⁹

Effect of Shipper's Haste in Signing Contract—Opportunity to Read.—A shipper can not, in the absence of fraud by a carrier, avoid limitations imposed by a special contract, by showing that he executed it hurriedly, or without due care, or that he was ignorant of its contents,⁹⁰ certainly where he could have known from previous dealings what stipulations were in the contract.⁹¹

Contract Not Ready for Signature until Time to Take Train.—Where there was no fraud or misrepresentation by the carrier or its agent, the shipper can not repudiate the terms of a written contract purporting to limit the carrier's liability, which was signed by him without reading because it was not ready for his signature until the time arrived for him to take the train.⁹²

Prior Loading under Verbal Contract.—In the absence of fraud or mistake, a bill of lading containing special limitations of the common carrier's liabil-

78. *McIlroy v. Buckner*, 35 Ark. 555.

79. *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915, failure to read receipt of transfer company.

80. *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322.

81. *Brehme v. Dinsmore*, 25 Md. 328.

82. *Rice v. Dwight Mfg. Co. (Mass.)*, 2 Cush. 80; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

83. *McMillan v. Michigan, etc., Railroad*, 16 Mich. 79, 93 Am. Dec. 208.

84. *Patterson v. Kansas City, etc., R. Co.*, 56 Mo. App. 657; *Snider v. Adams Exp. Co.*, 63 Mo. 376.

A shipper must, at his peril, read the shipping contract. *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406.

85. *Zimmer v. New York, etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642; *Long v. New York Cent. R. Co.*, 50 N. Y. 76, 3 Am. R. Rep. 350; *Fibel v. Livingston (N. Y.)*, 64 Barb. 179; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 473; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Hallenbeck v. Dewitt (N. Y.)*, 2 Johns. 404; *Harris v. Story (N. Y.)*, 2 E. D. Smith 363; *Mills v. Weir*, 82 App. Div. 396, 81 N. Y. S. 801.

86. *In re Greenfield's Estate*, 14 Pa. 489, 504.

87. "It would tend to disturb the force of all such contracts, if one, in possession of ordinary capacity and intelligence, were allowed to sign a contract and act under it, in the employment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation or mistake, it must be presumed that he read the contract and assented to its

conditions." *Bethea v. Northeastern R. Co.*, 26 S. C. 91, 1 S. E. 372; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

88. *Morrison v. Phillips, etc., Constr. Co.*, 44 Wis. 405, 409, 28 Am. Rep. 599; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599.

89. *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321.

90. *Indiana*.—*Evansville, etc., R. Co. v. Kevekordes (Ind. App.)*, 69 N. E. 1022; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89.

Michigan.—*Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530, 84 N. W. 1067.

Tennessee.—*Nashville, etc., R. Co. v. Stone*, 112 Tenn. 348, 367, 79 S. W. 1031, 105 Am. St. Rep. 955.

Texas.—*Fort Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147.

Signed in haste without reading.—A shipper will not be allowed to repudiate a shipping contract, purporting to restrict the carrier's liability merely on the ground that he signed it in haste and without reading, where he delivered the freight to the carrier without any special parol contract. *Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530, 84 N. W. 1067; *Houston, etc., R. Co. v. Smith*, 44 Tex. Civ. App. 299, 97 S. W. 836.

91. **Notice — Former dealings.**—*Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

92. **Contract not ready for signature until time to take train.**—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346; *Bethea v. Northeastern R. Co.*, 26 S. C. 91, 1 S. E. 372.

ity, signed by the shipper, is conclusive as to the terms of the contract; and he can not invalidate it by showing that he signed it without reading it, and that his shipment was all ready on the cars.⁹³

Shipper Put upon Inquiry as to Extent of Initial Carrier's Undertaking.

—Where the consignor was expressly told that the carrier's lines extended no further than a certain point, and at such point the money shipped would be delivered to a stage company to be forwarded, this was enough to have put him upon inquiry as to the extent of the initial carrier's undertaking, and if he did not in fact read the contract, which limited its liability to its own line, he was guilty of inexcusable negligence.⁹⁴

Receipt Containing Letters "(O. R.)"—Shipper's Testimony—Mere Failure to See.—Where it was the custom of the defendant carrier to carry horses at owner's risk, and at reduced rates for that reason, and the letters "(O. R.)," signifying "Owner's Risk," were upon the receipt given plaintiff for his horses, and retained and put in evidence by him, and he testified that "he did not see" those letters, but not that he did not understand their meaning, the restricted liability of the carrier clearly appeared from plaintiff's evidence.⁹⁵

§§ 1206-1217. What Constitutes Acceptance or Assent—§§ 1206-1208. Acceptance of Freight Receipt or Bill of Lading—§ 1206. In General.—General Rule.—The general rule is that the consignor's mere acceptance of a freight receipt or bill of lading implies his assent to all legal and reasonable limitations of the carrier's liability which it may embrace. This is on the theory that a bill of lading or receipt for freight issued by a common carrier to a consignor, and received by him without objection, and without any insistence upon the common-law liability of the carrier, is a contract fixing the rights and liability of the consignor and carrier. In jurisdictions where such rules prevail, in the absence of fraud, concealment or improper practices the legal presumption is that a shipper, when accepting without objection a written shipping contract, bill of lading or freight receipt, has fully acquainted himself with and unreservedly assents to all of its conditions, and he is estopped from gainsaying or repudiating it.⁹⁶ It follows, under this rule, that it is not necessary, in order to render

93. Prior loading under verbal contract.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

Contract signed after shipment loaded without opportunity to examine.—A written contract purporting to limit the common-carrier liability of a railroad company, is in the absence of fraud or mistake, the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the shipment was loaded into the cars, with a prior verbal understanding as to the terms of the shipment, and presented it to him for signature when there was no sufficient time for its examination before the departure of the train. *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13, 16 Am. & Eng. R. Cas. 122.

94. Shipper put upon inquiry as to extent of initial carrier's undertaking.—*United States Exp. Co. v. Haines*, 67 Ill. 137.

95. Receipt containing letters "(O. R.)"—Shipper's testimony—Mere failure to see.—*Morrison v. Phillips, etc.*,

Constr. Co., 44 Wis. 405, 28 Am. Rep. 599.

96. While a carrier's common-law liability can not be limited by conditions expressed in a mere notice to the shipper or to the general public, nor by the terms of a receipt for the goods, or where the conditions are printed on the back of the bill of lading or stamped across its face, yet conditions printed or written on the face and in the body of the bill will be presumed to have been assented to and to form part of a valid, enforceable contract, where the consignor receives the bill and ships the goods without complaint, if such conditions are not inimical to law. *Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

A shipper's consent will be conclusively presumed to the conditions inserted in the body of the bill of lading if he has had an opportunity to know the contents of the bill which was received at the time of shipping the goods, and the carrier has resorted to no unfair means of deception. *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

such a limitation binding upon a shipper accepting a written shipping contract without objection, to show that he was acquainted with its contents and knowingly assented to its terms when he accepted the contract. This doctrine prevails in the federal courts⁹⁷ and in the states of Alabama,⁹⁸ Arkansas,⁹⁹ California,¹ Connecticut,² Florida,³ Indiana,⁴ Iowa,⁵ Kansas,⁶ Kentucky,⁷ Maryland,⁸ Massachusetts,⁹ Michigan,¹⁰ Minnesota,¹¹ Missouri,¹² New Hampshire,¹³ New Jer-

97. *Calderon v. Atlas Steamship Co.*, 16 C. C. A. 332, 69 Fed. 574; *Charnock v. Texas, etc.*, R. Co., 194 U. S. 432, 48 L. Ed. 1054, 24 S. Ct. 671; *Cau v. Texas, etc.*, R. Co., 194 U. S. 427, 48 L. Ed. 1053, 13 R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 S. Ct. 663; *Hopkins v. Westcott (U. S.)*, 6 Blatchf. 64, Fed. Cas. No. 6,692; *Jennings v. Smith*, 45 C. C. A. 249, 106 Fed. 139; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. (U. S.)*, 16 Wall. 318, 21 L. Ed. 297; *The Henry B. Hyde*, 82 Fed. 681; *Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8,224

98. *Jones v. Cincinnati, etc.*, R. Co., 89 Ala. 376, 8 So. 61, 25 Am. & Eng. R. Cas. 321; *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537, 29 So. 602; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Louisville, etc.*, R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

99. *St. Louis, etc.*, R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

1. *Michalischke v. Wells, Fargo & Co.*, 118 Cal. 683, 50 Pac. 847.

2. *Lawrence v. New York, etc.*, R. Co., 36 Conn. 63; *Mears v. New York, etc.*, R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

3. *Atlantic, etc.*, R. Co. v. Dexter, 50 Fla. 180, 19 R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787, 39 So. 634.

4. *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279; *Evansville, etc.*, R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022; *Cleveland, etc.*, R. Co. v. Potts, 33 Ind. App. 564, 71 N. E. 685.

5. *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322, 328.

6. *Atchison, etc.*, R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *Kallman v. United States Exp. Co.*, 3 Kan. 205.

7. *Adams Exp. Co. v. Nock (Ky.)*, 2 Duv. 562, 87 Am. Dec. 510; *Louisville, etc.*, R. Co. v. Brownlee (Ky.), 14 Bush 590; *Louisville, etc.*, R. Co. v. Frazee, 24 Ky. L. Rep. 1273, 71 S. W. 437, 6 R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22.

By accepting a bill of lading without reading it or without objection or protest against a stipulation therein purporting to limit the carrier's liability, the shipper will be presumed to have assented to its terms. *Louisville, etc.*, R. Co. v. Brownlee (Ky.), 14 Bush 590.

8. *Brehme v. Dinsmore*, 25 Md. 328.

9. *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462; *Hill v. Boston, etc.*, R. Co., 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836; *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343; *Quimby v. Boston, etc.*, R. Co., 150 Mass. 365, 23 N. E. 205, 40 Am. & Eng. R. Cas. 693, 5 L. R. A. 846.

Where a person receives from a common carrier a bill of lading purporting on its face to set forth the terms of carriage, and accepts and acts upon it without objection, ordinarily he will be presumed, as in other cases of contract, in the absence of fraud or other sufficient excuse, to have assented to its terms, so far as its provisions are lawful and not opposed to public policy. *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

10. *Feige v. Michigan, etc.*, R. Co., 62 Mich. 1, 28 N. W. 685; *Hengstler v. Flint, etc.*, R. Co., 125 Mich. 530, 84 N. W. 1067; *McMillan v. Michigan, etc., Railroad*, 16 Mich. 79, 93 Am. Dec. 208; *Smith v. American Exp. Co.*, 108 Mich. 572, 66 N. W. 479.

11. *Christenson v. American Exp. Co.*, 15 Minn. 270, Gil. 208, 2 Am. Rep. 122; *Hutchinson v. Chicago, etc.*, R. Co., 37 Minn. 524, 35 N. W. 433.

Where there is nothing to show that a clause in a receipt for freight, purporting to limit the carrier's common-law liability was objected to by the consignor or escaped his notice, it is to be presumed that it was assented to. *Christenson v. American Exp. Co.*, 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

12. *Kellerman v. Kansas City, etc.*, R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369; *Levering v. Union Transp., etc.*, Co., 42 Mo. 88, 97 Am. Dec. 320; *Snider v. Adams Exp. Co.*, 63 Mo. 376; *Patterson v. Kansas City, etc.*, R. Co., 56 Mo. App. 657.

13. *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; *Merrill v. American Exp. Co.*, 62 N. H. 514.

Acceptance of freight receipt without objection — Constitutes contract.—*Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

sey,¹⁴ New York,¹⁵ North Carolina,¹⁶ Rhode Island,¹⁷ South Carolina,¹⁸ Tennessee,¹⁹ Texas,²⁰ Vermont,²¹ West Virginia,²² Wisconsin,²³ and perhaps others.

Stipulation Read and Not Objected to.—Where a stipulation in a bill of lading, purporting to limit the carrier's liability, is read and not objected to by the shipper, his assent to it may be inferred.²⁴

Bill of Lading Sent by Shipper to Agent as Authority to Receive Goods.—A bill of lading, limiting the liability of the carrier, signed by his

14. Delivery by an express company to a shipper, and his acceptance without dissent, of a shipping receipt containing a clause of limited liability, raises a presumption that the shipper knew of the restriction and would be bound thereby; but such presumption may be rebutted by evidence negating knowledge and assent. *Hill v. Adams Exp. Co.*, 80 N. J. L. (51 Vr.) 604, 77 Atl. 1073.

15. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Germania Fire Ins. Co. v. Memphis, etc.*, R. Co., 72 N. Y. 90, 28 Am. Rep. 113; *Giles v. Fargo*, 60 N. Y. Super. Ct. 117, 17 N. Y. S. 476, 43 N. Y. St. Rep. 65; *Hill v. Syracuse, etc.*, R. Co., 73 N. Y. 351, 29 Am. Rep. 163; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Landsberg v. Dinsmore (N. Y.)*, 4 Daly 490; *McMahon v. Macy*, 51 N. Y. 155; *Mills v. Weir*, 82 App. Div. 396, 81 N. Y. 801; *Springer v. Westcott*, 78 Hun 365, 29 N. Y. S. 149, 60 N. Y. St. Rep. 713; *Wetzell v. Dinsmore (N. Y.)*, 4 Daly 193; *Steers v. Liverpool, etc.*, Co., 57 N. Y. 1, 15 Am. Rep. 453; *Fibel v. Livingston (N. Y.)*, 64 Barb. 179; *Bernstein v. Weir*, 40 Misc. Rep. 635, 83 N. Y. S. 48; *Dobson v. Central R. Co.*, 38 Misc. Rep. 582, 78 N. Y. S. 82; *Rosenthal v. Weir*, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527; *Strong v. Long Island R. Co.*, 91 N. Y. App. Div. 442, 86 N. Y. S. 911; *Wilson v. Platt*, 84 N. Y. S. 143; *Zimmer v. New York, etc.*, R. Co., 137 N. Y. 460, 33 N. E. 642.

16. *Phifer v. Carolina Cent. R. Co.*, 89 N. C. 311, 45 Am. Rep. 687.

17. *Ballou v. Earle*, 17 R. I. 441, 22 Atl. 1113, 48 Am. & Eng. R. Cas. 31, 14 L. R. A., N. S., 433.

18. *Dunbar v. Charleston, etc.*, R. Co., 62 S. C. 414, 40 S. E. 884; *Johnstone v. Richmond, etc.*, R. Co., 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

19. *Dillard Bros. v. Louisville, etc.*, R. Co., 70 Tenn. (2 Lea) 288; *East Tennessee, etc.*, R. Co. *v. Brumley*, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; *Merchants', etc.*, Co. *v. Bloch*, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 35 Am. & Eng. R. Cas. 579.

The acceptance by the shipper, on the day of shipment, of a bill of lading for his goods containing valid stipulations against liabilities for loss, and retaining it without objection, raises a presumption, in the absence of anything to the

contrary, that the shipper knew the contents of the receipt and assented to its terms. *Dillard Bros. v. Louisville, etc.*, R. Co., 70 Tenn. (2 Lea) 288.

From shipper's acceptance of bill of lading without objection, it will be presumed, *prima facie*, that he knew its contents, and assented to its stipulations in favor of the carrier. *Merchants', etc.*, Co. *v. Bloch*, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 35 Am. & Eng. R. Cas. 579.

20. *Ryan v. M. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *International, etc.*, R. Co. *v. Watt*, 2 Texas App. Civ. Cas., § 781; *Texas, etc.*, R. Co. *v. Scrivener*, 2 Texas App. Civ. Cas., § 328.

Denial of knowledge of contents.—Shipper in absence of fraud is bound by stipulations contained in contract of shipment and is not permitted to say that he accepted, signed, and executed it without knowing its contents, in absence of fraud. *Texas, etc.*, R. Co. *v. Scrivener*, 2 Texas App. Civ. Cas., § 328.

Where a shipper accepts and executes a contract of shipment without reading it or knowing its stipulations, he is conclusively presumed, in the absence of fraud and imposition, to have assented thereto, and is bound thereby. *Texas, etc.*, R. Co. *v. Scrivener*, 2 Texas App. Civ. Cas., § 328.

21. *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

22. *Baltimore, etc.*, Railroad *v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664.

23. *Boorman v. American Exp. Co.*, 21 Wis. 152; *Ullman v. Chicago, etc.*, R. Co., 112 Wis. 150, 88 N. W. 41, 23 Am. & Eng. R. Cas., N. S., 782, 56 L. R. A. 246; *Schaller v. Chicago, etc.*, R. Co., 97 Wis. 31, 71 N. W. 1042.

Possession of receipt only prima facie evidence of assent.—Possession by a shipper of a carrier's receipt for the freight, containing limitations of the carrier's common-law liability, is at least prima facie evidence of his assent to them, and in most cases may be conclusive. *Morrison v. Phillips, etc.*, Constr. Co., 44 Wis. 405, 28 Am. Rep. 599. See also *Strohn v. Detroit, etc.*, R. Co., 21 Wis. 554, 94 Am. Dec. 114; *Boorman v. American Exp. Co.*, 21 Wis. 152.

24. **Stipulation read and not objected to.**—*Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152.

agent, delivered to the shippers, accepted by them and sent to their agent as authority to receive the goods, constituted the contract on which the shippers shipped the goods and on which they were received.²⁵

Bill of Lading Forwarded to Consignee.—Where the plaintiff's evidence tended to prove that the goods were shipped under previous verbal agreement, without special exemptions in favor of the carrier, and that after the goods were in transit the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds, it is error to charge the jury that such acts of the consignor and consignee were conclusive on the former, and bound him by the conditions contained in the bill, where it appears he had no knowledge of such conditions, and never in fact assented to them.²⁶

Objection after Contract Acted upon.—After a contract purporting to limit the common-law liability of a railroad company in the carriage of freight has been acted upon by both parties, the consignor, in the absence of fraud on the part of the railroad in procuring his signature to the contract, if he had the opportunity to read it, can not avoid it on the ground that he did not read, or hear it read, and signed it under a mistake as to its contents. There is nothing unreasonable in this.²⁷

Objection after Loss.—Where a bill of lading or freight receipt containing lawful restrictions of the carrier's liability is received without dissent, it is too late, after a loss, for the shipper to object that he failed to read the receipt, and did not know that it contained such limitation.²⁸

Receipts Thrust upon Public in Hurry of Travel.—See ante, "Fairness, Fraud or Duress," § 1196.

§ 1207. **Necessity for Signature of Consignor.**—In the absence of a statute requiring it, the shipper's signature to a bill of lading²⁹ or special contract,³⁰ limiting the liability of a common carrier, is not essential to render

25. Bill of lading sent by shipper to agent as authority to receive goods.—*Farnham v. Camden, etc.*, R. Co., 55 Pa. 53.

26. Bill of lading forwarded to consignee.—*Gaines v. Union Transp., etc.*, Co., 28 O. St. 418.

27. Objection after contract acted upon.—*St. Louis, etc.*, R. Co. *v.* *Weakly*, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

28. Objection after loss.—*Louisville, etc.*, R. Co. *v.* *Brownlee (Ky.)*, 14 Bush 590; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475.

Failure of shipper to return bill of lading before burning of freight.—A railroad company is not liable for the burning of freight in its depot at which it was received for shipment, where by the contract inserted in the bills of lading it was stipulated that the company "shall not be liable for loss or damage * * * by fire or other casualty while in transit, or while in depots or landings at points of delivery, etc.," where it appeared that the shipper received and retained the bills of lading until after the freight was destroyed by the burning of the depot, when he might have returned them before the burning. *Louisville, etc.*, R. Co. *v.* *Brownlee (Ky.)*, 14 Bush 590.

Conditions in body of bill of lading printed in small type.—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589. See ante, "Inconspicuous Conditions and Type," § 1171.

29. **Necessity for signature of consignor.**—*Inman & Co. v. Seaboard, etc.*, R. Co., 159 Fed. 960.

Iowa.—Under the law of Iowa, the shipper's assent to limitation of liability embraced in the carrier's bill of lading, though signed only by the carrier, will be presumed by the shipper's acceptance of the bill and acting upon it, in the absence of fraud, imposition, or mistake. *Coats v. Chicago, etc.*, R. Co., 87 N. E. 929, 239 Ill. 154.

30. *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537, 29 So. 602; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Chicago, etc.*, R. Co. *v.* *Montfort*, 60 Ill. 175; *United States Exp. Co. v. Haines*, 67 Ill. 137; *Illinois Match Co. v. Chicago, etc.*, R. Co., 250 Ill. 396, 95 N. E. 492; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

Opportunity of knowing contents.—A bill of lading given by a common carrier on the delivery of goods to it for transportation, limiting its common-law liability, if accepted by the shipper or consignor with knowledge of its contents, or with reasonable opportunity of

the restriction binding on him and the consignor. The acceptance by the consignor of a freight receipt or bill of lading limiting the liability of the carrier implies assent to its terms, thereby creating a contract equally as binding as though signed by both parties.³¹

Signature of Railroad's Agent Only.—A bill of lading signed by the railroad company's receiving agent, and accepted and acquiesced in by the consignor, is binding upon the latter, although not signed by him.³²

Application of Statute as to "Special Contracts."—Bills of lading are not "special contracts" within the meaning of a statute providing that "the obligations of a common carrier * * * may not be limited by special contract," unless they are signed by the consignor or consignee.³³

§ 1208. Effect of Consignor's Signing Bill of Lading.—A shipper who signs a bill of lading, in the absence of fraud or deceit is conclusively presumed to know its contents and to have assented to its terms.³⁴ He can not relieve himself of its terms by reason of ignorance of them, unless there be fraud or misapprehension in the execution of the contract.³⁵

Signing in Haste without Reading.—See ante, "Duty of Shipper to Read Contract," § 1205.

§ 1209. Receipt Prepared by Shipper.—Where a shipper tenders to a common carrier a form of receipt for goods to be carried containing a limita-

acquiring such knowledge, constitutes a special contract, and it is not necessary in order to make the contract binding between the parties, that it should have been signed by the consignor or shipper, or that the carrier should have been notified that its terms were accepted by the shipper or consignor. *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602; *Anchor Line v. Dater*, 68 Ill. 369.

It is the law of Ohio that a bill of lading signed by the carrier's receiving agent and accepted and acquiesced in by the consignor, is binding upon the latter though not signed by him. *Cincinnati, etc., Co. v. Pontius*, 19 O. St. 221, 2 Am. St. Rep. 391; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22; *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481.

The objection that the bill was not signed by both parties is without validity. It is enough that it was signed by the company, and accepted and acquiesced in by the other party, and that there was no fraud, deceit, or mistake accompanying the transaction. *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481; *Cincinnati, etc., R. Co. v. Pontius*, 19 O. St. 221, 2 Am. St. Rep. 391.

31. *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

Receipt—Understandingly assented to.—A clause in the receipt given by the carrier to the shipper for the freight, purporting to limit the liability of the carrier to its own line, if understandingly assented to by the shipper, will as ef-

fectually bind him as if he had signed it. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

Full understanding, and intent to assent.—Where a shipper takes a receipt for his goods from a common carrier, which contains stipulations purporting to limit the liability of the carrier, with a full understanding of such conditions, and intending to assent to them, he is as much bound by such stipulation as if he had signed the contract with full knowledge and assent. *Anchor Line v. Dater*, 68 Ill. 369.

32. Signature of railroad's agent only.—*Cincinnati, etc., R. Co. v. Pontius*, 19 O. St. 221, 2 Am. St. Rep. 391.

33. Application of statute as to "special contracts."—*Hartwell v. Northern Pac. Exp. Co.*, 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342.

34. Effect of consignor's signing bill of lading.—*Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

A shipper, who signs a contract which limits the liability of the company, held bound notwithstanding his allegation that he signed the contract hurriedly, and without examining it, and supposing it was the bill of lading. *Gatton v. United States Exp. Co.*, 32 O. C. C. R. 532.

Assent by a shipper to a stipulation in a bill of lading limiting liability will be presumed from his signature of the stipulation, in the absence of fraud. *Baker v. Atlantic, etc., R. Co.*, 63 S. E. 611, 82 S. C. 146.

35. *Coles v. Illinois, etc., R. Co.*, 41 Ill. App. 607.

tion of liability, and the carrier assents to its terms, the shipper is bound thereby, though the receipt is in the blank form furnished by the carrier.³⁶

§§ 1210-1211. Receipt Referring to Bill of Lading Containing Limitations—§ 1210. Receipt Prepared by Shipper.—In Georgia³⁷ and Ohio,³⁸ a shipper is bound by a shipping receipt prepared by himself and tendered to the carrier reciting that the shipment should be "as per conditions of company's bill of lading."

§ 1211. Receipt Prepared by Carrier.—In South Carolina it is held that where a shipper accepts for freight delivered to a common carrier a receipt providing that the shipment is received subject to the terms and restrictions of the carrier's liability expressed by the carrier's regular bill of lading, he is bound by such terms and conditions,³⁹ but in Indiana⁴⁰ it is held that a stipulation in a shipping contract that goods were to be shipped "as per conditions in company's bill of lading" is not binding on the shipper, where such provision was not read by the shipper, and was inserted in the bill of lading without his knowledge or consent.

§ 1212. Acceptance of Express Receipt.—The acceptance without objection, by a shipper, of an express company's receipt for goods delivered, though it be unread, at the time, constitutes a contract between the parties, and binds the shipper as to restrictions of the company's liability contained in it.⁴¹

36. Receipt prepared by shipper.—*Perlin v. United States Exp. Co.*, 78 N. J. L. 515, 74 Atl. 462, 28 L. R. A., N. S., 645.

Where a shipping receipt, limiting liability to the stated value of the goods, is prepared by the shipper and accepted by the carrier, the shipper is bound thereby. *American Silk Dyeing, etc., Co. v. Fuller's Exp. Co.*, 82 N. J. L. (53 Vr.) 654, 82 Atl. 894.

A shipper by express, who has employed a form of receipt issued by the carrier in shipping goods by express for six years, is chargeable with the knowledge of the contents of receipt, in the absence of any proof that he was not acquainted therewith, especially where a book of blank receipts was in his custody, and he had made entries on the blanks and completely prepared the receipts for signature by the carrier's driver when calling for the goods. *Greenwald v. Barrett*, 92 N. E. 218, 199 N. Y. 170, 35 L. R. A., N. S., 971, affirmed 115 N. Y. S. 311, 130 App. Div. 696.

37. Receipt prepared by shipper.—Where a milling company prepared for itself a blank form of shipping receipt, wherein it was stated that shipments should be "as per condition of the company's bill of lading," and knew that the bill of lading referred to contained provisions for protection of the railroad company, the milling company was bound by a provision in the bill of lading that no carrier should be liable for loss or damage not occurring on its portion of the road, or after the property was ready for delivery to the consignee, though it was without knowledge that that particular provision was in the bill

of lading. *Central, etc., R. Co. v. City Mills Co.*, 58 S. E. 197, 128 Ga. 841.

38. Cincinnati, etc., R. Co. v. Berdan & Co., 12 O. C. D. 481, 22 O. C. C. 326.

Loaded in cars upon shipping receipts prepared by shipper—Opportunity to see regular bill of lading.—A shipper delivered goods to a railroad company in cars loaded and sealed by himself, and for his own convenience, upon shipping receipts prepared by himself, but conditioned that the goods were received "subject to conditions contained in the company's regular bill of lading;" and that he had an opportunity to see the bill of lading. It was held that he was bound by the lawful conditions in such regular bill of lading, whether he knew them or not. *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481.

39. Receipt prepared by carrier.—*Dunbar v. Charleston, etc., R. Co.*, 62 S. C. 414, 40 S. E. 884.

40. Cleveland, etc., R. Co. v. Potts & Co., 33 Ind. App. 564, 71 N. E. 685.

41. Acceptance of express receipt.—*Soumet v. National Exp. Co. (N. Y.)*, 66 Barb. 284.

Where a shipper, upon delivery of property to an express company for transportation, received, without dissent, a receipt, with the understanding that it contained a contract on the part of company as to the transportation, in the absence of fraud or imposition, the company had a right to infer an assent on the shipper's part to stipulations in such receipt, not unusual or unreasonable, restricting the common-law liability of the company. *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475.

§ 1213. Acceptance of Dray Ticket and Checks of Local Carrier.—

The doctrine as to acceptance and acquiescence does not apply to dray tickets or receipts, the same as it does to a bill of lading. The stipulations of such receipts are more in the nature of a notice than of a contract between the parties.⁴² It is held in New York that tokens given by local carriers in exchange for baggage checks are not of such a nature as to put persons on their guard as to memoranda printed upon them, and persons receiving them are not presumed to know their contents or to assent to them.⁴³ The federal courts held that, where a railroad passenger delivered to a local carrier a metallic check, which he had received for his baggage, so that the local carrier might obtain the trunk and deliver it at his residence, and received from such carrier, at the same time, a paper, on which the number of the check was endorsed, and which contained a printed notice, that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for, in writing, on this check receipt, and the extra risk paid therefor," and a statement that the owner thereby agreed that the carrier should be liable only as above stated, the passenger was chargeable with actual notice of the contents of the paper.⁴⁴

§ 1214. Fact of Shipment under Limited Liability Rate.—The fact that a shipper did not pay full charges⁴⁵ or the mere fact that a shipper shipped under a rate prescribed for limited liability, instead of under a greater rate, prescribed for unlimited liability, would not operate as a limitation upon the carrier's common-law liability; nor would the additional fact, in case of an interstate shipment, that the rates in force were on file with the Interstate Commerce Commission and duly posted in the carrier's depots and freight offices, as required by the interstate commerce act, operate as constructive knowledge, sufficient as a basis of a contract limiting liability of the carrier, through an acceptance, by the mere act of shipping the goods under the lesser rate.⁴⁶

§ 1215. Previous Shipments under Limited Liability Contract.—See ante, "Constructive Notice Generally," § 1204.

42. Acceptances of dray ticket and checks of local carriers.—Mack, etc., Co. v. Great Western Despatch, 3 O. C. C. 36, 2 O. C. D. 22.

43. Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; **Madan v. Sherard,** 73 N. Y. 329, 29 Am. Rep. 153; **Prentice v. Decker** (N. Y.), 49 Barb. 21.

The putting into the hands of a passenger, receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement, to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract. **Prentice v. Decker** (N. Y.), 49 Barb. 21.

Car dimly lighted.—The agent of a local transfer company came into a railroad car, in which plaintiff was traveling, and called for baggage, and received the check for plaintiff's trunk with directions as to its delivery, and marked on a blank receipt the date, number of check, and place of delivery, which he handed to plaintiff, without anything being said

as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have read the receipt; and, without looking at it or reading it, he put it into his pocket. The receipt was marked upon its margin "domestic bill of lading," and purported to be a contract exempting defendant from liability in certain specified cases, and limiting its liability, in the absence of a special contract, to \$100. It was held that defendant in order to relieve itself from full liability was bound to establish a contract upon the special terms contained in the receipt and that no such contract was created, as matter of law, from the mere acceptance of the receipt under such circumstances. **Madan v. Sherard,** 73 N. Y. 329, 29 Am. Rep. 153.

44. Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692.

45. Fact of shipment under limited liability rate.—**Pacific Exp. Co. v. Rudman** (Tex. Civ. App.), 145 S. W. 268.

46. Drey, etc., Glass Co. v. Missouri Pac. R. Co., 156 Mo. App. 178, 136 S. W. 757.

§ 1216. Customary Use of Printed Form of Receipt.—A printed form of receipt, generally used by carrier, but not used in the particular case, and not shown to have been known to the employer, does not raise the question of the power of a carrier to restrict his liability by contract.⁴⁷

§ 1217. Failure to Dissent within Reasonable Time.—The assent of a shipper to a stipulation limiting the carrier's liability may be implied from his failure to dissent within a reasonable time.⁴⁸

§ 1218. Proof of Non-Assent.—See post, "Proof of Express Assent Not Required," § 1320.

§ 1219. Question for Jury.—See post, "As to Contracts," § 1324.

§§ 1220-1229. Persons Who May Give Assent—§ 1220. In General.—The shipper's assent, that restrictions contained in a contract of carriage or bill of lading shall bind the shipper, may be given either by himself or his agent.⁴⁹

§ 1221. Possession of Goods.—The rule that mere possession of goods does not enable one to make a contract binding upon the owner applies to contracts with carriers.⁵⁰

§§ 1222-1225. Authority of Consignor to Bind Consignee—§ 1222. In General.—As a general rule, the consignor, as the agent to whom the owner entrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. Having the power to make the delivery, he is to be presumed to have all the power necessary to carry it into effect. In the absence of any knowledge to the contrary, the carrier has the right to assume that the consignor has authority to bind the consignee by entering into a special contract which limits the carrier's common-law liability; for authority to ship the goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability. The consignee can not repudiate a shipping contract made under such circumstances on the ground of absence of authority to contract in the consignor; ⁵¹ aliter in Illinois.⁵²

47. Customary use of printed form of receipt.—*Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256.

48. Assent implied from failure to dissent within reasonable time.—Plaintiff's agents, D. W. & Co., sent merchandise to the defendant, accompanied by the following bill of lading: "Received in good order, of Dinsmore, Wayne & Co., at the depot of the Cincinnati, Hamilton & Dayton and Dayton & Michigan Railroads, the articles marked or numbered as below, which are to be delivered in like good order at Detroit, Michigan, to W. & R. Muller, or assigns, he or they paying freight for the same at the rate of forty-five cents per hundred pounds. Cincinnati, April 23, 1866. Marks: W. & R. Muller, Detroit. Articles: Ten barrels liquor." Defendant's freight agent inserted the words "Toledo for" between the words "at" and "Detroit," and sent it back to the consignees, who did not observe the alteration until after the loss of the property. It was held that this insertion was a rejection, on the part of the railroad company, of the proposition of shipment of D. W. & Co., and the substitution of a

counter proposition to which D. W. & Co. are presumed to have assented by not dissenting within a reasonable time. *Muller v. Cincinnati, etc., R. Co.*, 2 Cin. R. 288, 13 O. Dec. 903.

49. Persons who may give assent.—*Wabash R. Co. v. Curtis*, 134 Ill. App. 409.

50. Possession of goods.—*Bates v. Weir*, 105 N. Y. S. 785, 121 App. Div. 275.

51. Authority of consignor to bind consignee.—*Alabama.*—*Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602.

Indiana.—*Adams Exp. Co. v. Carnhan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

Iowa.—*Robinson Bros. v. Merchants, Despatch Transp. Co.*, 45 Iowa 470.

Michigan.—*Frohlich Glass Co. v. Pennsylvania Co.*, 138 Mich. 116, 101 N. W. 223, 4 Am. & Eng. Ann. Cas. 1140.

New York.—*Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258, 48 How. Prac. 257; *Moriata v. Harnden's Exp. Co. (N. Y.)*, 1 Daly 227, 24 How. Prac. 290.

Texas.—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

52. Illinois rule.—Consignors of goods

§ 1223. Effect of Interstate Commerce Act and Elkins Act.—If the consignor of goods had no express or implied authority to limit the carrier's common-law liability to obtain a lower express rate, contrary to the Interstate Commerce Act and Elkins Act, it can not be said that the contract was made void by such limitation as to the consignee who had no knowledge of such limitation when the shipment was made.⁵³

§ 1224. Instances Where Consignee Bound.—The consignee is bound by consignors executing a bill of lading limiting the carrier's liability, where the vendor is authorized to deliver the freight to the carrier and superintend its shipment;⁵⁴ where the consignee directs a firm to ship certain goods to him;⁵⁵ and by the consignor's selection of an unsuitable car for the transportation of all merchandise, where he is authorized to select cars.⁵⁶ An agent of a nonresident firm who bought cotton for the firm and shipped it to his principal would be presumed to have authority to make any kind of a lawful freight contract upon shipment of such cotton.⁵⁷

can not be held to be impliedly authorized to limit the carrier's liability for goods shipped by express to an amount less than the full value of the goods. *Nonotuck Silk Co. v. Adams Exp. Co.*, 99 N. E. 893, 256 Ill. 66, affirming judgment 166 Ill. App. 519; *S. C.*, 99 N. E. 897, 256 Ill. 76, affirming judgment 166 Ill. App. 525.

Burden of proof of authority.—Where the carrier seeks to bind the consignee by the act of the consignor, it must show that the consignor had authority to bind the consignee by such restriction. *Plaff v. Pacific Exp. Co.*, 95 N. E. 1089, 251 Ill. 243.

53. Effect of interstate commerce act and Elkins act.—*Nonotuck Silk Co. v. Adams Exp. Co.*, 99 N. E. 893, 256 Ill. 66, affirming judgment 166 Ill. App. 519; *S. C.*, 99 N. E. 897, 256 Ill. 76, affirming judgment 166 Ill. App. 525.

54. Vendor of lumber authorized to deliver to carrier and superintend shipment—Effect of consignee's mere acceptance of carrier's offer made by letter.—In *Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678, it is held that when the agreement for the carriage of lumber on the great lakes is in the form of a letter addressed by a common carrier to the consignee of the freight, merely offering to carry lumber from the part of shipment to that of delivery during the season of navigation, at certain prices per thousand feet, and is silent as to all the conditions of the contract of shipment or charter party, with a simple acceptance of the offer, signed by the consignee, and the vendor of the lumber has been authorized by the consignee to deliver it to the carrier and superintend the shipment, the carrier may treat the vendor as having authority to bind the consignee by the usual contract of affreightment or bill of lading, and if, on shipping a cargo, the vendor and carrier execute a bill of lading in the usual form, exempting the carrier from liability for

loss through perils of the sea, the consignee will be bound thereby.

55. Firm directed to ship certain goods to plaintiff.—In *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 253, 48 How. Prac. 257, it appeared that plaintiff directed C. & Co. to ship to him at J. certain goods by defendant's line. The goods were marked with plaintiff's address, delivered at defendant's depot, and receipts taken in a book kept for that purpose by C. & Co. No special contract for carriage was made at the time. After shipment of the packages, C. & Co., who had been large shippers by defendant's line, in accordance with an habitual course of dealing between them, sent the receipts to defendant's office and received bills of lading, the giving of which was entered upon the receipts. The bills of lading limited defendant's liability to its own line, which terminated at C. It was held that the bills of lading being taken by C. & Co. in the exercise of their original authority to contract, displaced the common-law relation between the parties and controlled their rights.

56. Consignee bound by consignor's selection of car.—Where the consignor is authorized to select cars for transportation of merchandise, and selects a car, which had been delivered to him loaded with sand, for the shipment of a consignment of glass to plaintiff, and damage resulted by reason of the unsuitableness of the car. The carrier is not liable to the consignee for negligently furnishing an unsuitable car, since, as against the railroad company, the consignee was bound by the consignor's selection under such agreement. *Frohlich Glass Co. v. Pennsylvania Co.*, 138 Mich. 116, 101 N. W. 223, 4 Am. & Eng. Ann. Cas. 1140.

57. Missouri Pac. R. Co. v. International Marine Ins. Co., 84 Tex. 149, 19 S. W. 459, citing *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

§ 1225. Instances Where Consignee Not Bound.—A person merely employed to construct and superintend the shipment of glass cases is not the shipper and can not bind the owner.⁵⁸

Bill of Lading Delivered to Shipper in New York—Transportation to Owner in Wisconsin—Loss by Lake Navigation Excepted.—Where the condition that the owner of goods assumed the risk of loss by lake navigation, and damage from unavoidable or accidental delay, was contained in a bill of lading delivered to the shipper in New York, but the owner of the goods lived in Wisconsin, and there was no proof that he ever assented to or had any knowledge of such condition, the court declined to say that there was a special contract between the parties, by which the owner agreed to take any risk which the law would otherwise impose upon the carrier.⁵⁹

Effect of Knowledge of Merchants of Whom Goods Were Purchased.—The fact that the merchants of whom the goods were purchased knew of a clause in the receipt given by the carrier for them purporting to limit its liability, will not have such effect, without proof of authority from the owner of the freight to make such a contract with the carrier, and, in the absence of evidence, it will be presumed that the persons shipping had only authority to ship the goods with all the liabilities of the carrier attaching, without exceptions of any description.⁶⁰

§ 1226. Agent of Consignor.—As a general rule, the consignor is bound by the act of the person whom he authorizes to take goods to a depot and deliver them to the carrier in accepting a freight receipt or bill of lading purporting to restrict the carrier's common-law liability,⁶¹ although the carrier knew who was the owner of the freight.⁶² Such agent is at least regarded as having authority to stipulate for the ordinary terms of transportation.⁶³ The power

58. Person employed to construct and superintend shipment of glass cases.

An individual residing in Philadelphia, Pa., was employed by a firm in Memphis, Tenn., to construct glass cases, and to superintend their shipment. It was held that this did not make him in a legal sense the shipper; and that he could not bind the owner of such freight by any contract he might enter into of so important a character as would exempt the vessel from the usual responsibilities of a common carrier. *Merriman v. May Queen*, Newb. 464, Fed. Cas. No. 9481.

59. Bill of lading delivered to shipper in New York—Transportation to owner in Wisconsin—Loss by lake navigation excepted.—*Falvey v. Northern Transp. Co.*, 15 Wis. 129, 141.

60. Effect of knowledge of merchants of whom goods were purchased—Presumption of lack of authority.—*Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152.

61. Agent of consignor.—*United States v. Van Schaack v. Northern Transp. Co.*, 3 Biss. 394, Fed. Cas. No. 16,876.

Indiana.—*Adams Exp. Co. v. Carnaham*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

Massachusetts.—*Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836.

Missouri.—*Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 487.

New Jersey.—*Russell v. Erie R. Co.*, 70 N. J. L. 808, 67 L. R. A. 433, 15 R. R. R. 699, 39 Am. & Eng. R. Cas., N. S., 699, 59 Atl. 150.

New York.—*Meyer v. Harnden's Exp. Co. (N. Y.)*, 24 How. Prac. 290, 1 Daly 227; *Moriata v. Harden's Exp. Co. (N. Y.)*, 1 Daly 227, 24 How. Prac. 290; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Soumet v. National Exp. Co. (N. Y.)*, 66 Barb. 284.

Texas.—*St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346.

62. Jennings v. Grand Trunk R. Co., 5 N. Y. S. 140, 23 N. Y. St. Rep. 15, 52 Hun 227, affirmed in 127 N. Y. 438, 28 N. E. 394.

63. Plaintiff, a guest at a hotel, gave a bell boy a package addressed to plaintiff in another city, instructing the boy to "take this to Adams Express." The boy did as directed, neglected to value the package, and received an express receipt containing a stipulation limiting the carrier's liability on unvalued packages to \$50. Held, that the boy was plaintiff's agent, and, being authorized to deliver the package for shipment, was authorized to bind plaintiff by his acceptance of such limited liability contract, under the rule that an agent to whom the owner intrusts goods for delivery to a carrier

of an agent of the owner of goods to bind the latter by a contract to restrict the liability of the carrier to whom the goods are delivered by the agent for transportation will be presumed.⁶⁴

Duty of Carrier to Examine Authority of Person Delivering Goods.—A common carrier receiving goods for transportation is not required by law to examine the authority of the person delivering them to make a contract limiting its liability.⁶⁵

Instances Where Authority of Agent Sufficient.—An agent with whom the owner left goods to be shipped;⁶⁶ an agent employed by the owner to attend to the cars and transportation;⁶⁷ a vendor directed by the vendee to ship by express;⁶⁸ or the clerk of a firm directed by the owner of certain goods to ship them by express;⁶⁹ has power to bind the owner by an agreement limiting the carrier's common-law liability.

Bill of Lading Prepared by Agent of Shippers—Excepting Loss by Exposure to Rain and Mud—Knowledge of Weather Conditions.—Where the shippers or their agents were present at the taking of their cotton on board of the boat, and knew, from the rain storm then prevailing, that the cotton must necessarily be exposed to the rain and mud, they could not recover from the owners of the boat, the amount of damages resulting from such exposure, where the agent of the shippers accepted the bill of lading, prepared by himself, containing the clause: "The boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud."⁷⁰

Bill of Lading Given to Agent Who Was Unable to Read Acted upon by Shipper.—Where a shipper accepted and acted on a paper given to his agent as a bill of lading, which contained a provision limiting the carrier's liability in case of loss, he can not deny that such was the contract, on the ground that his agent was unable to read.⁷¹

§§ 1227-1228. Person Only Authorized to Deliver to Carrier—

§ 1227. In General.—Notice by a common carrier of a restriction of its common-law liability, given to a person who was simply directed by the owner to deliver the goods to the carrier, is not sufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter,⁷² as, for instance, where goods are left in charge of a workman of a manufacturer by the purchaser to be delivered to a carrier.⁷³

must be regarded as having authority to stipulate for the ordinary terms of transportation. *Addoms v. Weir*, 108 N. Y. S. 146, 56 Misc. Rep. 487.

64. *Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 487.

65. **Duty of carrier to examine authority of person delivering goods.**—*Moriata v. Harden's Exp. Co.* (N. Y.), 1 Daly 227, 24 How. Prac. 290.

66. **Instances where authority of agent sufficient.**—*Jennings v. Grand Trunk R. Co.*, 5 N. Y. S. 140, 23 N. Y. St. Rep. 15, 52 Hun 227, affirmed in 127 N. Y. 438, 28 N. E. 394.

67. *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836.

68. **Vendor directed to ship by express.**—In *Moriata v. Harden's Exp. Co.* (N. Y.), 1 Daly 227, 24 How. Prac. 290.

69. **Firm directed by owner to send by express—Firm's clerk as owner's agent.**—*Soumet v. National Exp. Co.* (N. Y.), 66 Barb. 284.

70. **Bill of lading prepared by agent of shippers—Excepting loss by exposure to rain and mud—Knowledge of weather conditions.**—*Newman & Co. v. Smoker*, 25 La. Ann. 303.

71. **Bill of lading given to agent who was unable to read acted upon by shipper.**—*Missouri, etc., R. Co. v. Patrick*, 75 C. C. A. 434, 20 R. R. R. 483, 43 Am. & Eng. R. Cas. N. S., 438, 144 Fed. 632.

72. **Person only authorized to deliver to carrier.**—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 93 Am. Dec. 68.

73. **Goods left in charge of workman of manufacturers, by purchaser, for delivery to carrier—Former dealings.**—But in *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 93 Am. Dec. 68, it appeared that A. & B., copartners, purchased goods at a factory, left them in charge of a workman of the manufacturers to be delivered there to C., a common carrier, but they gave no authority to the workman to

§ 1228. Cartmen or Truckmen.—Receipt Delivered to Truckman of Shipper.—A receipt delivered to the truckman of a shipper by the carrier upon the receipt of goods, containing conditions with respect to the transportation thereof, if the only written evidence of the contract of shipment, is binding on consignee, although the shipper was ignorant of its terms.⁷⁴

Goods Sent to Depot by Cartmen, Accompanied by Complete Shipping Order.—Where the owner of goods held in storage directed the storage company to send them to him by railroad, and an officer of the storage company sent the box containing the goods by a cartman to the railroad station, accompanied by a complete shipping order, the agent of the railroad company had no right to assume that the cartman had the authority to alter or modify the terms of the shipping order.⁷⁵

§ 1229. Initial Carrier.—See post, "Connecting Carriers," Part V.

§§ 1230-1232. Time of Agreement—§ 1230. In General.—In order that a shipping contract purporting the limit of the common-law liability of a common carrier may bind the shipper, it must have been made before or at the time of the shipment of the goods.⁷⁶

§§ 1231-1232. Issuance of Bill of Lading or Receipt after Shipment—§ 1231. In General.—A completed contract, containing all the terms under which the shipment was undertaken, can not be affected by a subsequent bill of lading purporting to limit, or limit to a greater extent, the liability of the carrier.⁷⁷

make a special contract with C. for their carriage; that C. there received them and gave the workman a receipt for them which purported to limit the carrier's liability; that it had been the daily practice of C., for several weeks previous, to receive package at the factory from the manufacturers and give similar receipts therefor; that it was the bookkeeper of the manufacturers that had charge of such receipts; and that C., at these visits to the factory, had as often as twice a week received packages from A. & B., for which one quarter of the time he had given similar receipts, not giving receipts at all the rest of the time. It was held that these facts did not show that A. & B. assented to any limitation of the carrier's liability with respect to the package delivered by the workman.

74. Receipt delivered to truckman of shipper.—*Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

75. Goods sent to depot by cartman, accompanied by complete shipping order.—*Russell v. Erie R. Co.*, 15 R. R. R. 699, 39 Am. & Eng. R. Cas., N. S., 699, 59 Atl. 150, 70 N. J. L. 808, 67 L. R. A. 433.

76. Time of agreement.—*Alabama*.—*Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

Georgia.—*Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

Illinois.—*American Exp. Co. v. Spellman*, 90 Ill. 455; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Wabash R. Co. v. Lannum*, 71 Ill. App. 84.

Indiana.—*Cleveland, etc., R. Co. v.*

Potts & Co., 33 Ind. App. 564, 71 N. E. 685.

Iowa.—*German v. Chicago, etc., R. Co.*, 38 Iowa 127.

Massachusetts.—*Perry v. Thompson*, 98 Mass. 249.

Minnesota.—*Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 442, 619.

Nebraska.—*Union Pac. R. Co. v. Marston*, 30 Neb. 241, 46 N. W. 485.

New York.—*Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Lamb v. Camden, etc., Transp. Co. (N. Y.)*, 2 Daly 454; *Ryer v. Pennsylvania R. Co.*, 26 Misc. Rep. 715, 56 N. Y. S. 1083; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105.

Ohio.—*Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *Welsh v. Pittsburg, etc., R. Co.*, 10 O. St. 65, 75 Am. Dec. 490.

Texas.—*Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073.

77. Issuance of bill of lading or receipt after shipment.—*United States*.—*Farmers', etc., Trust Co. v. Northern Pac. Co.*, 57 C. C. A. 533, 120 Fed. 873.

Alabama.—*Southern R. Co. v. Levy*, 144 Ala. 614, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50, 39 So. 95.

Georgia.—*Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

Illinois.—*Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Cleveland,*

In Illinois.—Although a common carrier, when receiving goods for transportation issues a bill of lading therefor, containing conditions purporting to restrict its common-law liability, the shipper may show by parol that there was a controlling prior verbal agreement under which the goods were shipped, and which did not provide for the restrictions upon the carrier's liability contained in the bill of lading.⁷⁸

Merger of Parol in Subsequent Written Contract.—The mere acceptance of a bill of lading does not affect or alter a prior contract, under which the freight has been actually shipped, and is in course of transit, unless the shipper actually consents to the change.⁷⁹ Where freight is shipped under a verbal agreement for its transportation, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading by its terms purported to limit the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped.⁸⁰

Failure to Read—Absence of Fraud—Reduced Rate.—Where shortly after a car left the station under an oral agreement for transportation over defendant's railroad, nothing being said as to the rate of freight to be charged, plaintiffs, without any fraud or concealment on the part of defendant, signed a shipping contract, without reading it, which limited defendant's common-law liability as a common carrier, the reduction of the freight charges was a sufficient consideration for signing the special contract; all contemporaneous agreements were merged in the written contract, and defendant's liability as a common carrier was thereby limited to the terms thereof.⁸¹

etc., *R. Co. v. Wilson*, 99 Ill. App. 367; *Fortier v. Pennsylvania Co.*, 18 Ill. App. 260; *St. Louis, etc., R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619, 13 Am. & Eng. R. Cas., N. S., 112; *American Exp. Co. v. Spellman*, 90 Ill. 455; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

Indiana.—*Cleveland, etc., R. Co. v. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685. *Iowa.*—*German v. Chicago, etc., R. Co.*, 38 Iowa 127.

Michigan.—*Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415.

In the absence of statutory regulation, where no receipt is given by the carrier at the time of shipment, it can not limit its liability by afterwards delivering to the shipper a receipt containing a limited liability clause, if the shipper had no knowledge that the carrier claimed any such limitations at the time of shipment. *Farnsworth v. National Exp. Co.*, 166 Mich. 676, 132 N. W. 441.

Ohio.—*American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490.

Oregon.—*Seller v. Pacific, Deady* 17, 1 Ore. 409, Fed. Cas. No. 12,644.

South Carolina.—*Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

Tennessee.—*Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164.

After shipment has commenced.—The common-law liability of a carrier is not affected by the issuing and delivery to the shipper of a bill of lading limiting the carrier's liability after the shipment has commenced. *Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164.

Texas.—*Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023; *Gulf, etc., R. Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715.

Virginia.—*Wilson v. Chesapeake, etc., R. Co.*, 62 Va. (21 Gratt.) 654.

78. *Baker v. Michigan, etc., R. Co.*, 42 Ill. 73.

79. **Merger of parol in subsequent written contract.**—*Farmers', etc., Trust Co. v. Northern Pac. Co.*, 57 C. C. A. 533, 120 Fed. 873; *The Arctic Bird*, 109 Fed. 167; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

80. *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712.

81. **Failure to read—Absence of fraud—Reduced rate.**—*Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89.

Failure of Shipper to Point Out Errors in Bill of Lading.—Where freight has been actually shipped under a parol contract, the subsequent receipt by the shipper of a bill of lading and his neglect to point out errors therein does not preclude him from showing the oral contract.⁸²

Initial Carrier's Bill of Lading Not Received by Shipper Contemporaneously with Delivery of Goods to Carrier.—Where a shipper of goods over the lines of connecting carriers does not receive a bill of lading from the initial carrier limiting its common-law liability contemporaneously with the delivery of the goods to such carrier, the carrier assumes a common-law liability.⁸³

Express Receipt.—Where no receipt is given at the time a package is delivered to an express company for carriage, the company can not restrict its liability by a receipt subsequently given, where the proof negatives all presumption of any knowledge on the part of the shipper that the receipt contained a clause purporting to limit the carrier's liability, or that the carrier claimed any such limitation.⁸⁴

Receipt Given to Shipper's Drayman after Receipt of Package.—Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship, containing the words, "not accountable for contents," this, of itself, does not constitute such an agreement, it being a mere ex parte proposition on the part of the carrier, after the receipt of the package, and, to exempt the carrier, there must be direct or unequivocal evidence of the assent of the shipper.⁸⁵

Folded Receipt Accepted without Knowledge of Contents after Car Loaded under Verbal Contract.—Where there is a verbal shipping contract, under which the shipper accepts and loads the car, it can not be varied or modified, so as to restrict the carrier's liability, by a receipt for the goods which the carrier's agent thereafter delivers to the shipper folded up and which the shipper, without knowledge of its contents, puts in his pocket.⁸⁶

Fraud or Coercion—Misleading Conduct of Carrier.—Where a shipper after the delivery of a shipment to a common carrier under a verbal contract for transportation is induced by the fraud or coercion⁸⁷ of the carrier's agent, or other misleading conduct,⁸⁸ to accept a bill of lading containing liability

82. Failure of shipper to point out errors in bill of lading.—*Guillaume v. General Transatlantic Co.*, 100 N. Y. 491, 3 N. E. 489.

83. Initial carrier's bill of lading not received by shipper contemporaneously with delivery of goods to carrier.—*Southern R. Co. v. Levy*, 144 Ala. 614, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50, 39 So. 95.

84. Express receipt.—*American Exp. Co. v. Spellman*, 90 Ill. 455.

85. Receipt given by shipper's drayman after receipt of package.—*Seller v. Pacific*, 1 Ore. 409, Deady 17, Fed. Cas. No. 12,644.

86. Folded receipt accepted without knowledge of contents after car loaded under verbal contract.—*Stoner v. Chicago*, etc., R. Co., 109 Iowa 551, 80 N. W. 569.

87. Contract signed after train had started with cattle—Coercion and impatience of trainmen constituting fraud.—Where in a shipment of stock no written contract was entered into between the shipper and the carrier until after the stock had been started toward their destination, and that subsequently the shipper and his men were called into the de-

pot at a way station, late at night, and there told to hurriedly sign for transportation; and he was compelled to sign papers which he did not have time to read, owing to the coercion and impatience of the trainmen, such conduct constituted fraud in securing the signature of the shipper to a written contract of shipment. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

88. Paper handed to shipper several hours after shipment—Misleading conduct of carrier's agent.—M. applied to an agent of the Rock Island & Peoria R. Co., at one of its stations in the state of Illinois to ship certain office furniture, including a stove, to Kearney on the line of the Union P. R. Co. in Nebraska. The agent informed M. that the custom was for shippers to release stoves, but advised him not to do it for certain reasons, but to pay the additional expense of sending it at carrier's risk. To this M. assented, and offered to pay the freight to such agent, who informed him that he could as well pay it at the end of the route. Four or five hours after the agent had shipped the goods, he handed M. a paper, saying that it was a receipt for

clauses, limiting its common-law liability, the verbal contract is not thereby modified but is controlling.

Provision Stamped upon Face of Contract after Delivery to Carrier.

—In order to relieve a common carrier from its common-law liability and from liability according to the terms of the contract offered by plaintiff, by virtue of a provision stamped upon the face of the contract after the goods have been received by the carrier, and the contract of shipment signed by its agent, it is necessary that it should appear that the shipper assented to such provision.⁸⁹

Bill of Lading Sent to Shipper after Delivery of Freight to Railroad.

—Where a shipper after contracting for transportation delivered the shipment to the carrier and afterwards a bill of lading was sent to him, the liability of the carrier was not limited by liability clauses in such bill.⁹⁰

Bill of Lading Mailed to Consignor after Shipment of Goods.—If the consignor, contemporaneously with the delivery of the goods to the carrier, receives a bill of lading limiting the liability of the carrier to losses accruing on his own route, “possibly he would be conclusively presumed to have read it, and to have acquiesced in it;” but this principle does not apply, where it is shown that the carrier, receiving the freight for the entire route, made out a bill of lading, which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was subsequently forwarded to him by mail at the place of destination.⁹¹

Failure to Object, Where Bill of Lading Delivered Several Days after Shipment, as Waiver of Oral Contract.—A failure to object to restrictions of the carrier’s liability contained in a bill of lading, delivered several days after the freight had been shipped, can not, in view of the doctrine prevailing in New York, be held to be a waiver of an oral contract of shipment wherein different terms were agreed upon.⁹²

Bill of Lading Received without Examination and Sent to and Used by Consignee.—Where the plaintiff’s evidence tended to show that the goods were shipped under a previous verbal agreement without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of it to receive and sell the goods not lost, and accounted to the shipper for the proceeds, it was error to charge the jury that such acts of the consignee and consignor were conclusive on the latter, and bound him by the conditions contained in the

the goods shipped. This paper M. put in his pocket without examining it, and which proved to be a bill of lading of the goods, containing, inter alia, the condition, “stoves at owner’s risk of breakage.” It was held that, as between M. and the Rock Island & Peoria R. Co., the stove was carried at carrier’s risk. *Union Pac. R. Co. v. Marston*, 30 Neb. 241, 46 N. W. 485.

89. Provision stamped upon face of contract after delivery to carrier.—*American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490.

90. Limiting liability to own line.—A shipper contracted with a railroad company to ship two hundred bales of cotton from Atlanta, Ga., to Chicopee, Mass., over a certain route, at a stated price; and delivered the cotton to the railroad, and afterwards a bill of lading was sent to the shipper. It was held that liability of the railroad company was that of a

common carrier to transport the cotton from the initial point to its destination; and it could not limit its liability by inserting in the bill of lading a provision that, for all loss or damage occurring in the transit, the legal remedy should be sought and held only against the particular carrier in whose custody the cotton might be at the time thereof; there being no express contract to that effect, the bill of lading being signed only by the agent of the company, and not having been agreed to by the shipper. *Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

91. Bill of lading mailed to consignor after shipment of goods.—*Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

92. Failure to object where bill of lading delivered several days after shipment—As waiver of oral contract.—*Merchants’ Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

bill of lading, where it appeared that he had no knowledge of such conditions, and never in fact assented to them.⁹³

Negotiation of Bill of Lading.—The fact that a shipper, after receiving a bill of lading, negotiates or hypothecates it, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul or modify a prior valid contract under which the freight was shipped, and under which rights have vested and obligations accrued.⁹⁴

Contract Made by Prospective Consignee—Bill of Lading Given to Consignor.—Where a contract for carriage is made by a prospective consignee with the carrier's agent in one place, and his consignor, in another place, pursuant to the consignee's instructions, ships the goods at such place, the bill of lading given by the carrier to the consignor at the latter place does not constitute the contract between the carrier and consignee; the rule that oral negotiations are merged in the written instrument having no application.⁹⁵

Bill Signed by Shipper's Agent without Authority.—The term of a bill of lading signed by the shipper's agent without express authority will not prevail against a previous verbal contract for through transportation.⁹⁶

Verbal Contract Made by Shipper—Bill of Lading Handed to Shipper's Clerk.—The terms of a bill of lading purporting to restrict the carrier's liability, handed by the carrier to the shipper's clerk, and never brought to the shipper's attention, will not prevail as against a verbal contract of shipment previously made by the shipper with the carrier's authorized agent.⁹⁷

§ 1232. **Issuance after Loss.**—A stipulation in a bill of lading or shipping receipt purporting to limit the carrier's liability, issued after the goods have been lost, does not effect the shipper's rights;⁹⁸ although the receipt was issued

93. Bill of lading received without examination and sent to and used by consignee.—*Gaines v. Union Transp., etc., Co.*, 28 O. St. 418.

94. Negotiation of bill of lading.—*Farmers', etc., Trust Co. v. Northern Pac. R. Co.*, 120 Fed. 873, 57 C. C. A. 533; *Northern Pac. R. Co. v. American Trading Co.*, 195 U. S. 439, 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744, 25 S. Ct. 84.

Subsequent bill of lading received without objection, and hypothecated—Acceptance by clerk without authority.—A special agreement in behalf of railway receivers to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder terminates, upon the delivery of the property to the vessel, where the bill of lading was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made. *Northern Pac. R. Co. v. American Trading Co.*, 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84, 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744.

95. Contract made by prospective consignee—Bill of lading given to consignor.—*Lowenstein v. Lombard, etc., Co.*, 164 N. Y. 324, 58 N. E. 44.

96. Bill signed by shipper's agent without authority.—*Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394.

97. Verbal contract made by shipper—Bill of lading merely handed to shipper's clerk.—*Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415.

98. Issuance after loss.—*Illinois*.—*Cleveland, etc., R. Co. v. Wilson*, 99 Ill. App. 367.

A railroad company cannot escape from its liability as a common carrier by issuing a bill of lading in the form of a track or warehouse receipt after the destruction of the consignment. *Cleveland, etc., R. Co. v. Wilson*, 99 Ill. App. 367.

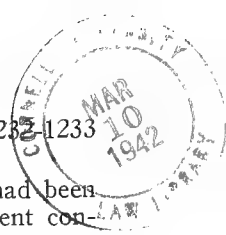
Iowa.—*Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 272, 29 Am. Rep. 479.

Michigan.—*Detroit, etc., Co. v. Adams*, 15 Mich. 458.

New York.—*Park v. Preston*, 108 N. Y. 434, 15 N. E. 705; *Lamb v. Camden, etc., Transp. Co.* (N. Y.), 2 Daly 454.

Oregon.—*McGregor v. Oregon R., etc., Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

Instances.—Defendant received from plaintiff's consignor at New York a package marked "Iowa City," giving at the time a shipping receipt entitling the consignor to a bill of lading. Some days after it issued the bill of lading, purport-



at the shipper's request.⁹⁹ Nor are they affected by the fact that he had been recently their freight agent, and the receipts given by him as such agent contained the same stipulation.¹ Where the published tariff provides two rates, one with the carrier's ordinary liability, and the other a lesser rate, by reason of liability being limited, and the shipper makes no selection of rate, it is proper for the carrier to elect which rate shall apply, but a bill of lading showing the limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed in due course of business, before a loss occurs, and the carrier can not wait until after the goods have been destroyed, and then choose to make a low rate, with a limited liability, apply to the shipment.²

Bill Prepared by Shipper but Not Signed by Carrier's Agent.—Where cotton had been delivered to a railroad company and accepted for shipment, that the bills of lading, which were prepared by the shipper and presented to the company's agent for signing, but had not been signed before the cotton was destroyed by fire, exempted the company from liability for loss by fire, would not prevent a recovery of the value of the cotton, as the company's liability did not depend upon the undelivered bill of lading, but upon acceptance of the cotton for transportation.³

§§ 1233-1234. Subsequent Written Agreement Contemplated by Parties—§ 1233. In General.—The rule that, where a railroad company has accepted goods subject to its ordinary liability, such liability can not be lessened

ing to carry the package to Chicago only, knowing that the consignment had been destroyed in transitu at Chicago. It was held that the carrier was liable at common law, notwithstanding a restriction in the bill of lading. *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 272, 29 Am. Rep. 479.

Where, after loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability. *McGregor v. Oregon R., etc., Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

Portion of freight lost before shipment of balance or signing of contract.—A portion of a certain quantity of freight was delivered to the appellant railroad by the owner, and received by their agent for transportation, with understanding that the balance should be sent to their depot as soon as they should give notice that they had cars for its transportation. The company having notified the owner, the balance of the freight was delivered to and accepted by it, and the owner then signed a shipping request furnished to him, to the effect that said company would forward all of such freight, according to certain special conditions endorsed thereon, and purporting to limit the carrier's liability. Suit being brought for the value of a portion of the freight, which was lost before the balance was shipped, it was held that the notice came too late to affect the question of a prior delivery to and acceptance by the rail-

road as a common carrier, and that at the time of the receipt of the notice, plaintiff had a right to consider it as intended to refer only to the liability of the company in respect to the carriage of the property. *Detroit, etc., Co. v. Adams*, 15 Mich. 458.

Loss by fire—Receipt given after shipment—Notice of exemption after loss.—In *Lamb v. Camden, etc., Transp. Co.* (N. Y.), 2 Daly 454, it appeared that plaintiffs agreed with defendant, a common carrier, for the carriage of certain bales of cotton at a specified freight rate; that, at the time the agreement was made, no bills of lading or shipper's receipts were given by the carrier, but after the goods had been shipped receipts were sent to the shippers, containing a clause exempting the carrier from liability for loss by fire; but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. It was held that such exemption clause was of no effect, and defendant was liable for the loss.

Bill of lading mailed after loss of vessel—Prior contract acted upon—Letter and delivery order.—*Park v. Preston*, 108 N. Y. 434, 15 N. E. 705.

99. *Gott v. Dinsmore*, 111 Mass. 45.

1. **Shipper carrier's former freight agent.**—*Gott v. Dinsmore*, 111 Mass. 45.

2. Judgment, 93 Pac. 908, modified on rehearing. *Harris v. Great Northern R. Co.*, 48 Wash. 437, 96 Pac. 224.

3. **Bill prepared by shipper but not signed by carrier's agent.**—*Texas Mid. Railroad v. Edwards & Co.*, 121 S. W. 570, 56 Tex. Civ. App. 643.

by a subsequent agreement does not apply, where the parties contemplated the making of a written contract defining their obligations.⁴

§ 1234. Knowledge of Rule Requiring Written Contract.—Where the shipper knows of the restriction on the authority of the agent, he is in no position to contend that he, in good faith to the carrier, made the oral contract of shipment. He either must have contemplated shipping under the required written contract, or he must have contemplated a fraud on the carrier by procuring their shipment through a contract with the agent contrary to what he knew was required of the agent.⁵ The theory upon which these written contracts are held not to bind the shipper as against a preceding oral contract of shipment is that the agent had ostensible authority to make the oral contract. Such theory, however, is without force when the shipper knows what is required of the agent by the company, as plaintiff admits was his knowledge at the time he claims to have loaded the shipment on appellant's cars.⁶ Where in signing a written contract of shipment, which limited the liability of the carrier to damages occurring on its own line, the shipper merely carried out an agreement which was implied when he made a previous oral negotiation with the carrier's agent, the signing was but the consummation of such negotiation or oral contract, and the shipper was not in a position to avoid the binding force of the written contract, which took away none of the rights he would have had in the absence of any contract, oral or written.⁷

4. Subsequent written agreements contemplated by parties.—*Union Pac. R. Co. v. Beardwell*, 79 Kan. 40, 99 Pac. 214.

5. Knowledge of rule requiring written contract.—*Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *San Antonio, etc., R. Co. v. Williams* (Tex. Civ. App.), 57 S. W. 883.

Where plaintiff had been engaged in shipping freight over other lines for years, and had been executing limited liability contracts therefor, they were bound by the legal provisions of a similar contract entered into with defendants for the shipment in question. *Texas, etc., R. Co. v. Byers Bros.* (Tex. Civ. App.), 84 S. W. 1087.

In action against a carrier for damages under oral contract of shipment, where defendants plead written contract and plaintiff's agent claims that written contract was signed without being read, stipulations limiting the liability of the carrier are binding when the shipper knew, from previous dealings, contents of written contract to be signed. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 293, 58 S. W. 846.

6. Texas Mex. R. Co. v. Gallagher (Tex. Civ. App.), 70 S. W. 97.

Where, in an action for damages to freight shipped on defendant's railway, plaintiff alleged that the shipment was under an oral contract with defendant's agent, and that the written contract afterwards signed by him, limiting defendant's liability to its own line, was executed under circumstances constituting duress, but it appeared that at the time of the alleged oral contract he had knowledge of a rule of defendant requiring all

its shipments to be made under written contract; he was not entitled to recover on the oral contract. *Texas Mex. R. Co. v. Gallagher* (Tex. Civ. App.), 70 S. W. 97.

7. Chicago, etc., R. Co. v. Halsell, 36 Tex. Civ. App. 522, 81 S. W. 1243. The case is not to be distinguished from that of *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

After the loading of a shipment one of the shippers, knowing a written contract would be required, went to the office and signed one without reading it, and without knowing that it contained a clause limiting the company's liability to damages occurring on its own road. The shippers took a copy of the contract with them, did not ask for time to read it before signing, and it did not appear that had they done so the train would not have been held for such purpose. Held, that their failure to read the contract was their own fault, and not chargeable to duress. *Houston, etc., R. Co. v. Smith*, 97 S. W. 836, 44 Tex. Civ. App. 299.

The evidence shows that the shipment was made on the written contract and that the contract is not without consideration, but a valid contract and it being admitted that the shipment was not damaged as a result of injuries occurring on the Houston & Texas Central Railroad, the judgment must be reversed and here rendered for appellant. *Houston, etc., R. Co. v. Smith*, 44 Tex. Civ. App. 299, 303, 97 S. W. 836, citing, in support of these conclusions, *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 58 S. W. 846; *Chicago, etc., R. Co. v. Hal-*

§§ 1235-1242. Notice or Advertisements—§§ 1235-1236. General Notice or Advertisements—§ 1235. In General.—It is well settled that a common carrier of goods can not exempt itself from liability as an insurer by a general notice or advertisement to the public of its intention not to undertake in the future to transport freight except under contracts restricting its liability in a specified manner or degree,⁸ whether such notice is known or unknown to the party engaging the services of the common carrier.⁹ Aliter in Pennsylvania.¹⁰ If any implication is to be indulged from the delivery of the

sell, 36 Tex. Civ. App. 522, 81 S. W. 1243; Texas Mex. R. Co. v. Gallagher (Tex. Civ. App.), 70 S. W. 97; and San Antonio, etc., R. Co. v. Williams (Tex. Civ. App.), 57 S. W. 883.

8. General notice or advertisement.—*United States.*—New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Railroad Co. v. Manufacturing Co. (U. S.), 16 Wall. 318, 328, 21 L. Ed. 297; York Co. v. Central Railroad (U. S.), 3 Wall. 107, 18 L. Ed. 170; Merriman v. May Queen, Newb. 464, Fed. Cas. No. 9,481; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrarty 48; Inman & Co. v. Seaboard, etc., R. Co., 159 Fed. 960.

Connecticut.—Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Peck v. Weeks, 34 Conn. 145; Derwort v. Loomer, 21 Conn. 245.

Georgia.—Central, etc., R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673, 18 Am. & Eng. R. Cas., N. S., 640; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Georgia R. Co. v. Gann, 68 Ga. 350; Rome R. Co. v. Sullivan, etc., Co., 14 Ga. 277; Southern Exp. Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53.

In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it so held that a common carrier can not vary his responsibility by notice of special acceptance, such being void as contravening the policy of the law.

Under Georgia Act of April 18, 1863.—Georgia act of April 18, 1863, defining the liability of common carriers in certain cases was enacted to meet a certain state of things specified in its preamble, and its provisions will not be extended beyond its terms. The notice required in such statute to define the carrier's liability is public notice. The statute has expired by its own limitation. *Purcell v. Southern Exp. Co.*, 34 Ga. 315.

Illinois.—Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Louisiana.—Baldwin v. Collins (La.), 9 Rob. 468.

Maine.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Maryland.—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

Massachusetts.—Gott v. Dinsmore, 111

Mass. 45; Judson v. Western R. Corp. (Mass.), 6 Allen 486, 83 Am. Dec. 646.

Michigan.—McMillan v. Michigan, etc., Railroad, 16 Mich. 79, 93 Am. Dec. 208.

Mississippi.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725.

New Hampshire.—Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Cole v. Goodwin (N. Y.), 19 Wend. 251, 32 Am. Dec. 470; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Slocum v. Fairchild (N. Y.), 7 Hill 292; Camden, etc., Transp. Co. v. Burke (N. Y.), 13 Wend. 611, 28 Am. Dec. 488; Hollister v. Nowlen (N. Y.), 19 Wend. 234, 32 Am. Dec. 455, a case of liability for passenger's baggage.

Ohio.—Davidson v. Graham, 2 O. St. 131.

Oregon.—McGregor v. Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

Texas.—Ryan v. M., K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Vermont.—Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

West Virginia.—Brown v. Adams Exp. Co., 15 W. Va. 812.

Express contract necessary.—Mere notice by a carrier to a shipper is insufficient to limit the carrier's liability, an express stipulation being necessary for that purpose. *McGregor v. Oregon R., etc., Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

5. Davidson v. Graham, 2 O. St. 131 (qualifying and explaining *Jones v. Voorhees*, 10 O. 145); *Cleveland, etc., R. Co. v. La Tourette*, 2 O. C. C. 279, 1 O. C. D. 486; *United States Exp. Co. v. Bachman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22. See post, "Notice Brought to Attention of Shipper," § 1236.

A common carrier can not limit its common-law responsibility by any general notice, though knowledge of such general notice may be brought home to the consignor before or at the time he applied to have his goods transported. *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

10. Verner v. Sweitzer, 32 Pa. 208.

goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.¹¹

Notice That Freight at Carrier's Risk.—Public notice given by a common carrier, that he will not be responsible for freight, or that it is at the owner's risk, will not vary the carrier's liability.¹²

Particular Liabilities.—The common-law liability of a carrier for accidental loss¹³ or liability for failure to deliver at point of destination beyond its own line,¹⁴ can not be restricted by mere notice.

Duties Designed to Insure Fair Dealings.—A common carrier may, by notice alone, discharge itself from those duties designed merely to insure good faith and fair dealing.¹⁵

Manner of Delivery—Contents of Parcels—Rates.—A common carrier may restrict its liability by a general notice to the public, of any reasonable requisition to be observed, as to the manner of delivery, entry of parcels, information of contents, rates of freight and the like.¹⁶

§ 1236. **Notice Brought to Attention of Shipper.**—The mere fact that a general notice seeking to limit the common-law liability of a common carrier was brought home to the shipper before or at the time he applied to have his goods transported is ineffectual for that purpose,¹⁷ unless there is very clear proof that he expressly assented to such restriction, as forming the basis of the contract.¹⁸ A general notice by a carrier to the public purporting to limit its

11. *New Jersey Steam Nav. Co. v. Merchants' Bank* (U. S.), 6 How. 344, 12 L. Ed. 465; *Railroad Co. v. Manufacturing Co.* (U. S.), 16 Wall. 318, 328, 21 L. Ed. 297.

12. **Notice that freight at owner's risk.**—*Derwort v. Loomer*, 21 Conn. 245.

13. **Accidental loss.**—*Moses v. Boston, etc.*, Railroad, 24 N. H. 71, 55 Am. Dec. 222.

14. **Duty to carrier to deliver beyond its own line.**—The common-law duty of a carrier receiving goods for transportation beyond its own line, to deliver at the point of final destination, can not be restricted by mere notice. *Chicago, etc.*, R. Co. v. *Simon*, 160 Ill. 648, 43 N. E. 596.

15. **Duties designed to insure fair dealings.**—*Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

16. **Manner of delivery—Contents of parcels — Rates.**—*Merriman v. May Queen*, Newb. 464, Fed. Cas. No. 9481.

17. **General notice brought to attention of shipper.**—*Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

United States.—*Baltimore, etc.*, R. Co. v. *Doyle*, 74 C. C. A. 245, 142 Fed. 669.

Alabama.—*Louisville, etc.*, R. Co. v. *Meyer*, 78 Ala. 597, 27 Am. & Eng. L. Cas. 44.

Connecticut.—*Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

Illinois.—*Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Maine.—*Gerry v. American Exp. Co.*, 100 Me. 519, 62 Atl. 498, 21 R. R. R. 677, 44 Am. & Eng. R. Cas., N. S., 677.

Massachusetts.—*Gott v. Dinsmore*, 111 Mass. 45.

Michigan.—*McMillan v. Michigan, etc.*, Railroad, 16 Mich. 79, 93 Am. Dec. 208.

Mississippi.—*Mobile, etc.*, R. Co. v. *Weiner*, 49 Miss. 725.

New Hampshire.—*Moses v. Boston, etc.*, R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—*Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Dorr v. New York Steam Nav. Co.*, 9 N. Y. Super. Ct. Rep. 136.

Vermont.—*Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Kimball v. Rutland, etc.*, R. Co., 26 Vt. 247, 62 Am. Dec. 567.

West Virginia.—*Brown v. Adams Exp. Co.*, 15 W. Va. 812.

Express assent essential.—The common-law liability of a common carrier can not be limited by notice, even when it is brought home to the knowledge of the shipper, it being necessary to prove the express assent of the shipper to the limitation. *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

18. A common carrier may limit its responsibility for property intrusted to it by notice containing reasonable and suitable restrictions, if they are brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him, if it also appears that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties. *Gerry v. American Exp. Co.*, 100 Me. 519, 62 Atl. 498, 21 R. R. R. 677, 44 Am. & Eng. R. Cas., N. S., 677; *Farmers', etc.*, Bank v. *Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

obligations as a common carrier affords no evidence of a special contract restricting such obligations, even if the existence and contents of the notice were brought home to the shipper.¹⁹

Notice That Goods at Risk of Owners While in Carrier's Storehouses.

—Where the defendants, who were common carriers, had printed upon their bills of freight tariff and their receipts, a notice "that all goods and merchandise will be at the risk of the owners while in the storehouses or warehouse of the company," in the absence of proof that the owners of goods delivered to defendants for carriage assented to such notice as limiting defendants' duties and obligations as common carriers in respect to such goods, such notice would have no effect to prevent the defendants from being liable for a loss of the goods, if the facts in other respects were such as to make them liable, though the owners had knowledge of such notice when the goods were delivered to the defendants.²¹

Effect of Knowledge of Initial Carrier.—A common carrier can not, by a general notice, exonerate itself entirely from its legal duty and liability for property which is delivered to it for carriage, or fix the amount beyond which it will not be held responsible, in case of injury or loss, although such property is delivered to it by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over its own line, and then, as agent of the consignee, to send it forward by a carrier.²²

§ 1237. **Special Notice to Owner of Goods.**—A common carrier may, by special notice to the owner of goods, restrict its liability as an insurer.²³ Thus, an express agreement between a carrier and a shipper is not necessary to exempt the carrier from liability for delay in delivery, due to congested conditions of traffic if the shipper was notified of such conditions when the shipment was tendered.²⁴

§ 1238. **Form and Sufficiency of Notice.—Publication of Notice.**—A common carrier can not limit its liability as an insurer of the goods by notice of publication.²⁵

Newspaper Publication of Notice.—The mere publication of a notice in one or more newspapers, no matter for how long a time, of an intention not to be responsible for particular articles unless their contents and value be disclosed, is not enough to release the carrier from responsibility, it being necessary to bring the notice home to the shipper.²⁶

19. *Blumenthal v. Brainerd*, 38 Vt. 402, 31 Am. Dec. 349.

21. **Notice that goods at risk of owner's while in carrier's storehouses.**—*Moses v. Boston, etc., Railroad*, 24 N. H. 71, 55 Am. Dec. 222; *Blumenthal v. Brainerd*, 38 Vt. 402, 31 Am. Dec. 349.

A railroad gave public notice, which it offered to bring home to the knowledge of plaintiff, that all goods would be at the owner's risk in the company's warehouses, and that no responsibility would be admitted for any loss or injury except such as might result from fire from a locomotive, or from negligence of the agents of the railroad. Plaintiff's goods were delivered at the warehouse, with instructions to be forwarded presently, and were consumed in the warehouse by an accidental fire, not caused by a locomotive. It was held that defendant was liable for the value of the goods as a common carrier, notwithstanding the notice. *Moses v. Boston, etc., Railroad*, 24 N. H. 71, 55 Am. Dec. 222.

22. **Effect of knowledge of initial carrier.**—*Judson v. Western R. Corp.* (Mass.), 16 Allen 486, 83 Am. Dec. 646.

23. **Special notice to owner of goods.**—*Kime v. Southern R. Co.*, 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

24. *Missouri, etc., R. Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410, modifying judgment (Tex. Civ. App.), 120 S. W. 1146.

25. **Publication of notice.**—*Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 741, 110 Am. St. Rep. 170, 4 L. R. A., N. S., 898, 4 Am. & Eng. Ann. Cas. 128; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Georgia Railroad v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75; *Central R. Co. v. Bryant*, 73 Ga. 722; *Central, etc., R. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197.

26. **Newspaper publication of notice.**—*Baldwin v. Collins* (La.), 9 Rob. 468.

A notice, purporting to limit the com-

Hand Bills.—A notice purporting to limit the common-law liability of a common carrier by hand bills forms no part of the shipping contract, and need not be noticed in the declaration in an action against the carrier for loss or injury to the freight.²⁷

Carrier's Circulars—Valuation of Freight.—A statement on the carrier's circular, "insurance free when valuation declared before the sailing of the steamers," is not notice to a prospective shipper that an agent appointed by the carrier to make contracts for transportation has authority to insure only when the value of the shipment is so declared; since the announcement therein is not to be considered as the measure of the agent's authority in the absence of an express statement to that effect, but only as a general rule promulgated by the agent, which does not restrict him from departing from it in a special case.²⁸

General Notice Printed on Bill of Lading.—A mere notice of limitation upon a railway company's liability, printed on the bill of lading, will not bind the owner of the goods shipped, although brought to his knowledge.²⁹

Notice Displayed in Carrier's Office.—A mere notice of limitation upon a railway company's liability, displayed in the company's office, will not bind the owner of the goods shipped, although brought to his knowledge.³⁰

Pamphlet Hanging in Railroad Office.—A pamphlet hanging in a railroad company's office, containing rules and rates with respect to freight, is not of itself constructive notice of its contents to a shipper of freight.³¹

Sufficiency of Notice under Pennsylvania Rule.—A general notice of limitation of a common carrier's liability must be such as to amount to actual notice, or shown to have been so conspicuous that the party sought to be affected by it could not have failed to have discovered it without gross negligence.³²

§ 1239. **Reasonableness of Regulations.**—General notice of a reasonable regulation of the carrier, such as one declaring that the true value of goods must be disclosed when they are tendered for shipment or the amount of the carrier's liability will be limited to their apparent value, will bind the shipper, whether his attention is called to it or not.³³

§§ 1240-1241. **Assent of Shipper**—§ 1240. **In General.**—A common carrier can not restrict its common-law responsibility in any particular by a gen-

mon-law liability of a common carrier, printed in the newspapers, forms no part of the shipping contract, and is ineffectual for the purpose intended. *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

27. **Hand bills.**—*Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

28. **Carrier's circulars—Valuation of freight.**—*Lowenstein v. Lombard, etc.*, Co., 164 N. Y. 324, 58 N. E. 44.

29. **General notice printed on bill of lading.**—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

Limitation contained in printed table of tariff of special rates.—The fact that transportation charges were paid in accordance with a tariff of special rates, under which, by the printed table, the carrier assumed no responsibility for loss or damage or delay, is not sufficient to exempt the railroad from liability for such losses; it is necessary to show that the shipper had notice or actual knowledge of those terms at the time, or before the delivery of the shipment by him to the railroad, and that they were as-

sented to by him. *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

30. **Notice displayed in carrier's office.**—*Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

31. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 55 Am. & Eng. R. Cas. 380, 15 L. R. A. 534.

32. **Sufficiency of notice under Pennsylvania rule.**—*Verner v. Sweitzer*, 32 Pa. 208.

33. **Reasonableness of regulation.**—*United States*.—*Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6,692; *New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.)*, 6 How. 344, 12 L. Ed. 465. *Alabama*.—*Southern Exp. Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

Connecticut.—*Lawrence v. New York, etc., R. Co.*, 36 Conn. 63.

Kansas.—*Kallman v. United States Exp. Co.*, 3 Kan. 205.

Maine.—*Gerry v. American Exp. Co.*, 100 Me. 519, 62 Atl. 498, 21 R. R. 677, 44 Am. & Eng. R. Cas., N. S., 677.

Maryland.—*Brehme v. Dinsmore*, 25 Md. 328.

Massachusetts.—*Judson v. Western R.*

eral notice, unless such notice is brought to the knowledge of the shipper and he expressly or impliedly assents to such limitation, but where such notice is brought home to the owner of the goods, before or at the time of delivery of them, and is expressly or impliedly assented to by him, the carrier may reasonably restrict its liability. This doctrine prevails in the federal courts,³⁴ and in most of the states among, which are, Alabama,³⁵ Connecticut,³⁶ Georgia,³⁷ Illinois,³⁸ Indiana,³⁹ Louisiana,⁴⁰ Maine,⁴¹ Maryland,⁴² Massachusetts,⁴³ Michigan,⁴⁴ Mississippi,⁴⁵ Nebraska,⁴⁶ New Hampshire,⁴⁷ New Jersey,⁴⁸ New York,⁴⁹ Ohio,⁵⁰

Corp. (Mass.), 6 Allen 486, 83 Am. Dec. 646.

Michigan.—McMillan v. Michigan, etc., Railroad, 16 Mich. 79, 93 Am. Dec. 208.

Missouri.—Ketchum v. American, etc., Union Exp. Co., 52 Mo. 390; Snider v. Adams Exp. Co., 63 Mo. 376.

New Hampshire.—Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—Fibel v. Livingston (N. Y.), 64 Barb. 179.

Vermont.—Farmers', etc., Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

Wisconsin.—Boorman v. American Exp. Co., 21 Wis. 152.

34. Ayres v. Western R. Corp. (U. S.), 14 Blatchf. 9; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; New York, etc., R. Co. v. Sayles, 32 C. C. A. 485, 87 Fed. 444; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary, 48; Seller v. Pacific (U. S.), Deady 17, 1 Ore. 409, Fed. Cas. No. 12,644; Baltimore, etc., R. Co. v. Doyle, 74 C. C. A. 245, 142 Fed. 669.

35. Mobile, etc., R. Co. v. Jarboe, 41 Ala. 644; Southern Exp. Co. v. Armistead, 50 Ala. 350; Southern Exp. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

General notices in relation to the liabilities of common carriers, are of no effect unless reduced to the form of a special stipulation, and signed by the party sending the goods, or be so brought home to his knowledge as to show his assent thereto, and be also just and reasonable. Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140. See post, "Reasonableness," §§ 1293, 1480.

36. Derwort v. Loomer, 21 Conn. 245; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Peck v. Weeks, 34 Conn. 145.

37. Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Georgia R. Co. v. Gann, 68 Ga. 350; Rome R. Co. v. Sullivan, etc., Co., 14 Ga. 277.

38. Chicago, etc., Ry. Co. v. Harmon, 12 Ill. App. 54; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Oppenheimer & Co., v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596;

Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

39. Evansville, etc., R. Co. v. Young, 28 Ind. 516; Indianapolis, etc., R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640.

40. Baldwin v. Collins (La.), 9 Rob. 468; Logan v. Pontchartrain R. Co. (La.), 11 Rob. 24, 43 Am. Dec. 199; New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

41. Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

42. Baltimore, etc., R. Co. v. Brady, 32 Md. 333; Barney v. Prentiss (Md.), 4 Harr. & J. 317, 7 Am. Dec. 670.

43. Gott v. Dinsmore, 111 Mass. 45; Judson v. Western R. Corp. (Mass.), 6 Allen 486, 83 Am. Dec. 646.

44. American Transp. Co. v. Moore, 5 Mich. 368; McMillan v. Michigan, etc., Railroad, 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. v. Hale, 6 Mich. 243.

45. Mobile, etc., R. Co. v. Weiner, 49 Miss. 725.

46. Atchison, etc., R. Co. v. Miller, 16 Neb. 661, 18 Am. & Eng. R. Cas. 545, 21 N. W. 451.

47. Bennett v. Dutton, 10 N. H. 481; Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

The common-law liability of common carriers can not be limited by a mere notice brought home to the knowledge of the shipper. Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

48. Gibbons v. Wade, 8 N. J. L. 255.

49. Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Camden, etc., R. Co. v. Belknap (N. Y.), 21 Wend. 354; Cole v. Goodwin (N. Y.), 19 Wend. 251, 32 Am. Dec. 470; Fibel v. Livingston (N. Y.), 64 Barb. 179; Hollister v. Nowlen (N. Y.), 19 Wend. 234, 32 Am. Dec. 455; Knell v. United States, etc., Steamship Co., 33 N. Y. Super. Ct. 423; Limburger v. Wescott (N. Y.), 49 Barb. 283; Prentice v. Decker (N. Y.), 49 Barb. 21; Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Slocum v. Fairchild (N. Y.), 7 Hill 292; Sunderland v. Wescott, 40 How. Prac. 468, 32 N. Y. Super. Ct. 260; St. John v. Van Santvoord, 25 Wend. 660.

50. Davidson v. Graham, 2 O. St. 131; Gaines v. Union Transp., etc., Co., 28 O.

South Carolina,⁵¹ Tennessee,⁵² Texas,⁵³ Vermont,⁵⁴ West Virginia,⁵⁵ and others. The assent of the shipper to the limitation must be proved by evidence aliunde⁵⁶ and is not to be inferred or implied from a general notice to the public.⁵⁷ It can not be presumed from the terms of the receipt alone, or be implied from the posting of notices, or the delivery of a notice to the consignor,⁵⁸ nor is it to depend upon doubtful or conflicting evidence, but it should be specific and certain, leaving no room for controversy between the parties.⁵⁹

§ 1241. Express Assent Not Essential.—Some authorities hold that where a general notice is reasonable, and brought to the shipper's attention so as to charge him with knowledge of its purport, his express assent to the condition purporting to limit the carrier's liability is not necessary in order to render it binding.⁶⁰ Such notice enters the shipping contract, so far as the carrier has the right to impose such terms, either by express or implied contract. Such notice if not inconsistent with the express contract will be considered in construing it.⁶¹ Though in Pennsylvania a common carrier may limit his responsibility by a general notice, yet the terms of the notice must be clear and explicit, and the person with whom the carrier deals must be fully informed of the terms and effect of the notice.⁶² Proof of general notice of limitation of a carrier's common-law liability must be such as amounts to actual notice, or shown to have been so conspicuous that the party sought to be affected by it could not have failed to discover it without gross negligence, the affirmative of which is upon the carrier. Emblazoning the general object on a check, ticket or notice, in large letters, but stating the restriction in small ones, is insufficient.⁶³

Distinction between Notices Merely Designed to Insure Fair Dealing and Others.—There is a distinction between the effect of those notices by a carrier by which it is sought to relieve from duties which the law has annexed to his employment, and those designed simply to insure good faith and fair dealing on the part of the consignor. In the former, notice without assent to the attempted restrictions, is ineffectual, while in the latter actual notice alone will

St. 418; *Jones v. Voorhees*, 10 O. 145; *Union Mut. Ins. Co. v. Indianapolis, etc.*, R. Co., 1 Disn. 480, 12 O. Dec. Reprint 745.

51. *Levy v. Southern Exp. Co.*, 4 S. C. 234; *Patton v. Magrath* (S. C.), Dud. L. 159, 31 Am. Dec. 552.

52. *Walker v. Skipwith*, 19 Tenn. (1 Meigs) 502, 33 Am. Dec. 161.

53. *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

54. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68; *Kimball v. Rutland, etc.*, R. Co., 26 Vt. 247, 62 Am. Dec. 567; *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; *Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. 728.

55. *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

56. *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

57. *Merriman v. May Queen, Newb.* 464, Fed. Cas. No. 9,481.

58. *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

59. *Merriman v. May Queen, Newb.* 464, Fed. Cas. No. 9,481.

60. **Express assent not essential.**—*Illinois.*—*Field v. Chicago, etc.*, R. Co., 71 Ill. 458.

Kentucky.—*Ornduff & Co. v. Adams Exp. Co.* (Ky.), 3 Bush 194, 96 Am. Dec. 207.

Louisiana.—*Baldwin v. Collins* (La.), 9 Rob. 468.

Maine.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, etc.*, R. Co., 31 Me. 223, 50 Am. Dec. 659.

New York.—*Cole v. Goodwin* (N. Y.), 19 Wend. 251, 32 Am. Dec. 470.

North Carolina.—*Smith v. North Carolina R. Co.*, 64 N. C. 235.

Tennessee.—*Louisville, etc.*, R. Co. v. Sowell, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

Vermont.—*Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349.

Virginia.—*Virginia, etc.*, R. Co. v. Sayers, 6 Va. (26 Gratt.) 328.

61. **Considered in construing express contract.**—*Ornduff & Co. v. Adams Exp. Co.* (Ky.), 3 Bush 194, 96 Am. Dec. 207.

62. *Camden, etc.*, R. Co. v. Baldauf, 16 Pa. 67, 55 Am. Dec. 481.

63. *Verner v. Sweitzer*, 32 Pa. 208; *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602.

be sufficient.⁶⁴

§ 1242. Notice to Agent of Shipper.—Notice to Agent Must Be in Same Transaction.—Even if a certain notice could limit the defendant common carrier's liability, knowledge of it in other transactions by an agent of the owners of the freight, in the transaction in question, would not affect the principals, as a notice to an agent, in order to bind the principal, must be in the same transaction.⁶⁵

§ 1243. Custom and Usage.—Custom and usage can not limit the common-law liability of a common carrier,⁶⁶ but usage is a fact which may be resorted to to show that a contract limiting a common carrier's liability is to be implied.⁶⁷ A custom can not require that the shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters and fixes liability upon failure to perform duties and obligations of carriers, and when so fixed a custom can not extinguish it or require the injured party to limit it by agreement.⁶⁸

Effect of Shipper's Knowledge.—Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from its common-law liability with respect to a particular shipment made by such shipper without an express contract.⁶⁹ In New York it is held that a shipper is not affected by a custom of a carrier to restrict its common-law liability, of which he had no knowledge.⁷⁰

64. Distinction between notices merely designed to insure fair dealing and others.—*Oppenheimer & Co. v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596.

65. Notice to agent must be in same transaction.—*Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349.

66. Custom and usage.—*Trice v. Miller*, 3 Texas App. Civ. Cas., § 440; *Texas Exp. Co. v. Dupree*, 2 Texas App. Civ. Cas., § 318.

67. *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468.

68. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

69 Effect of shipper's knowledge.—*United States*—*The Reeside*, Fed. Cas. No. 11,657, 2 Sumn. 567.

Iowa.—*McMillan v. American Exp. Co.*, 123 Iowa 236, 10 R. R. R. 453, 33 Am. & Eng. R. Cas., N. S., 453, 98 N. W. 629.

Michigan.—*McMillan v. Michigan, etc., Railroad*, 16 Mich. 79, 93 Am. Dec. 208.

Ohio.—*Pittsburg, etc., R. Co. v. Barrett*, 36 O. St. 448, 3 Am. & Eng. R. Cas. 256.

Tennessee.—*Turney v. Wilson*, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515.

Evidence of custom to vary common bill of lading.—Evidence was not admissible to vary the common bill of lading, by the terms of which the freight was to be delivered in good order and condition, the danger of the seas only excepted, by

establishing the existence of a custom that the owners of packet vessels between New York and Boston should be liable only for damage to goods occasioned by their own neglect. *The Reeside*, Fed. Cas. No. 11,657, 2 Sumn. 567.

Effect of local custom of merchants.—Evidence of the custom of merchants of a particular place is inadmissible to contradict, or in any way limit or affect, the carrier's liability under a written contract of the parties, as contained in the bill of lading. *Turney v. Wilson*, 15 Tenn. (7 Yerg.), 340, 27 Am. Dec. 515.

70. *Little v. Fargo*, 43 Hun 233, 5 N. Y. St. Rep. 462.

Loss caused by mob.—The defendant carrier claimed that its undertaking, as a common carrier, was qualified by a special agreement by which the plaintiff assumed all risk of injury by delivery and loss that might be occasioned by mob, riot or insurrection, and sought to support this claim by proving the method and course adopted by the company in carrying on its business, which was that the receipts from the railway company for goods delivered at the freight depot to be carried by defendant, were presented by the consignor to the agent of the defendant company, and bills of lading taken from it expressing the contract and limiting the liability of the defendant. It was held that as there was no evidence given which would warrant the conclusion that plaintiff had knowledge of such custom, defendant's liability was not affected by it. *Little v. Fargo*, 43 Hun 233, 5 N. Y. St. Rep. 462.

Invalid Custom.—If the law imposes a duty upon a common carrier neglect of which would give the shipper right to damages, a custom refusing or limiting such damages, or a custom that they should be expressly relinquished, would be invalid.⁷¹

Previous Knowledge of Owner of Conditions in Bills or Receipts Usually Given.—A carrier who fails to give a receipt, or to make any other contract for the shipment of property, will not be absolved from liability for its destruction by evidence that the owner or his agent previously knew of conditions in the shipping bills or receipts usually given, which would discharge the carrier from liability for the loss sustained,⁷² but the shipper's knowledge of the fact that a stipulation limiting the carrier's liability is usually contained in a bill of lading or freight receipt will charge the shipper with notice that it is also contained in the bill of lading or receipt which he has accepted from the carrier.⁷³

Custom as to Mode of Shipping Money.—Where an express company received a valise for shipment, knowing that the contents were valued at \$500, and contracted to deliver it at a certain place, its liability, as a common carrier, attached, under the contract, and could not be limited by a custom of express companies to ship money only through the money department, or even by special contract.⁷⁴

Usage as to Delivery of Goods.—The duties and liabilities of a common carrier, in regard to the delivery of goods intrusted to him, may be modified by the particular usage of the carrier; and if he rely upon and prove such usage, as a defense in an action brought against him by the consignor of goods, it is not necessary that he should prove that the consignor had knowledge of such usage.⁷⁵

General Custom of Port to Unload upon Wharf.—A general custom of a port, that "after the vessel arrives at the port and goes to a wharf designated by the consignee, and due notice has been given to the consignee, and the cargo is taken off and distributed upon the wharf according to the marks and numbers, the care of the goods devolves then upon the consignee," is valid.⁷⁶

71. **Invalid custom.**—Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

72. **Previous knowledge of owner of conditions in bills or receipts usually given.**—London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 68 Hun 598, 23 N. Y. S. 231, 52 N. Y. St. Rep. 581.

The sending of goods under a special contract limiting the carrier's liability in any number of instances will not bind the party sending them to similar terms in the future, without an express agreement. *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Goods deposited by express company on railroad depot platform—"Owner's risk" inserted in receipt without shipper's knowledge.—An express company in depositing goods on the platform of a railroad depot at their destination, without delivering them to the consignees, or placing them in the custody of any person, is guilty of gross negligence, and is liable as a common carrier for their loss although the express company's agent, to whom they were tendered by the consignor's messenger for shipment, at first declined to receive

them, because the company had no agent at the place of destination, and was not allowed to use the depot of the railroad company, and although the shipping agent, in signing the receipt, added the words "owner's risk," but without the knowledge or consent of the consignor, and although the consignee, when he ordered the goods to be forwarded by the express company, knew that the company had no agent at the place of destination, and he had lately received goods forwarded by it under receipts containing the same added words. *Southern Exp. Co. v. Armstead*, 50 Ala. 350.

73. *Ghormley v. Dinsmore*, 53 N. Y. Super. Ct. 36 and in *Rubens v. Ludgate Hill Steamship Co.*, 65 Hun 625, 20 N. Y. S. 481, 48 N. Y. St. Rep. 732.

74. **Custom as to mode of shipping money.**—*Texas Exp. Co. v. Dupree*, 2 Texas App. Civ. Cas., § 318.

75. **Usage as to delivery of goods.**—*Farmers', etc., Bank v. Champlain Transp. Co.*, 18 Vt. 131.

76. **General custom of port to unload upon wharf.**—*Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081.

§ 1244. Ratification of Contract of Another Carrier.—Goods Consigned to Person Having Special Contract with Carrier.—One who ships his own goods consigned to a person who has a special contract with the carrier for the carriage of goods at reduced rates at the owner's risk, and afterwards accounts with his consignee for the freight charges paid by the latter on the goods at reduced rates, will not be held to have ratified the contract, as one for the carriage of such goods at his risk, unless it appears that he had notice of such contract.⁷⁷

§ 1245. Instructions to Carrier's Agent.—The liability of a common carrier can not be limited by secret instructions given to his general agent.⁷⁸

Regulations of Stage Line and Instructions to Agents.—When a stage proprietor has habitually carried in his coaches persons and baggage or packages, the regulations of his line and instructions to his agents not to receive goods for transportation, except as the baggage of passengers or in the care of passengers, except at the risk of the owner or of the person sending them, will not restrict his liability for goods received by his agents, unless the owner of the goods or his agent was notified of the rule or instructions at the time of the receipt of the goods.⁸⁰

Effect of Knowledge of Postmaster, to Whom Trunk Was Delivered for Delivery to Stage Driver.—Notices posted by the proprietor of a stage line "that he would not be accountable for any baggage, unless the fare was paid, and the same was entered on the way bill," did not prevent him from being liable for the loss of a trunk through negligence, though the fare was not paid, knowledge of the notice not having been brought home to the owner of the trunk or his servant who carried it to the stage office. Knowledge of such notice by the postmaster, to whom the trunk was delivered by the plaintiff's servant, to be delivered to the stage driver, would not affect the owner of the trunk, such knowledge, not having been communicated to him by the postmaster, or to his servant.⁸¹

Arrangement between Carrier and Employee as to Payment of Employee.—Any arrangement made between a carrier and its servant, by which the employee is to be paid for the carriage of particular parcels, will not exempt the carrier from liability for the loss of them, unless such arrangement is known to the owner of the parcels, so that he contracts with the servant exclusively.⁸²

§ 1246. Arrangement between Express and Railroad Companies.—Public policy demands that the right of the owners of freight to absolute security against the negligence of the carrier, and of all persons engaged in performing its duty, shall not be taken away by any arrangement between it and the performing carrier; as, for instance, an arrangement between a railroad and an express company for whose use the railroad company sets apart a car.⁸³

§ 1247. Depositing Freight in Warehouse at End of Route.—In the absence of an express contract, or one fairly inferable from the nature of the

77. Goods consigned to person having special contract with carrier.—*White v. Goodrich Transp. Co.*, 46 Wis. 493, 1 N. W. 75.

78. Instructions to carrier's agent.—*Craig v. Childress*, 7 Tenn. (Peck) 270, 14 Am. Dec. 751; *Walker v. Skipwith*, 19 Tenn. 1 (Meigs) 502, 33 Am. Dec. 161, cited in *White v. Vann*, 25 Tenn. (6 Humph.) 70, 73, 44 Am. Dec. 294.

80. Regulations of stage line and instructions to agents.—*Walker v. Skip-*

with, 19 Tenn. (1 Meigs) 502, 33 Am. Dec. 161.

81. Effect of knowledge of postmaster, to whom trunk was delivered for delivery to stage driver.—*Bean v. Green*, 12 Me. 422.

82. Arrangement between carrier and employer as to payment of employee.—*Mayall v. Boston, etc., Railroad*, 19 N. H. 122, 49 Am. Dec. 149.

83. Arrangement between express and railroad companies.—*Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872.

business, the known necessities under which it is carried on, and the established usage upon the subject, a railway company can not shift its responsibility as a common carrier to that of a warehouseman by depositing the goods in the warehouse at the end of the route.⁸⁴

§§ 1248-1278. Construction, Operation and Effect—§ 1248. Construction Question for Court.—Where the restriction of the carrier's liability is contained in a contract signed by the shipper, the contract is to be construed by the court.⁸⁵

§§ 1249-1252. Rules of Construction and Application Thereof—§ 1249. Construed against Carrier.—Stipulations for exemption from liability are to be construed strictly against the carrier and in favor of the shipper, in every doubtful case, and not liberally in its favor.⁸⁶ Cases not in terms

84. Depositing freight in warehouse and end of route.—Feige v. Michigan, etc., R. Co., 62 Mich. 1, 28 N. W. 685.

85. Question for court.—Coles v. Louisville, etc., R. Co., 41 Ill. App. 607.

An instruction that unless the consignor assented and knowingly intended to assent to the limitations of the carrier's liability in the shipping contract, the carrier would not be relieved from its common-law liability; and that the jury were to determine whether the consignor understood the terms of the shipping receipt, is erroneous, for although this may be the rule where the consignee merely took a receipt containing such limitations, yet where a contract is executed and signed by the shipper, and there is no reason why it should not be held valid, it is not a question to be left to the jury to determine whether or not the consignor understood its terms. Chicago, etc., R. Co. v. Hale, 2 Ill. App. 150.

86. United States.—Menzell v. Chicago, etc., R. Co., Fed. Cas. No. 9,429, 1 Dill. 531.

Construed against carrier.—As a general rule, restrictions upon the liability of a common carrier, inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed. Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278; Compania, etc., La Flecha v. Brauer, 168 U. S. 104, 118, 42 L. Ed. 398, 18 S. Ct. 12.

Alabama.—Contracts creating special limitation on the liability of the carrier for his own defaults are to be strictly construed against the carrier. St. Louis, etc., R. Co. v. Cavender, 170 Ala. 601, 54 So. 54.

California.—Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

Agreements limiting a carrier's liability are strictly construed against the carrier, even when valid. Estes v. Denver, etc., R. Co., 49 Colo. 378, 113 Pac. 1005.

Indiana.—Adams Exp. Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E.

647, 94 Am. St. Rep. 279; Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121, 21 Am. & Eng. R. Cas. 87, 2 N. E. 344, 53 Am. Rep. 500; St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302.

Missouri.—Kellerman & Co. v. Kansas City, etc., R. Co., 68 Mo. App. 255; Standard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

New Hampshire.—Barter & Co. v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.—Edsall v. Camden, etc., Transp. Co., 50 N. Y. 661; judgment, Carleton v. New York, etc., R. Co., 117 N. Y. S. 1021, 64 Misc. Rep. 51, affirmed in Carleton v. Union Transfer, etc., Co., 121 N. Y. S. 997, 137 App. Div. 225; Galloway v. Erie R. Co., 102 N. Y. S. 25, 116 App. Div. 777.

South Carolina.—Gilliland v. Southern R. Co., 85 S. C. 26, 67 S. E. 20.

Tennessee.—Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.—The rule that, if a written contract, when viewed as a whole and in the light of the attendant circumstances, reasonably admits of two constructions, that one is to be adopted which is least favorable to the party whose language it is, has been applied to no class of cases with more stringency than to those in which common carriers seek to limit their liability as it exists at common law. In general not only are the bills of lading drawn by the carrier and tendered to the shipper to be accepted by him without alteration, but they are also executed upon forms prepared for the purpose of protecting the interest of the carrier, with all the care and ability which experience in the business and professional skill can bring to bear upon the subject. The rule does not require that a strained construction should be put upon the contract of shipment, in order to favor the shipper; but rather, that in case of a reasonable doubt as to which of two constructions best accords with the intent of the parties, that should prevail which is least favorable

included by the exemption should be excluded from its operation.⁸⁷ But they ought not to be wholly frittered away by an adherence to the letter of the contract in obvious disregard of its intent and spirit.⁸⁸ In other words such restriction or limitation will not be carried further than the obvious meaning of the words import.⁸⁹ This rule applies to limitations of the common-law liability of a common carrier, for its benefit, inserted in a receipt drawn up by it and signed by the carrier alone,⁹⁰ to bill of lading exemptions of a carrier from its common-law liability,⁹¹ and to all other special agreements purporting to limit such carrier's liability.⁹²

Ambiguous contracts, by which a common carrier seeks to avoid its common-law liability, should be construed most strongly against it.⁹³

Rules for Measuring—Evidence and Findings.—The evidence and findings in actions involving the construction of contracts limiting the liability of common carriers are not measured by any different rules than in cases to which carriers are not parties.⁹⁴

Contract upon Printed Blank of Form in General Use.—The rule of construction that effect should be given to all the language employed in a contract does not apply strongly to a case where a shipping contract, purporting to limit the carrier's liability, was upon a printed blank of a form in general use all over the country and one which was usually executed by the shipper without careful consideration of its language and effect.⁹⁵

Bill of Lading Partly Printed and Partly Written.—Where a contract of affreightment is contained in a bill of lading which is partly printed and partly written, the contract is to be gathered from the whole instrument, and a condition therein that the carrier will transport the freight "without transfer, in cars owned and controlled by the company" constitutes a part thereof, a breach of which, occasioning a loss of the goods by fire, does not entitle the carrier to the protection of another stipulation of the bill of lading, that the carrier will not be responsible for such a loss.⁹⁶

to the carrier. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65.

Wisconsin.—*Cream City R. Co. v. Chicago, etc., R. Co.*, 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267.

^{87.} *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98; *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

In order that a shipping contract shall limit the carrier's liability, the language of the contract must fairly require it to be so construed without the aid of implication. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98.

Plainly within words of contract.—Where a contract of shipment purports to limit the liability of a common carrier by a special agreement with the shipper, the carrier can claim nothing beyond what is plainly within the words of the contract. *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

^{88.} **Exemptions not to be frittered away by construction.**—*Queen of the*

Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278.

^{89.} *Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disn. 480, 12 O. Dec. 745.

^{90.} *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

^{91.} *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

^{92.} *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

^{93.} *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302.

When the language of a shipping contract is ambiguous every presumption is in favor of the shipper. *American Roofing Co. v. Memphis, etc., Packet Co.*, 2 O. Dec. 490, 5 N. P. 146.

^{94.} **Bills for measuring—Evidence and findings.**—*Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

^{95.} **Contract upon printed blank of form in general.**—*Grand v. Livingston*, 4 App. Div. 589, 38 N. Y. S. 490, 73 N. Y. St. Rep. 646.

^{96.} **Bill of lading partly printed and partly written.**—*Robinson Bros. v. Merchants' Despatch Transp. Co.*, 45 Iowa 470.

Exception of Loss by Inevitable Accident—Implied by Law.—The exception clause as to inevitable accident is implied by law in favor of common carriers where it is not expressed in the bill of lading.⁹⁷

As Conditions Precedent to Right to Recover.—At common law common carriers were liable for injuries resulting to property through the negligence of their employees while in transit, and, where a bill of lading limits the common-law liability, its provisions must be strictly construed, and will not be considered conditions precedent to a right to recover, unless it clearly appears that such was the intent, or it is so specifically stated.⁹⁸

§ 1250. Specific as Prevailing over General Clauses.—A specific exemption in a bill of lading prevails over a general exemption in the same instrument, in case of conflict between the two.⁹⁹

§ 1251. Conflicting Agreements.—Where there exists more than one agreement as to the terms under which freight shall be transported by a common carrier covering the same shipment, and a loss or injury to the goods occurs, the contract most advantageous to the shipper and which least restricts the carrier's liability is the one which the law will declare the contract by which the carrier's obligations shall be determined; the latter not being allowed to choose the one limiting its liabilities, or limiting them to the greater extent.¹

§ 1252. Construction of Words and Phrases.—Limitations.—Unavoidable Accident.—The phrase "unavoidable accidents" in a bill of lading, is equivalent to "inevitable accidents."²

97. Exception of loss by inevitable accident implied by law.—*Morrison v. Davis & Co.*, 20 Pa. 171, 57 Am. Dec. 695.

98. As conditions precedent to right to recover.—Judgment 100 N. Y. S. 190, 1121 affirmed. *Hoye v. Pennsylvania R. Co.*, 191 N. Y. 101, 83 N. E. 586, 17 L. R. A., N. S., 641, 14 Am. & Eng. Ann. Cas. 414.

99. Specific as prevailing over general clauses.—*Texas, etc., R. Co. v. Callender*, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257. See, also, *Texas, etc., R. Co. v. Reiss*, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253.

A clause in a bill of lading by which cotton was shipped over the line of a railroad company to be transferred to a steamship company at the end of the line of the railroad, provided that "cotton is excepted from any clause herein on the subject of fire and the carrier shall be liable as at common law for loss or damage of cotton by fire." Other clauses in the bill of lading provided that the railroad company should not be liable for damage after a readiness to deliver to the steamship company, or otherwise than as a warehouseman after the property waited further conveyance. It was held that the specific clause took effect to the exclusion of the general clause containing matters of general exemption and that the carrier was liable as at common law for loss of the cotton by fire while in its possession although it was ready for delivery or awaiting further conveyance within the meaning of the other clauses in the bill of lading. *Texas, etc., R. Co. v. Callender*, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257. See, also,

Texas, etc., R. Co. v. Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253.

For the purpose of obtaining shipments over a line consisting of several connecting roads of which its road was one, the defendant railroad company established an agency at a point some distance away from the end of its road. Goods shipped from this point were receipted for by a through bill of lading exempting the company from loss by fire after its arrival at the point where the defendant's road commenced. Another clause in the bill of lading exempted the defendant company from loss or damage by fire from any cause whatever. It was held that the last exemption applied to the whole route, from the point where the bill of lading was issued to the final destination of the goods, and not to the part of the route after the goods reached the place where the road of the defendant commenced; and goods having been destroyed by fire between the point where the bill of lading was issued and the commencement of the defendant's road, the company was exempted from liability for the loss. *Railroad Co. v. Androscoggin Mills (U. S.)*, 22 Wall. 594, 22 L. Ed. 724.

1. Conflicting agreements.—*Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. 731, 42 Am. & Eng. R. Cas. 514; *Munn v. Baker (Eng.)*, 2 Stark 255.

Shipping receipt and release—Separate and distinct papers—Receipt not applicable to partial loss and release void.—*Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. 731, 42 Am. & Eng. R. Cas. 514.

2. Unavoidable accident.—*Fowler v. Davenport*, 21 Tex. 626.

"Taken at the Owner's Risk."—In a bill of lading, or receipt for freight, given by a railroad company, an exception in these words, "taken at the owner's risk," only exempts the company from the liability of an insurer which is by law imposed on a common carrier.³

"Goods in Depots," "Goods Awaiting Delivery," etc.—"While at Depots Excepted"—Application—Depot at End of Route.—A condition in a bill of lading stipulating that the carrier would forward the freight with reasonable dispatch, "the damages incident to the railroad transportation, loss or damage by fire or the elements, while at depots excepted," should be construed to mean that the carrier would be exempt from liability from the designated causes only at depots, where the cars containing the freight stop while in transit, and not at the depot at the end of the route.⁴

"Awaiting Delivery"—Goods in Depots Awaiting Transportation.—The charter of a railroad company providing that the company shall not be responsible for goods on deposit in any of their depots "awaiting delivery," does not include goods in such depots awaiting transportation, but refers to such goods alone as have reached their final destination.⁵

"Ready for Delivery to the Next Carrier."—A condition upon the back of a shipping receipt containing the words, "ready for delivery to the next carrier" should be given a construction consistent with the agreement on the face of the contract; and one fairly susceptible of the construction that the carrier's liability is to continue until the goods are either actually or constructively in the possession of the other carrier.⁶

Delivery to Steamships—Placing Lumber on Railroad's Pier.—Under a railroad bill of lading for lumber received for shipment to Liverpool, and containing among others, this clause: "This contract is executed and accomplished, and all liability thereunder terminates, on the delivery of the said property to the steamships, * * * or on the steamship pier at the said port of Newport News," the placing of the lumber on the pier of the railroad at such port, under its own exclusive control, was not sufficient to relieve it of its liability as a common carrier for damages for the loss of the lumber.⁷

Negligence in Selecting Route—Notice of Danger from Cold.—A contract of shipment by which the shipper insures the carrier railroad against claims for loss or damage which may be incurred by reason of delay in transportation, or any other cause arising out of its responsibility as master over its agents (gross or wanton negligence excepted), incident to such shipment does not relieve the railroad from liability for the destruction of the trees by reason of its conduct in unreasonably ordering them to be transported over a route upon which the railroad was chargeable with notice of the danger of their destruction by cold.⁸

Bill of Lading for Baggage Marked "Personal Goods."—Where a person took passage in a vessel, but his personal baggage did not reach him in time to be put on board of the vessel, and he sailed without it, and it was put on board of another vessel, and a receipt or bill of lading was given for it by the mate of the latter vessel; but the baggage was never delivered at its port of

3. **Taken at owner's risk.**—Mobile, etc., R. Co. v. Jarboe, 41 Ala. 644.

4. **"While at depots excepted"—Application—Depot at end of route.**—Standard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

5. **"Awaiting delivery"—Goods in depots awaiting transportation.**—Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297.

6. **"Ready for delivery to the next carrier."**—American Roofing Co. v. Mem-

phis, etc., Packet Co., 8 O. Dec. 490, 5 N. P. 146.

7. **Delivery to steamship—Placing lumber on railroad's pier.**—Lewis v. Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

8. **Negligence in selecting route—Notice of danger from cold.**—Pierce v. Southern Pac. Co., 120 Cal. 156, 10 Am. & Eng. R. Cas., N. S., 88, 47 Pac. 874, 52 Pac. 302.

destination; the case was one of the ordinary shipment of goods on freight; and the words "personal goods" on the margin of such receipt or bill of lading, were at most but a description of the character of the goods, and did not exempt their owner from freight, or the vessel from responsibility.⁹

"Released."—See post, "Losses Arising from Negligence," § 1263.

§§ 1253-1259. Written Instrument as Complete Contract—§ 1253. Parol Evidence to Vary or Contradict Generally.—As a general rule, the law presumes that a shipping contract in writing limiting the carrier's common-law liability embraces the entire agreement between the parties, and it can not be varied or contradicted by parol testimony.¹⁰

Delivery with Special Dispatch Guaranteed—Parol Evidence to Vary Receipt.—The acceptance by a shipper from a common carrier of a receipt for freight delivered for transportation, without reading it and supposing it to be merely a receipt, though it contained stipulations so indorsed upon it as to become a part of it, if treated as a contract, to the effect that the carrier did not guarantee any special dispatch in the carriage of any article, unless it was expressly so stipulated in writing, did not, under the circumstances of its reception, conclude the shipper from showing by parol that the carrier did guarantee the delivery of the freight at its destination with special dispatch at a particular time.¹¹

§§ 1254-1255. Merger of Prior Parol Negotiations—§ 1254. In General.—The rule is that where the shipper takes from the carrier a bill of lading,¹² expressing the terms upon which the property is to be carried, the

9 Bill of lading for baggage marked "personal goods."—*The Elvira Harbeck*, 2 Blatchf. 336, Fed. Cas. No. 4,424.

10. Parol evidence to vary or contradict generally.—*Alabama*.—*Tallahassee Falls Mfg. Co. v. Western R. Co.*, 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179.

Georgia.—*McElveen v. Southern R. Co.*, 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

Illinois.—*Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506, 53 N. E. 326; *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490.

Indiana.—*Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89.

Iowa.—*Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335, 75 N. W. 192.

Louisiana.—*Sonia Cotton Oil Co. v. Red River*, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Mississippi.—*Yazoo, etc., R. Co. v. Wilson*, 83 Miss. 224, 35 So. 340.

North Carolina.—*Morgantown Mfg. Co. v. Ohio, etc., R. Co.*, 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

Ohio.—*Stevens v. Lake Shore, etc., R. Co.*, 11 O. C. D. 168, 20 O. C. C. 41.

Texas.—*Bessling & Co. v. Houston, etc., R. Co.*, 35 Tex. Civ. App. 470, 80 S. W. 639; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

11. Delivery with special dispatch—Guaranteed—Parol evidence to vary receipt.—*King v. Woodbridge*, 34 Vt. 565.

12. Merger of prior parol negotiations.—*United States*.—*The Delaware v. Oregon*

Iron Co. (U. S.), 14 Wall. 579, 20 L. Ed. 779.

Georgia.—*Central, etc., R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Illinois.—*Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490.

Louisiana.—*Cotton Oil Co. v. Steamer Red River*, 106 La. Rep. 42.

New York.—*Long v. New York Cent. R. Co.*, 50 N. Y. 76, 3 Am. Rep. 350.

North Carolina.—*Morgantown Mfg. Co. v. Ohio River, etc., R. Co.*, 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

Ohio.—*Cleveland, etc., R. Co. v. La Tourette*, 1 O. C. D. 486, 2 O. C. C. 279.

Bill of lading as contract of shipment.—In the absence of fraud and mistake, a bill of lading signed by the receiving agent of a common carrier, containing no restriction upon its common-law liability, delivered to the consignor contemporaneously with the receipt of the goods for shipment and acquiesced in by him, becomes the contract of shipment, and its terms can not be contradicted by parol. *Cleveland, etc., R. Co. v. La Tourette*, 1 O. C. D. 486, 2 O. C. C. 279. See ante, "Bills of Lading," chapter 6.

Bill of lading not a mere receipt for goods.—*Cotton Oil Co. v. Steamer Red River*, 106 La. Rep. 42. See ante, "Bills of Lading," chapter 6.

Bill of lading as both contract and receipt.—See ante, "Bills of Lading," chapter 6.

writing, in the absence of proof of fraud or mistake, must be taken as the sole evidence of the final agreement of the parties, and can not be altered by prior parol negotiations or any previous verbal agreement of the parties not incorporated into it. Thus where the shipping contract is silent as to the time of delivery,¹³ or as to the place of stowage of the freight,¹⁴ evidence to show a definite and specific agreement distinct from that implied by law in such cases is not admissible.

Receipt as Conclusive Evidence.—A receipt given by a railroad company for freight intrusted to it for transportation, purporting to limit the carrier's liability, is not conclusive evidence of the terms of the shipping contract. This is the rule in California¹⁵ and many other jurisdictions. In New York a receipt or voucher expressing the terms upon which the property is to be carried must be taken as the sole evidence of the final agreement of the parties.¹⁶

Evidence—Other Failures of Agent to Require Declaration of Value.—Where the defense is that the carrier's agent had no authority to make the shipping contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties without requiring such declarations to be made, before and at the time of the alleged contract with plaintiff, is admissible as direct evidence for the purpose of defining the contract as actually made.¹⁷

§ 1255. Bill of Lading Issued Subsequent to Contract.—See ante, "Time of Agreement," §§ 1230-1232.

§ 1256. Parol Evidence to Show Meaning of Words and Phrases.—**"Dangers of the River."**—Parol proof is admissible to show that the words "dangers of the river," in a bill of lading, are, by the usage and custom of merchants and others, understood to include other casualties than those arising from the element of water.¹⁸

Fire.—Parol evidence is admissible to show that the words "dangers of the river," as used in a bill of lading, by usage and custom include dangers by fire.¹⁹

Seizure of Boat by Armed Men.—Where the only limitation of the carrier's liability specified in the bill of lading is "dangers of the river," parol evidence can not be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew.²⁰

"K. D. & Released."—And where the bill of lading accepted by the shipper, after specifying the articles shipped, contains the words "K. D. & Released," it is competent for the railroad agent issuing such bill of lading to explain what

13. Bill of lading silent as to time of delivery.—Bills of lading being silent as to the time within which delivery of freight was to be made, the law presumes it was to be done in a reasonable time and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication. *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

14. Bill of lading silent as to stowage on deck—Oral agreement—Silence of bill of lading.—A bill of lading which is silent as to the place of stowage of the freight imports a contract that it is to be stowed under deck therefore, an alleged agreement that it should be stowed on deck was inadmissible. So held in *The*

Delaware v. Oregon Iron Co. (U. S.), 14 Wall. 579, 20 L. Ed. 779.

15. *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 4 Pac. 988.

16. *Long v. New York Cent. R. Co.*, 50 N. Y. 76, 3 Am. Rep. 350.

17. Evidence—Other failures of agent to require declaration of value.—*Lowenstein v. Lombard, etc., Co.*, 164 N. Y. 324, 58 N. E. 44.

18. "Dangers of the river."—*McClure & Co. v. Cox, etc., Co.*, 32 Ala. 617, 70 Am. Dec. 552.

19. Fire.—*Hibler v. McCartney*, 31 Ala. 501.

20. Seizure of boat by armed men.—*Boon & Co. v. Belfast*, 40 Ala. 184, 88 Am. Dec. 761.

these words meant, and the testimony of such agent that by the word "Released" was meant that the carrier was released by the shipper from liability for loss not occasioned by the carrier's negligence is admissible.²¹

§ 1257. Only Part of Contract Contained in Written Agreement.—Evidence of the terms of prior agreements between the parties is admissible to complete the shipping contract, where it appears that a subsequent written agreement contains only part of such contract.²²

§ 1258. Effect of Waybill.—A waybill issued by a carrier for the guidance of its employees which denominates a shipment as a through waybill to a point on a connecting line, via the transit point of its own line, does not affect the terms of the written contract under which the shipment was received.²³

§ 1259. Parol Agreement Substituted for Written Contract.—Where it appears that a parol agreement has been substituted for a written shipping contract, the former may be the controlling agreement; and to establish this evidence of conversation between the shipper and carrier's freight agent is admissible²⁴ to prove that the written contract for transportation was abandoned, and that the shipment was under a parol contract subsequently made.

§ 1260. Effect as Measure of Liability Generally.—A contract limiting a common carrier's common-law liability becomes the rule by which the parties are governed, instead of the general law governing common carriers.²⁵ By such a contract the carrier becomes an insurer by agreement, and according to its terms. If there be a loss, the agreement furnishes the extent of liability, unless the plaintiff can show that the loss occurred through the willfulness or negligence of the carrier.²⁶

Effect as Rendering Carrier a Private Carrier or Bailee.—A part of the authorities hold that the carrier may by special contract restrict his common-law liability, and where this is done his relations are changed, and he becomes as to that transaction an ordinary bailee and private carrier for hire, which imposes upon him the responsibility of exercising ordinary care in the transportation of property.²⁷ Others hold that in doing so, he does not cease to be a common carrier, nor in any manner change his relation to the public as such; and he can only excuse himself for a failure to deliver the goods intrusted to

21. "K. D. and released."—*Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602.

22. Only part of contract contained in written agreement.—*Union R., etc., Co. v. Riegel & Co.*, 73 Pa. 72; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382.

23. Effect of way bill.—*San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 1 R. R. R. 789, 24 Am. & Eng. R. Cas., N. S., 789, 66 S. W. 474.

Proof that a waybill issued by the carrier for the guidance of its employees stipulated delivery at a certain packing house was inadmissible to add that provision to the written contract between the carrier and shipper. *International, etc., R. Co. v. Griffith* (Tex. Civ. App.), 103 S. W. 225, affirmed in 102 Tex. 585, no op.

Effect of through line waybill on contract limiting liability to own line executed to secure free transportation.—*San Antonio, etc., R. Co. v. Barnett*, 27 Tex.

Civ. App. 498, 1 R. R. R. 789, 24 Am. & Eng. R. Cas., N. S., 789, 66 S. W. 474.

24. Parol agreement substituted for written contract.—*Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

25. Effect as measure of liability generally.—*Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Central, etc., R. Co. v. Rogers*, 111 Ga. 865, 36 S. E. 946; *Central, etc., R. Co. v. Hurst*, 113 Ga. 1006, 39 S. E. 476; *Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422, 41 S. E. 653.

26. *Farnham v. Camden, etc., R. Co.*, 55 Pa. 53.

27. Effect as rendering carrier a private carrier or bailee.—*French v. Buffalo, etc., R. Co.*, 43 N. Y. (4 Keyes) 108, 2 Abb. Dec. 196; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 5 Am. R. Rep. 249, 12 Am. Rep. 275; *Meyer v. Harnden's Exp. Co.* (N. Y.), 1 Daly 227, 24 How. Prac. 290.

him by showing that, without his fault, he has been prevented by some one of the causes recognized by law, or specifically provided for in the contract.²⁸

§ 1261. Persons Bound and Carriers Benefited.—Where a valid express contract has been fairly entered into, both parties are bound by its terms.²⁹ It is otherwise where the shipper sues in trover or in trespass for an illegal taking or a conversion.³⁰

Connecting Carrier.—See post, "Connecting Carriers," Part V.

§ 1262. Property to Which Applicable.—**Several Receipts for Property Consigned.**—Where several receipts containing limitations of the carrier's liability were given for property consigned, each receipt constituted a special contract for the transportation of the property named therein, so that a limitation of liability in a receipt only applied to the property described therein.³¹

§§ 1263-1277. Losses Covered—§ 1263. Losses Arising from Negligence.—However broad and general may be the language of a carrier's contract, if it does not specifically and in express terms release it from the consequences of its own negligence, and if the general words may operate without including such negligence, that construction will be given to them, and they will not so exempt the carrier.³²

§§ 1264-1277. Particular Limitations—§ 1264. Loss from Causes beyond Carrier's Control.—The acceptance of a bill of lading, stipulating that no carrier or party in possession of property should be liable for loss or damage by causes beyond its control, relieved the carrier from an insurer's liability, with familiar exceptions, and limited liability to loss or damage by negligence of the carrier.³³

§ 1265. Unavoidable Dangers.—The exception of unavoidable dangers, in a contract of a common carrier, does not limit his responsibility to the exercise of ordinary care and diligence.³⁴

§ 1266. Dangers of Navigation.—Losses arising from the "dangers of navigation" within the meaning of an exception are not such as are in any degree produced from the intervention of man, but are such as happen in spite of human exertions, and which can not be prevented by human skill and prudence.³⁵ An exception from dangers of navigation covers the sinking of a

28. *Graham & Co. v. Davis & Co.*, 4 O. St. 362, following *Davidson v. Graham*, 2 O. St. 131.

29. **Persons bound and carriers benefited.**—*Georgia R. Co. v. Gann*, 68 Ga. 350; *Southern Exp. Co. v. Palmer*, 48 Ga. 350; *Central R., etc., Co. v. Anderson*, 58 Ga. 393.

30. *Southern Exp. Co. v. Palmer*, 48 Ga. 85.

31. **Several receipts for property consigned.**—*Rappaport v. White's Exp. Co.*, 131 N. Y. S. 131, 146 App. Div. 576.

32. **Losses arising from negligence.**—*Hahn v. St. Louis, etc., R. Co.*, 141 Mo. App. 453, 125 S. W. 1185; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; *Burke v. Erie R. Co.*, 119 N. Y. S. 309, 134 App. Div. 413.

33. **Loss from causes beyond carrier's control.**—*Central, etc., R. Co. v. Burton*, 165 Ala. 432, 51 So. 643.

34. **Unavoidable dangers.**—*Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disn. 480, 12 O. Dec. 745.

"It may be doubtful whether the exception of 'unavoidable dangers' properly means more than 'inevitable accidents,' or such acts as the law has allowed to be an excuse. * * * The exception in this case of 'unavoidable danger' can not be construed to change the contract of the common carrier into that of an ordinary bailee, bound only to the exercise of ordinary care and diligence, and responsible only for what are acts of negligence." *Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disn. 480, 12 O. Dec. 745, citing *Jones v. Voorhees*, 10 O. 145.

35. **Loss by "dangers of navigation" means loss without negligence.**—*Propeller Niagara v. Cordes (U. S.)*, 21 How. 7, 29, 16 L. Ed. 41.

vessel by injury due to an unknown sunken snag or pile in the river,³⁶ but an exception of "perils of navigation" does not include loss by explosion of a steam boiler.³⁷ The terms "dangers of lake navigation" include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.³⁸

§ 1267. Dangers of the River.—An exception, in the bill of lading of a common carrier by water, of "the dangers of the river only," means such dangers as no human skill or foresight could guard against,³⁹ all hidden obstructions in the river, as rocks, logs, sawyers, and the like.⁴⁰

§ 1268. Shipment "Released" or at "Owner's Risk."—**Shipment at Owner's Risk.**—A common carrier is not released from damages occurring through his own negligence, by stipulating that the goods are shipped at the "owner's risk." At most this would only protect him against loss occurring from the ordinary and known risks of transportation.⁴¹

The term "released," as a legal phrase, and when used in reference to a shipment by a carrier, means that the carrier is relieved from losses not occasioned by its negligence.⁴²

§ 1269. Stipulation as to Disclosure of Value of Property.—Where the property delivered for transportation is of unusual and extraordinary value, a condition that the carrier will not be responsible for the loss if the true character and value of the articles are not stated and extra freight paid will operate to exempt the carrier from liability even for his own negligence, unless he was informed when or before the goods were received that they were of such special and unusual value.⁴³

§ 1270. Loss from Delay.—A contract by which a carrier undertakes to relieve itself of all liability for damages occasioned by any delay in transportation, and to impose them upon the shipper, will be effectual to protect the company only against the consequences of delays not caused by its own negligence.⁴⁴

Delay Caused by Duty to Re-Ice Cars.—Clauses in a bill of lading, exempting the carrier from liability for delay in transportation arising from specified causes, did not relieve it, when delay occurred, from the obligation which it assumed to re-ice a refrigerator car from point of shipment to destination.⁴⁵

Delay Caused by Mobs and Strikes.—A stipulation, in a contract by a railroad company to carry freight, that it shall not be liable for delay caused by a strike, will not exempt it from liability for delay occasioned by a strike which it could have suppressed by the exercise of diligence.⁴⁶ The shipper hav-

36. Loss due to hidden snag or pile in river.—*Hostetter v. Park*, 137 U. S. 30, 40, 34 L. Ed. 568, 11 S. Ct. 1.

37. Explosion of boiler not a peril of navigation.—*Propeller v. Mohawk* (U. S.), 8 Wall. 153, 19 L. Ed. 406.

38. Meaning of exemption from loss from "dangers of lake navigation."—*Transportation Co. v. Downer* (U. S.), 11 Wall. 129, 20 L. Ed. 160.

39. Dangers of the river.—*Turney v. Wilson*, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; *Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256, 267; *Moss v. Bettis*, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1; *Gordon v. Buchanan*, 13 Tenn. (5 Yerg.) 72, 82; *Craig v. Childress*, 7 Tenn. (Peck) 270, 14 Am. Dec. 751; *Johnson v. Friar*, 12 Tenn. (4 Yerg.) 47.

40. *Turney v. Wilson*, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515.

41. "Owner's risk."—*Nashville, etc., R. Co. v. Jackson*, 53 Tenn. (6 Heisk.) 271.

42. Released.—*Central, etc., R. Co. v. Butler Marble, etc., Co.*, 8 Ga. App. 1, 68 S. E. 775; *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807.

43. Stipulation as to disclosure of value of property.—*Rathbone v. New York, etc., R. Co.*, 140 N. Y. 48, 35 N. E. 418.

44. Loss from delay.—*Dawson v. Chicago, etc., R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296; *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. Rep. 318.

45. Delay caused by duty to re-ice cars.—*Geraty v. Atlantic, etc., R. Co.*, 81 S. C. 367, 62 S. E. 444.

46. Delay caused by mobs and strikes.—*I. & G. N. R. Co. v. Server*, 3 Texas App. Civ. Cas., § 441.

ing expressly agreed to assume all risk of delay caused by any mob or strike or threatened violence to person or property, he can not recover for delay occasioned by a strike and violence of such magnitude as to require the military forces of the government to overcome.⁴⁷

Delay on Connecting Road.—Where a shipper agrees to assume all risks of loss or injury from delays in transportation, this relieves the company of liability for a loss caused by a delay occasioned by an obstruction on another road, which suddenly diverts business to defendant's road.⁴⁸

§ 1271. **Breakage or Leakage.**—Proof that brine had run off fish shipped in barrels, and that the barrels during transportation had been punctured, and that the fish were injured thereby, did not prove a leakage within the bill of lading, relieving the carrier from liability for damages caused by leakage.⁴⁹

§ 1272. **Loading and Unloading.**—Where a shipper had bulk corn, which was shipped in a stock car, sacked en route without removing it from the car, and redelivered it for transportation under a bill of lading providing that damage on account of being loaded in a stock car was at the owner's risk, the carrier was not liable for damage to the corn by it being loaded in the stock car.⁵⁰

Rule Requiring Shippers to Load Freight upon Cars.—A rule of a railroad requiring all shippers of hay, straw, or other heavy freight to unload it from the vehicle upon which it was delivered into the freight house at the station in question, when delivered there, and to load it upon the cars furnished by the company, if of any binding force only requires shippers of the kinds of freight covered by it to furnish the necessary help to load the freight, and did not change the railroad's relation to property delivered to and accepted by it for the sole purpose of being transported over its road.⁵¹

§ 1273. **Defect in Cars.**—A common carrier is not protected against liability for loss of goods resulting from defects in car, the existence of which affords evidence of negligence, by a stipulation in the bill of lading accepted by the shipper to the effect that he had examined the car for himself, and found it in good order, and accepted it as "suitable and sufficient" for the purpose of his shipment.⁵²

§ 1274. **Loss by "Fire and Floods."**—A clause in a bill of lading, exempting the carrier from liability for loss "by floods or by fire," limits liability to negligence.⁵³

Loss by Fire.—A clause in a bill of lading exempting the carrier from liability for loss or damage caused by fire does not relieve it from liability for negligence.⁵⁴ Common carrier, though protected by a valid fire clause exemp-

47. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

48. **Delay on connecting road.**—*Dawson v. Chicago, etc., R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296.

49. **Breakage or leakage.**—*Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.), 122 S. W. 362.

50. **Loading and unloading.**—*Nicholson v. St. Louis, etc., R. Co.*, 141 Mo. App. 199, 124 S. W. 573.

51. **Rule requiring shippers to load freight upon cars.**—*London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 52 N. Y. S. 581, 68 Hun 598, 23 N. Y. S. 231.

52. **Defect in car.**—*Railroad v. Dies*, 91 Tenn. (7 Pickle) 177, 18 S. W. 266.

53. **Fire and floods.**—*Central, etc., R. Co. v. Burton*, 165 Ala. 432, 51 So. 643;

Burke v. Erie R. Co., 119 N. Y. S. 309, 134 App. Div. 413.

The mere fact of the destruction of property by flood will not justify a railroad company to which the property has been intrusted, in failing to exercise reasonable care and diligence in order to save it from injury, although the bill of lading under which the property was shipped provided that the carrier should not be liable for any loss caused by floods; and this duty is a continuing one as long as the loss is avoidable, and this, independent of the notice to be given to the consignee of the arrival of the freight. *Cunningham v. Pennsylvania R. Co.*, 50 Pa. Super. Ct. 609.

54. **Effect of negligence of carrier.**—*Bobbink v. Erie R. Co.*, 82 N. J. L. 547,

tion is not excused from liability for loss of goods by fire while in his custody, even when the fire occurred without his negligence, if by his fault or negligence the goods were placed in reach of or contact with the fire. The carrier's negligence, not the fire, is, in such case, the proximate cause of the loss.⁵⁵

Carrier Must Have Possession of Goods.—A clause in a bill of lading, providing that no carrier or party in possession of all or any of the property shall be liable for any loss thereof or damage thereto by fire, is applicable only in case the carrier at the time of the fire which destroyed the goods was "in possession" thereof.⁵⁶

Fire Communicated from Adjoining Property.—A limitation in a contract of carriage against loss by fire applies to loss resulting from fire communicated from adjoining property, such loss arising without default or negligence on part of the carrier.⁵⁷ Where the bill of lading under which a car of lumber was shipped relieved the carrier from liability for damage by fire unless resulting directly from the carrier's negligence, and the carrier, before moving the car, allowed it to remain for two days on a side track near a sawmill, and

82 Atl. 877.

Negligence must be proximate cause of fire.—Common carrier, protested by a valid stipulation in his bill of lading against liability for loss of goods by fire, is not responsible for any loss resulting from that cause, unless his negligence was the proximate cause of the fire. And it is wholly immaterial, in this regard, whether the contracting carrier be an initial or other carrier in the line, or a mere transportation company owning no part of the line. *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Fire caused by burning of feed.—A contract with two railroad companies for the transportation of sheep, by its terms, in consideration of a reduction of the charges for freight, released them from liability for injuries to the animals "caused by burning of hay, straw, or other material used for feeding said animals, or otherwise." The contract contained no words expressly exempting the carriers from liability for their own negligence. A fire occurred in the cars which destroyed a number of the sheep, the loss resulting from the negligence of one of the railroad companies, in omitting to supply the train with such appliances as would have enabled those in charge to have stopped it and extinguished the fire before serious damage had resulted. It was held that the exemption did not include negligence, and that defendant was liable. *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487.

55. *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Carrier's act in leaving cotton on platform exposed to danger of fire from passing engines is negligence which is proximate cause of loss by fire, and he is not exempt from loss under fire clause

in bill. *Missouri, etc., R. Co. v. McFadden Bros.*, 89 Tex. 138, 33 S. W. 853.

A railroad company received, and issued bills of lading making it liable for loss by fire, in case of negligence, for, uncompressed cotton, and, under authority of the assignee of the bills, sent it to a compress company, and, after it was compressed, allowed it to remain for an unreasonable length of time on the platform of the compress company, exposed to sparks from passing engines, and it was burned up. Held, that the company was liable for the cotton. *Missouri, etc., R. Co. v. McFadden Bros.*, 89 Tex. 138, 33 S. W. 853, reversing 32 S. W. 18, on another point.

56. *Bolles v. Lehigh Valley R. Co.*, 86 C. C. A. 562, 159 Fed. 694. See ante, "Loss by Fire," § 1305.

57. **Fire communicated from adjoining property.**—A car loaded with binding twine and rope was run into a freight yard about 9 o'clock in the evening for unloading in the morning, and about 3 o'clock the next morning, fire from a warehouse on property other than that of the defendant and about twenty-three feet distant from the car and across an alley outside the freight yard, communicated to the contents of the car, possibly through an opening of about ten inches where the car door had been left open, and damaged the contents; the employees about twenty minutes after the commencement of the fire moving the car out of further danger and extinguished the fire. Held, that the company was not guilty of negligence, and was relieved from liability by a stipulation in the bill of lading that "No carrier, or party in possession of all or any part of the property herein described, shall be liable for any loss thereon or damage thereto, by causes beyond its control, * * * or by fire, from any cause whatsoever occurring." *Scott v. Allegheny Valley R. Co.*, 172 Pa. 646, 33 Atl. 712.

the lumber was destroyed by fire originating in the mill, the carrier was liable for the loss.⁵⁸

Goods in Depot Awaiting Shipment.—The railroad company was exonerated from liability for three hogsheds of tobacco, destroyed by the burning of the depot at which they were received for shipment, by the stipulation inserted in the bills of lading that the company "shall not be liable for loss or damages by fire or other casualty while in transit, or while in depots or landings at points of delivery, etc." The shipper received and retained the bills of lading until after the tobacco was destroyed by the burning of the depot, though he might have returned them before the burning.⁵⁹ A carrier is released from liability for loss of goods by fire while awaiting transshipment in the company's depot under a bill of lading issued in another state, stipulating that no carrier shall be liable for loss by fire from any cause, or that no carrier shall be liable for loss by fire while goods are awaiting transshipment to any point.⁶⁰

Loss in Warehouse as Including Loss of Cotton in Warehouse for Compression.—A valid stipulation in a bill of lading exempting carrier from liability for loss of cotton by fire "while at depots, stations, yards, landings, warehouses, or in transit," exempts him from liability for loss thereof by fire, occurring without fault of himself or agent, while the cotton is in warehouse for compression by his agent—the warehouseman.⁶¹

Limitation of Liability for Loss of Cotton in Compress Company's Warehouse.—A carrier is not liable for cotton found in a warehouse of a cotton compress company, where the bill of lading contained a fire clause exempting the carrier from liability for loss by fire or other casualty in or at any cotton press, although the compress company was the carrier's agent to receive the cotton.⁶²

"Places of Transshipment"—Cotton in Warehouse of Compress Company.—Common carriers are not exempted from liability for loss of cotton by fire, caused without their negligence, after its delivery to the carrier, and while it remained in the warehouse of a compress company for compression for shipment, although their respective bills of lading contained valid fireclauses, providing for exemption from liability for loss by fire, in general terms, or "while in depots or places of transshipments," or "while at depots or stations," or "while in transit or at stations," a warehouse of a compress company not being included in any of such clauses.⁶³

Carriage by Water—Application of Fire Clause to Fire on Railroads.—Where common carriers by water, in their bill of lading made at Toledo, Ohio, stipulated to deliver goods to consignees at Concord, N. H., the damages of navigation, fire, and collisions on the lakes and rivers and the Welland Canal excepted, this limitation did not extend to losses by fire on the railroads.⁶⁴

Fire—Act of Mob.—A provision in a bill of lading exempting the carrier from liability for "loss or damage of any article or property whatever by fire or other casualty while in transit or while in depots or places of transshipment," applies to a case where a lawless mob takes the goods while in transit and burns them, where the negligence of the carrier does not contribute to such loss.⁶⁵

58. *Arkansas Southern R. Co. v. Murphy*, 83 Ark. 562, 103 S. W. 743.

59. *Goods in depot awaiting shipment.*—*Louisville, etc., R. Co. v. Brownlee* (Ky.), 14 Bush 590.

60. *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140.

61. *Loss in warehouse as including loss of cotton in warehouse for compression.*—*Lancaster Mills v. Merchants', etc., Co.*, 89 Tenn. 1, 14 S. W. 317.

62. *Limitation of liability for loss at cotton compress.*—*Deming v. Merchants'*

Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

63. *"Places of transshipment" cotton in warehouse of compress company.*—*Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

64. *Carriage by water—Application of fire clause to fire on railroads.*—*Barter & Co. v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

65. *Fire act of mob.*—*Hall v. Pennsylvania R. Co.*, 3 Am. & Eng. R. Cas. 274,

Express Company's Liability for Railroad's Negligence.—An exception in its bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or any portion thereof occasioned by fire," does not excuse the express company from liability for the loss of such freight by fire, if it was caused by the negligence of a railroad company to which the express company had intrusted a part of the duty it had assumed.⁶⁶

Goods Destroyed by Fire on Steamer Connecting Portions of Carrier's Railway.—See post, "Limitation of Loss to Carrier's Own Line or to Carrier Having Custody of Goods," Part V, Chap. 32, I, A.

§ 1275. **Loss "in Transit" or "in Depot or Place of Transshipment."**—Where a bill of lading for a consignment of cotton, executed while the cotton was on a compress company's platform, provided that the carrier and connecting carrier should not be liable for loss of or damage to the cotton "while in transit, or while in depot or place of transshipment, or of landing at place of delivery," and the cotton was burned while yet on the compress company's platform, the cotton was not constructively in transit,⁶⁷ or at the depot or place of transshipment, within the contract in a bill of lading, exempting a carrier from loss by fire.⁶⁸ The provision, "while in depot or place of transshipment," must

1 Fed. 226; *Wertheimer v. Pennsylvania R. Co.* (U. S.), 17 Blatchf. 421, 1 Fed. 232.

66. Express company's liability for railroad's negligence.—*Bank v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872.

67. Loss while in "transit" or "in depot or place of transshipment."—*Amory Mfg. Co. v. Gulf, etc., R. Co.*, 37 S. W. 856, 89 Tex. 419, 59 Am. St. Rep. 65; *Gulf, etc., R. Co. v. Pepperell Mfg. Co.* (Tex. Civ. App.), 37 S. W. 965.

The words "in transit" are not the equivalent of the words "in transitu," and goods in the hands of a carrier are not in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In sense, the meaning of the two phrases is the same; the one is a literal translation of the other; but as actually employed they have a materially different meaning and application. "In transit" means literally, in course of passing from point to point, and such is its common acceptance. Such also is the literal meaning of the phrase "in transitu;" but for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem therefore that if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. But here the words "in transit"—the words actually used—according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until the time

it was to end under the contract. The cotton not having been set in motion towards its destination was not in fact in transit, and it can not be held to be constructively in transit while on the platform, without unwarrantably extending the meaning of a well-defined word and doing violence to a well-established canon of construction. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 425, 37 S. W. 856, 59 Am. St. Rep. 65.

This interpretation of the word is strengthened by the fact that, in addition to exemption while in transit, the contract also provides that the company is not liable for loss of the cotton while in depot or place of transshipment or of landing at place of delivery. If the words "in transit" are to be given the broad construction contended for, then this additional provision is unnecessary. It is to be presumed that the express provision, that the company was not to be liable for loss while in depot or place of transshipment or of landing at place of delivery, was incorporated for a purpose, and the inference is strong that the purpose was to supply that which would have been wanting without it. In the absence of the well-recognized rule of construction applicable to these contracts, it would be necessary to hold that the phrase "while in transit" did not exempt the company from the loss of the cotton before the transportation actually began; and in any event, there is such grave doubt as to the construction of the phrase as would require that the doubt should be resolved in favor of the shipper. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 426, 37 S. W. 856, 59 Am. St. Rep. 65.

68. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 426, 37 S. W. 856, 59 Am. St. Rep. 65.

be read as, "while in depot of transshipment or place of transshipment," within the meaning of the contract limitation, and hence the company was liable for loss at its receiving depot.⁶⁹

§ 1276. Default of Subcarrier.—A stipulation in its bills of lading exempting a carrier from responsibility for damages or loss of goods occasioned by the default of its agents—the subcarriers—is contrary to public policy, and void.⁷⁰

§ 1277. Release of Claim for Accrued Damages.—Contracts releasing the carrier from accrued damages are to be strictly construed against the carrier.⁷¹

Damages for Failure to Furnish Cars at Time Agreed on.—A shipping contract stipulating that in consideration of a reduced rate the shipper releases the carrier for breach of any contract to furnish cars at any particular time releases a claim for damages for failure to furnish cars at a time agreed on, which damages had accrued when the contract was signed.⁷²

§ 1278. Estoppel of Shipper.—A shipper, who introduces the contract of shipment to prove the existence of a contract of carriage, is not bound by a limited liability clause in the contract invalid at common law.⁷³

§ 1279. Performance, Discharge or Breach.—Failure of Shipper to Comply with Contract.—Where goods are shipped under a special contract the carrier may proceed to perform its part of the contract at the appointed time without notifying the shipper of its intention to do so, and it is the latter's duty to be prepared to carry out his part of the contract also at the time stipulated. So where there was a special contract requiring the shipper to accom-

69. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 37 S. W. 856, 89 Tex. 419, 59 Am. St. Rep. 65; *Gulf, etc., R. Co. v. Pepperell Mfg. Co.* (Tex. Civ. App.), 37 S. W. 965.

The cotton was not "in depot" within the meaning of the contract, when it was destroyed. The clause in which the words are quoted are found admits of two constructions—one as if it reads "or while in depot, or while in place of transshipment"—the other as if the words were "while in depot or transshipment or place of transshipment." If the former be the correct rendering of the clause, then the company would not have been liable for the loss of the cotton while at its depot at the initial point of the carriage; the latter is the better construction. The words "depot" and "place" stand in close connection, being separated only by the disjunctive conjunction, and by a strict grammatical construction occupy precisely the same relation to the other words of the clause. If it were intended to say depot or other place of transshipment, the words accurately expressed the idea and no others are necessary to be supplied. But if it were intended to mean any depot, then to express fully and accurately the meaning, the words "in" or "while in" must be inserted before the word "place." In addition, the punctuation supports the court's construction of the language. If there had been a comma after the word "depot," it would have

indicated that it was the purpose to detach that word from those next succeeding and to render it independently of and qualified by them. But the instrument, though in print, as appears from a facsimile found in the transcript and though carefully and correctly punctuated, has no comma at the place indicated. This tends to show that it was intended that the word depot should be qualified by the subsequent words in the clause, and that only depots of transshipment were meant. "Punctuation is a most fallible standard by which to interpret a writing," but "it may be resorted to when all other means fail." *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 426, 37 S. W. 856, 59 Am. St. Rep. 65.

70. **Default of subcarrier.**—*Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 6 Am. St. Rep. 847.

71. **Release of claim for accrued damages.**—*St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

72. **Damages for failure to furnish cars at time agreed on.**—*Freeman v. St. Louis, etc., R. Co.*, 138 Mo. App. 322, 122 S. W. 1.

73. **Estoppel of shipper.**—*Atchison, etc., R. Co. v. Smythe*, 55 Tex. Civ. App. 557, 119 S. W. 892.

Estoppel by receiving benefit of reduced rate.—*Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383.

pany the freight and the freight was lost through his failure to do so, he can not render the carrier liable on the ground that the carrier failed to notify him at the time that the shipment commenced.⁷⁵

Deviation from Route or Method of Transportation as Abrogating Limitation.—Where a carrier departs from the method or manner of transportation agreed upon in the contract of shipment, it becomes liable as an insurer, though the contract may exempt it from liability under circumstances under which the goods were actually injured.⁷⁶ Deviation by a carrier from the route described in the contract of shipment makes him liable as an insurer of the goods shipped, though the contract of shipment exempts him from liability under the circumstances under which the goods were lost or damaged.⁷⁷

§§ 1280-1327. Enforcement—§§ 1280-1290. Pleading—§§ 1280-1281. Petition, Declaration or Complaint—§ 1280. Necessary Allegations.—Where shippers sued on special transportation contracts for damage to a shipment by mud and water, and the contracts exempted the carrier from liability for "wet and country damage," a general allegation of injuries without some specific acts of negligence on the part of the carrier was insufficient.⁷⁸ Thus where foreign bills of lading under which cotton was transported provided that the carrier should not be liable for injuries caused by "wet or country damage," and declarations charged that the cotton was damaged by "water and mud" prior to the termination of the inland transportation, the shipper was bound to allege, in order to state a cause of action, that such damage resulted from some concurrent negligence of the carrier or its servants, or that the damage could have been avoided by the exercise of care, etc., and that the carrier was not therefore relieved by the exception in the bill of lading.⁷⁹

Foreign Statute Forbidding Limitation of Carrier's Liability.—In an action against a carrier to recover for damages to a shipment under bills of lading made in another state, a statute of such state forbidding contracts limiting a carrier's liability is available without being pleaded.⁸⁰

Notice Printed on Back of Freight Receipt.—A notice, purporting to restrict a common carrier's common-law liability, printed on the back of its freight receipt, need not be noticed in the declaration, in an action against the carrier for loss or damage to the freight.⁸¹

§ 1281. Sufficiency of Allegations.—Where special cotton transportation contracts exempted all carriers from liability for "wet and country damage," declarations alleging that the cotton was injured by "water and mud" prior to the termination of the inland transportation stated a cause of damage within such exemption, the terms "water and mud" and "wet and country damage" being synonymous.⁸²

Declaration Regarded as Embodying Entire Contract.—Where declarations in actions against certain carriers for injury to goods were based on written bills of lading containing limited liability clauses, such bills on demurrer to the declarations would be regarded as embodying the entire contract of the parties.⁸³

75. Failure of shipper to comply with contract.—Purcell v. Southern Exp. Co., 34 Ga. 315.

76. Deviation from route or method of transportation as abrogating limitation.—McKahan v. American Exp. Co., 209 Mass. 270, 95 N. E. 785.

77. McKahan v. American Exp. Co., 209 Mass. 270, 95 N. E. 785.

78. Necessary allegations.—Inman & Co. v. Seaboard, etc., R. Co., 159 Fed. 960.

79. Inman & Co. v. Seaboard, etc., R. Co., 159 Fed. 960.

80. Foreign statute forbidding limitation of carrier's liability.—Coats v. Chicago, etc., R. Co., 134 Ill. App. 217.

81. Notice printed on back of freight receipt.—Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

82. Sufficiency of allegations.—Inman & Co. v. Seaboard, etc., R. Co., 159 Fed. 960.

83. Declaration regarded as embody-

§§ 1282-1289. Plea or Answer and Affidavit of Defense—§§ 1282-1283. Necessity for Special Plea—§ 1282. In General.—A carrier being ordinarily an insurer of the goods it undertakes to transport, and all limitations of its common-law liability being in the nature of exceptions to its general responsibility, the carrier must allege a limited liability contract on which it seeks to relieve itself of its common-law liability. The existence of a special contract limiting the carrier's liability is a matter of defense to be shown by the carrier,⁸⁴ and is not available under a general denial,⁸⁵ but must be specially pleaded.⁸⁶ Where, therefore, in an action against carriers for injuries to goods, no limitation of their common-law liability was pleaded, none could be proved, and plaintiffs were not required to show defendants' negligence.⁸⁷ The exclusion of the limitation of their common-law liability contained in the bill of lading, as evidence was not error,⁸⁸ and the court is warranted in charging the jury that the carriers were deemed in law as common carriers and responsible as such for the discharge of their duties.⁸⁹

§ 1283. Demurrer.—A common carrier wishing to avail itself of the defense that a contract of shipment limits its liability, must set it up in its answer, and though the contract is made an exhibit to the complaint, the defense can not be raised by demurrer which does not reach exhibits attached to pleadings in cases at law.⁹⁰

§§ 1284-1287. Allegations—§ 1284. Allegation of Reasonableness.—The validity of a stipulation limiting a common carrier's liability depends upon its being reasonable; the party who asserts its validity must allege the facts which make it so.⁹¹ Thus, where a carrier pleads a special contract limiting its liability for damages, such plea⁹² or answer⁹³ must show that the contract was reasonable, although it is an interstate contract or one made in another state.⁹⁴ If the answer does not show that, under the facts existing, the limitation on the carrier's liability sought to be imposed by the special contracts was reasonable in its character, then it is not sufficient and is demurrable.⁹⁵

§ 1285. Validity under Foreign Laws.—Where a shipping contract is made in a foreign state, a carrier, relying upon stipulations limiting its common-law liability, must aver and prove that such stipulations are not in contraven-

ing entire contract.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

84. Pleading.—*Deierling v. Wabash R. Co.*, 163 Mo. App. 292, 146 S. W. 814; *McGregor v. Oregon R., etc., Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

A carrier relying on a special contract restricting its common-law liability must allege and prove the special contract. *Lacy v. Oregon R., etc., Co. (Ore.)*, 128 Pac. 999.

Texas.—*Missouri Pac. R. Co. v. Nicholson*, 2 Texas App. Civ. Cas., § 168; *Galveston, etc., R. Co. v. Efron (Tex. Civ. App.)*, 38 S. W. 639; *Ryan & Co. v. M., K. & T. R. Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 703; *Galveston, etc., R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.)*, 28 S. W. 98.

85. The limitation by contract of a carrier's common-law obligation of safe carriage of property delivered to it for

transportation is matter of defense not available to the carrier under a general denial. *Cleveland, etc., R. Co. v. Schaefer*, 47 Ind. 371, 90 N. E. 502.

86. *Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.)*, 28 S. W. 98.

87. *Cleveland, etc., R. Co. v. Schaefer*, 47 Ind. 371, 90 N. E. 502.

88. *Cleveland, etc., R. Co. v. Schaefer*, 47 Ind. 371, 90 N. E. 502.

89. *Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.)*, 28 S. W. 98.

90. *St. Louis, etc., R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939.

91. Allegation of reasonableness.—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

92. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574.

93. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

94. *Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.)*, 28 S. W. 98.

95. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

tion of the laws of that state.⁹⁶ In the absence of proof to the contrary, it is presumed that the law of another state prohibits common carriers from limiting their common-law liability as does the law of the forum.⁹⁷ Where a contract for the carriage made in Ohio, limiting the carrier's common-law liability, would have been invalid in Kentucky, under Const., § 196, forbidding carriers to contract away their common-law liability, the carrier should show, in order to protect itself, under such contract, not only that the contract was valid under the law of Ohio, but that the loss constituting the non-performance of the contract, also occurred there.⁹⁸

Fire Clause.—A clause in a through bill of lading, exempting the carrier "from damages or loss by fire while in depot," made in the state of Tennessee by a connecting road, being illegal in Texas, will not be passed upon in absence of allegation and proof that such limitation was legal where executed.⁹⁹

§ 1286. Negating Carrier's Negligence.—In an action for damage to fruit from delay in delivery, when shipped under a contract limiting the carrier's liability for loss from decay caused by the weather and arising during the ordinary time and method of transportation, a plea alleging the limitation and that the damage was caused by decay or changes in weather was bad for failure to negative the carrier's negligence as the proximate cause of the decay.¹

§ 1287. Shipping Order.—A carrier, pleading a provision of a shipping order, binding on the shipper, as made a part of the bill of lading by reference therein, is entitled to the benefit of such provision, without pleading the order as such.²

§ 1288. Affidavit of Defense.—Where goods have been delivered to a carrier under a contract exempting the carrier from liability, except for its own

96. Pleading and proof of foreign laws.—*International, etc., R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465.

In an action on a Missouri contract for shipment to Texas, Missouri laws being neither pleaded nor proved, the law of the former applies. *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

A stipulation in a bill of lading exempting the carrier from liability for loss "by fire while in depot," being illegal under laws of Texas, can not be assumed, in absence of averment and proof, to have been valid under the laws of another state where the contract was signed. *International, etc., R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465.

97. Texas.—*Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; citing *Houston, etc., R. Co. v. Baker*, 57 Tex. 419; *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196; *James v. James*, 81 Tex. 373, 16 S. W. 1087; and *Tempel v. Dodge*, 89 Tex. 68, 32 S. W. 514, 33 S. W. 222, affirming 31 S. W. 686. See to the same effect, *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 99 S. W. 566, affirmed in 102 Tex. 593, no op., and citing *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833, reversing 43 S. W. 1033.

The court is not permitted by any known rule of law to indulge the pre-

sumption that a limitation of the liability of the common carrier stipulated for in the bill of lading was lawful under the statutes of another state. *International, etc., R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465.

In a suit against a railroad company for injury to goods in transit, the contract of carriage having been made in California, the laws of such state will be presumed to forbid a carrier limiting its common-law liability for loss occasioned by its negligence, in the absence of any proof as to the California statutes. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

Sleeping car company.—It will not be presumed that the laws of any foreign state permit a sleeping-car company to contract against its own negligence. *Stevenson v. Pullman Palace-Car Co.* (Tex. Civ. App.), 32 S. W. 335.

98. Adams Exp. Co. v. Walker, 119 Ky. 121, 26 Ky. L. Rep. 1025, 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145, 83 S. W. 106, 67 L. R. A. 412.

99. Fire clause.—*International, etc., R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465.

1. Negating carrier's negligence.—*Western Railway v. Hart*, 130 Ala. 599, 49 So. 371.

2. Shipping order.—*Burke v. Erie R. Co.*, 119 N. Y. S. 309, 134 App. Div. 413.

negligence, and providing that the carrier should not be obliged to personally deliver the goods to the consignee at points where no delivery service is available, an affidavit of defense in a suit to recover the loss of the goods is sufficient which avers that the goods were delivered at the company's warehouse at a point where there was no delivery service, and that they were stolen from the warehouse on the night of their arrival without "any negligence whatever upon the part of the said defendant or its agents."³ Such an affidavit is not open to the charge of insufficiency because it does not undertake in detail to negative every fact from which a possible inference of some negligence on the part of the defendant or its servants might be drawn.⁴

§ 1289. Demurrer to Plea.—A defense that the injuries resulted from causes excepted by the limited liability contract is not demurrable.⁵

§ 1290. Reply.—If a shipper suing a carrier claims that his signature to the contract, which includes a release pleaded by the carrier, was fraudulently and wrongfully procured, that issue should be attended by proper allegations in the reply.⁶

§§ 1291-1307. Presumption and Burden of Proof—§§ 1291-1300. Existence and Validity of Contract—§ 1291. Presumptions Generally.—Where a common carrier undertakes to carry an article for a compensation, the legal presumption is that he does it subject to his common-law liability, and this presumption holds until disproved,⁷ by proof of special agreement.⁸ Contracts limiting the common-law liability of carriers are not favored by the courts,⁹ and it is not presumed that a shipper intends to abandon any of his legal rights.¹⁰ Hence a special contract limiting a carrier's liability will not be presumed from inference, custom, or failure to object,¹¹ but must be found clearly expressed in the contract of shipment.¹²

As to Form of Contract Contemplated.—It will be presumed that when letters passed between shippers and a carrier's freight traffic manager setting forth the rates at which the goods would be carried, and the time when damages would be settled, were written, the parties contemplated the issuing of bills of lading containing such provisions.¹³

§ 1292. Burden of Proof Generally.—When a common carrier attempts to show an abridgment of its common-law liability, the burden of proof is on it.¹⁴ A carrier has the burden of establishing the existence of the special contract, where it sets up as a defense to an action for loss of or injury to freight a provision of such contract, under which it claims it is exempt from liability. In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law.¹⁵

3. **Affidavit of defense.**—Penn Clothing Co. v. United States Exp. Co., 48 Pa. Super. Ct. 520.

4. Penn Clothing Co. v. United States Exp. Co., 48 Pa. Super. Ct. 520.

5. **Demurrer to plea.**—Webster v. Union Pac. R. Co., 200 Fed. 597.

6. **Reply.**—McElvain v. St. Louis, etc., R. Co., 151 Mo. App. 126, 131 S. W. 736.

7. **Presumption generally.**—New Jersey R., etc., Co. v. Pennsylvania R. Co., 27 N. J. L. 100.

8. Hill v. Adams Exp. Co., 82 N. J. L. (53 Vr.) 373, 81 Atl. 859, affirming judgment 80 N. J. L. 604, 77 Atl. 1073.

9. Atlantic, etc., R. Co. v. Coachman,

59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

10. Illinois Match Co. v. Chicago, etc., R. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment 153 Ill. App. 568.

11. Pacific Exp. Co. v. Rudman (Tex. Civ. App.), 145 S. W. 268.

12. Atlantic, etc., R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

13. **As to form of contract contemplated.**—Merchants', etc., Transp. Co. v. Eichberg, 71 Atl. 993, 109 Md. 211.

14. **Burden of proof generally.**—Adams Exp. Co. v. Adams, 29 App. D. C. 250.

15. **Colorado.**—A carrier, sued for injury to or loss of a shipment, has the

§§ 1293-1298. Requisites of Contract—§ 1293. Reasonableness.—The burden of proof of reasonableness of limited liability clauses in a carrier's bill of lading is on the carrier.¹⁶

§ 1294. Delivery.—Where an express company's or other carrier's receipt for freight, embodying conditions limiting the carrier's liability to a reasonable and lawful extent, is shown to have been in the custody of the shipper, a due delivery of it to him, is presumed, and it is for him to show that there was no such delivery.¹⁷

§ 1295. Consideration.—In the absence of evidence to the contrary, it is a legal presumption that there was a fair consideration moving from the carrier to the shipper for a condition in a special contract purporting to limit the common-law liability of the carrier;¹⁸ rather than that there is no consideration for such limitation,¹⁹ and want of consideration must be established by the party seeking to avoid such limitation.²⁰ Aliter, in Idaho, where it has been held that the mere fact that a shipper accepts a bill of lading limiting the liability of the carrier, without such contract showing a consideration therefor, does not presume a consideration,²¹ and that the burden is on a carrier pleading a special contract as a defense to an action for loss of goods to prove a consideration therefor.²²

Presumption Not Conclusive.—The presumption that there was a fair consideration for a contract limiting a carrier's common-law liability is not conclusive.²³ Hence, want of consideration may be pleaded and proved.²⁴

burden of establishing a contract exempting it from risks other than those excepted at common law. *Estes v. Denver, etc., R. Co.*, 49 Colo. 378, 113 Pac. 1005.

Idaho.—*McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

Missouri.—*Deierling v. Wabash R. Co.*, 163 Mo. App. 292, 146 S. W. 814.

New Jersey.—*Hill v. Adams Exp. Co.*, 82 N. J. L. 373, 81 Atl. 859.

New York.—*Park v. Preston*, 108 N. Y. 434, 15 N. E. 705.

Oregon.—*McGregor v. Oregon R., etc., Co.*, 50 Ore. 527, 93 Pac. 463, 14 L. R. A., N. S., 668; *Lacy v. Oregon R., etc., Co. (Ore.)*, 128 Pac. 999.

16. *United States.*—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

17. *Delivery.*—*Boorman v. American Exp. Co.*, 21 Wis. 152.

18. **Presumption and burden of proof as to consideration.**—*Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042; *St. Louis, etc., R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

19. **No presumption that limitation is not based upon good consideration.**—When a bill of lading is based upon a valuable consideration, there is no presumption that a limitation of the common-law liability contained in it is not based upon a good and sufficient consideration. *St. Louis, etc., R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

Loss by fire.—Prima facie a fire clause exemption is valid and supported by sufficient consideration when it is found in a through bill of lading wherein through freight rates are granted over

two or more distinct carrier lines. *Lancaster Mills v. Merchants', etc., Co.*, 89 Tenn. 1, 2, 14 S. W. 317.

20. **Want of consideration must be affirmatively established.**—The presumption is that the rates for carriage of freight are made with reference to the risks assumed, and that the rate specified in a special shipping contract, when made, was intended to support the entire contract, hence the want of consideration must be affirmatively established by the party seeking to avoid such limitation of the carrier's liability. *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

21. *McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

22. *McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

23. **Presumption not conclusive.**—*St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

24. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Under proper pleadings, evidence is admissible to rebut the presumption and show that no consideration in reality existed. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

The facts that the liability of the carrier had become fixed under a parol contract for shipment; that a written contract was subsequently signed materially advantageous to the carrier and without consideration may be shown in avoidance of such written contract when invoked as defense against liability under the parol contract. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Recital of Reduced Rate.—A recital in a shipping contract, limiting the carrier's liability, that it has two rates for shipment, and that the rate named in the contract is a special rate and is less than the rate charged for shipments at carrier's risk, in consequence of which reduced rate the agreement limiting the carrier's liability is made, is *prima facie* evidence that the rate named is a reduced rate, and the burden of proving the contrary is on the shipper,²⁵ certainly where the shipper signed the contract;²⁶ and it is error to tell the jury in an action for damages for failure to transport safely, that they could not consider the contract as to the limitation without other evidence of consideration.²⁷

Presumption Where Restriction Forbidden by Law.—No statement or concession in rates will be presumed to be a consideration for a stipulation purporting to restrict the common-law liability of a common carrier, where such an abatement is forbidden by law.²⁸

Shifting Burden of Proof.—Where, as against a written contract of shipment improperly exacted by the carrier, the shipper proves that the consideration expressed therein was wanting, this is sufficient, unless the carrier proves a different or additional consideration, and the words "and other considerations" recited in the contract are immaterial.²⁹

Rebutting Presumption.—This presumption is not rebutted by evidence that in many cases the same rate was charged when no bill of lading was given.³⁰

Shipper's Knowledge of Higher Rate.—Where a contract to carry freight recites that, in consideration of a reduced freight rate, the carrier's liability shall be limited to a specified valuation, the shipper can not show, in the absence of a showing of fraud or imposition, that he did not know that the carrier had a higher rate than that charged.³¹

That Rate Included in Schedule Filed with Interstate Commerce Commission.—Where the contract of affreightment in the case of an interstate shipment expresses no consideration for the agreement limiting the carrier's liability, it can not be presumed that the claimed reduced rate was included in the schedule of rates filed with the Interstate Commerce Commission, and was duly posted, and so was the rate that the carrier could offer.³²

Unrestricted Receipts for Freight Delivered in Car-Load Lots—Stipulation in Subsequent Bills of Lading.—The presumption arising from unqualified and unrestricted receipts issued by a carrier when freight was delivered to it in car-load lots, and bills of lading issued subsequently in lieu of

25. *Georgia, etc., R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782; *Freeman v. St. Louis, etc., R. Co.*, 138 Mo. App. 322, 122 S. W. 1.

26. Where a shipper signs a contract limiting the liability of the carrier, and reciting that it was made in consideration of a reduced rate of freight, such recital is *prima facie* true, and the burden is on the shipper to show the contrary. *Georgia, etc., R. Co. v. Greer*, 58 S. E. 782, 2 Ga. App. 516.

27. *Wabash R. Co. v. Curtis*, 134 Ill. App. 409.

28. **Presumption where restriction forbidden by law.**—*Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, 59 N. W. 546.

29. **Shifting burden of proof.**—*Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

30. **Rebutting presumption.**—*Schaller v. Chicago, etc., R. Co.*, 97 Wis. 51, 71 N. W. 1042.

Same rate charged when no bill of lading.—Where the special contract purporting to limit the carrier's common-law liability relied on by defendant was contained in the bill of lading, the presumption in favor of a consideration for it was not rebutted by the evidence that in many cases the same rate was charged when no bill of lading was given. *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

31. **Shipper's knowledge of higher rate.**—*Mires v. St. Louis, etc., R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

32. **That rate included in schedule filed with interstate commerce commission.**—*Meyers v. Missouri, etc., R. Co.*, 120 Mo. App. 288, 96 S. W. 737.

such receipts, is that there was no consideration for a stipulation in the bills of lading whereby the carrier attempted to relieve itself from its common-law liability in case the freight was lost in transit by fire or other casualty, and therefore such stipulation was not binding.³³

Contract Executed by Shipper's Agent.—Where contracts of shipment were signed by agents, who, as the plaintiff himself testified, were authorized to do so, and where it does not appear when and under what circumstances they so signed, it can not be said that they were executed without consideration.³⁴

§§ 1296-1298. Knowledge of Contract and Assent of Shipper—§§ 1296-1297. Jurisdictions Requiring Express Assent—§ 1296. Presumption.—Whether any limitation of a carrier's liability has been knowingly assented to by the shipper is a matter of proof and can not be implied or presumed contrary to the fact, when the acts of the shipper do not operate as an estoppel.³⁵ In the absence of satisfactory proof, showing that the shipper has, by assent and acquiescence, or otherwise, agreed to limit the liability of the carrier, the presumption is that he intended to insist on his common-law rights.³⁶

Not Presumed from Notice.—The assent of the owner is not to be implied, and can not be reasonably presumed from a notice in the absence of proof of an express agreement.³⁷

Absence of Evidence of Assent in Appeal Record.—Where defendant railway contends that its liability was limited by a bill of lading which in its entirety constituted both a receipt and a contract, but there was no evidence in the record that the plaintiff assented thereto, he could not be held bound thereby.³⁸

Loss by Fire.—The mere fact that the bill of lading given by the carrier to the shipper contains a clause purporting to exempt the carrier from loss of the freight by fire, is not conclusive of such a contract.³⁹

Presumption in Absence of Question as to Shipper's Knowledge.—Where no question is made as to the knowledge of the shipper of the provisions in a bill of lading restricting the carrier's liability, it will be inferred that he received it with knowledge of its contents and agreed to its terms, and consequently the carrier is not liable.⁴⁰

33. Unrestricted receipts for freight delivered in car-load lots—Stipulation in subsequent bills of lading.—*Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 442.

34. Contract executed by shipper's agent.—*Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806.

35. Presumption.—*Illinois Match Co. v. Chicago, etc., R. Co.*, 250 Ill. 396, 95 N. E. 492; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *Mack, etc., Co. v. Great Western Despatch*, 3 O. C. C. 36, 2 O. C. D. 22; *Cincinnati, etc., R. Co. v. Berdan & Co.*, 22 O. C. C. 326, 12 O. C. D. 481; *American Roofing Co. v. Memphis, etc., Packet Co.*, 5 N. P. 146, 8 O. Dec. 490.

36. Pittsburgh, etc., R. Co. v. Barrett, 36 O. St. 448; *Graham & Co. v. Davis & Co.*, 4 O. St. 362.

"The notice is a restriction upon a legal liability, and if merely known to both shipper and carrier, and not expressly made a part of their contract, by the assent of the former, it is to be presumed that the carrier waives the illegal pre-

tension." *United States Exp. Co. v. Backman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144.

37. Not presumed from notice.—*Davidson v. Graham*, 2 O. St. 131.

38. Absence of evidence of assent in appeal record.—*Chicago, etc., R. Co. v. Calumet Stock Farm*, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095, 194 Ill. 9, 88 Am. St. Rep. 68.

39. Loss by fire.—*Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43.

40. Presumption in absence of question as to shipper's knowledge.—*Anchor Line v. Knowles*, 66 Ill. 150.

Presumption in absence of question as to shipper's knowledge.—It was so held where it appeared that a person shipped goods to be carried by water as well as by land, and received a bill of lading containing a provision that the carrier should not be liable for loss or damage to the property by fire or other casualty, while in transit or at depots or landing at the point of delivery, and the goods were safely carried to their destination, and there safely stored in a suitable warehouse, where they were destroyed by

§ 1297. Burden of Proof.—In jurisdictions which require the express assent of the shipper to conditions in the shipping contract limiting the carrier's liability, the burden is upon the carrier claiming the benefit of a contract purporting to limit its liability to prove the shipper's express assent to the restriction.⁴¹ This rule prevails in Illinois,⁴² Mississippi,⁴³ Ohio,⁴⁴ and other states, and is as applicable in assumpsit to recover damages for the breach of an alleged special contract as in an action of tort to recover damages for negligence.⁴⁵

Bill of Lading Not Signed by Owner or Consignor.—Where a carrier claims an exemption from its common-law liability, under a bill of lading not signed by the owner or consignee of the freight, it must aver and prove that the bill was assented to by the shipper.⁴⁶

Must Prove Understanding and Intentional Assent.—Where a limitation of the common-law liability of a carrier appears only in the bill of lading or receipt given to the shipper, however clearly expressed, the mere fact of its acceptance without objection by the shipper is not conclusive of his assent to it; it being necessary to show in order to bind him that he accepted it with a full understanding on his part of the restriction, and intentionally assented to it.⁴⁷

Receipt Delivered to Shipper.—Where a carrier delivers to the shipper a receipt for goods which limits its common-law liability, it must, to bind the shipper, show that he was aware of the restriction in the receipt, and assented thereto.⁴⁸ This rule applies to interstate commerce.⁴⁹

fire, on the night of the next day, without any fault on the part of the carrier. *Anchor Line v. Knowles*, 66 Ill. 150.

41. Burden of proof.—*The Guildhall*, 58 Fed. 796; *Seller v. Pacific*, Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409.

42. *Adams Exp. Co. v. King*, 3 Ill. App. 316; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; *Chicago, etc., R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095, 88 Am. St. Rep. 68; *Chicago, etc., R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Erie, etc., Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Elgin, etc., R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

A carrier who relies on a contract to limit the extent of its liability has the burden of showing that the shipper assented to its terms. *Childers v. Chicago, etc., R. Co.*, 166 Ill. App. 391; *Bekins Household Shipping Co. v. Grand Trunk R. System*, 162 Ill. App. 497; *Chicago, etc., R. Co. v. Igo*, 130 Ill. App. 373; *Wabash R. Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. N. S., 1041, affirming 122 Ill. App. 569; *Cleveland, etc., R. Co. v. McNutt*, 138 Ill. App. 66; *Hennigh v. Cleveland, etc., R. Co.*, 143 Ill. App. 283; *Tate v. Missouri Pac. R. Co.*, 157 Ill. App. 105; *Toberman v. Toledo, etc., R. Co.*, 159 Ill. App. 200; *Waxelbaum v. Southern R. Co.*, 168 Ill. App. 66; *Davis*

Bros. v. Vandalia R. Co., 168 Ill. App. 621.

43. *Mississippi Southern Exp. Co. v. Moon*, 39 Miss. 822.

44. *Pittsburgh, etc., R. Co. v. Blake-more*, 1 O. C. C. 42, 1 O. C. D. 26; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418.

45. *Kirby v. Chicago, etc., R. Co.*, 146 Ill. App. 31.

46. Bill of lading not signed by owner or consignor.—*Illinois Cent. R. Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *Jacobson & Co. v. Adams Exp. Co.*, 1 O. C. C. 381, 1 O. C. D. 212.

47. Must prove understanding and intentional assent.—*Wabash R. Co. v. Harris*, 55 Ill. App. 159.

48. Receipt delivered to shipper.—*Plaff v. Pacific Exp. Co.*, 251 Ill. 243, 95 N. E. 1089; *Illinois Custom Tailoring Co. v. Adams Exp. Co.*, 158 Ill. App. 374.

Under the express provisions of *Hurd's Rev. St.* 1908, c. 114, § 96, a common carrier can not by limitation in the receipt given for property for shipment limit its liability, unless it be shown that the shipper understood and assented to the limitation, and, when the contract containing the limitation is the bill of lading constituting both receipt and contract, the burden is on the carrier to show that the restrictions were assented to by the shipper. *Coats v. Chicago, etc., R. Co.*, 87 N. E. 929, 239 Ill. 154.

49. Interstate commerce.—*Igo v. Cleveland, etc., R. Co.*, 156 Ill. App. 190.

Receipt Signed by Shipper.—The burden of proof is upon the carrier to show that the shipper, in signing a shipping receipt containing a clause purporting to limit the carrier's common-law liability, understood the contents of the instrument he was signing.⁵⁰

Shipping Orders as Per Conditions of Bill of Lading.—Where a shipper delivered to a carrier his shipping order as per conditions of the carrier's bill of lading, and the carrier delivered to the shipper a bill of lading in which it limited its liability, the carrier must show by evidence outside of the instruments that the limitations were assented to by the shipper.⁵¹

§ 1298. Jurisdictions in Which Assent Presumed from Acceptance.—See ante, "Acceptance of Freight Receipt or Bill of Lading," §§ 1206-1208. Where a shipper delivers a shipment to a common carrier and accepts a bill of lading or receipt therefor, it is presumed to contain the terms of the contract or shipping receipt, and the law presumes, in the absence of proof to the contrary, that a shipper receiving a bill of lading containing a limited liability clause read the bill, or was otherwise informed of its contents⁵² and assented thereto, and the burden is on the person accepting the receipt to show that he was misled by misrepresentation or fraud,⁵³ and that there was no assent on his part.⁵⁴

Assent to Contract Presumed under Lex Fori Only.—If the law of the place where a contract, signed only by the carrier, is made for the transportation of freight, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from its acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought.⁵⁵

Presumption of Notice to Consignee.—In the absence of fraud or mistake, where a contract of affreightment made by the consignor for the consignee the latter will be conclusively presumed to know its stipulations.⁵⁶ A written instrument signed by the shipper may be explained by evidence showing the true situation of the parties and the true contract under which the shipment was made. When it is shown that the shipper relied upon a parol agreement of shipment and upon the common-law liability of the carrier, a written contract changing the liability of the carrier should not prevail, when the shipper did not know its contents or assent to its terms. In such cases, the presumption arising from the fact that he signed it may be rebutted, and want of assent and mutuality shown.⁵⁷

Verbal Contract to Carry to Destination—Bill of Lading to Deliver to Next Carrier.—Where a verbal shipping contract is made by which freight is to be carried to its destination, but the bill of lading then made is merely to

50. Receipt signed by shipper.—Atchison, etc., R. Co. v. Bilinsky, 107 Ill. App. 504.

51. Shipping orders as per conditions of bill of lading.—Illinois Match Co. v. Chicago, etc., R. Co., 250 Ill. 396, 95 N. E. 492, reversing judgment 153 Ill. App. 568.

52. Porteous v. Adams Exp. Co., 115 Minn. 281, 132 N. W. 296; Hill v. Adams Exp. Co., 78 N. J. L. 333, 74 Atl. 674; Florman v. Dodd, etc., Exp. Co., 79 N. J. L. 63, 74 Atl. 446.

53. Porteous v. Adams Exp. Co., 115 Minn. 281, 132 N. W. 296.

Express receipt.—Where a person delivers a package to an express company and accepts a receipt, it is presumed to contain the terms of the contract, and if

he desires to avoid such terms the burden is on the person accepting the receipt to show that he was misled by misrepresentations or fraud, and mere failure to examine the receipt is not sufficient. Porteous v. Adams Exp. Co., 115 Minn. 281, 132 N. W. 296.

54. Boorman v. American Exp. Co., 21 Wis. 152.

55. Assent to contract presumed under lex fori only.—Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

56. Presumption of notice to consignee.—Robinson Bros. v. Merchants' Despatch Transp. Co., 45 Iowa 470.

57. Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

carry to the next carrier, the shipper not noticing this, the verbal contract is competent evidence, and the burden is on the carrier, to show assent by the shipper to a change in its terms.⁵⁸

Knowledge of Inconspicuous Conditions.—See ante, "Inconspicuous Conditions and Type," § 1171.

§ 1299. Authority of Shipper's Agent.—Authority of Agent of Owner of Goods to Bind Him.—See ante, "Agent of Consignor," § 1226.

Authority of Consignor to Bind Consignee.—See ante, "Authority of Consignor to Bind Consignee," §§ 1222-1225.

§ 1300. Misrepresentation of Value or Contents of Package.—It can not be assumed, because there was a conflict in the testimony of plaintiff and the agent of a carrier, that plaintiff was guilty of any misrepresentations regarding the value or character of the contents of a box shipped by him.⁵⁹

§§ 1301-1306. Showing Loss within Exemption—§ 1301. In General.—Where goods are lost by a carrier it is presumed that the loss was due to its fault, and the burden is on the carrier to show that the damage was due to a cause for which it is not responsible by reason of exemptions in the bill of lading.⁶⁰

58. Verbal contract to carry to destination—Bill of lading to deliver to next carrier.—Pittsburgh, etc., R. Co. v. Blakemore, 1 O. C. C. 42, 1 O. C. D. 26.

59. Misrepresentation of value or contents of package.—Union Pac. R. Co. v. Stupeck, 50 Colo. 151, 114 Pac. 646.

60. Burden of proof as to exemption from liability.—New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Clark v. Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Cau v. Texas, etc., R. Co., 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663; Charnock v. Texas, etc., R. Co., 194 U. S. 432, 437, 48 L. Ed. 1057, 24 S. Ct. 671; Nelson v. Woodruff (U. S.), 1 Black 156, 17 L. Ed. 97; Inman v. South Carolina R. Co., 129 U. S. 128, 139, 32 L. Ed. 612, 9 S. Ct. 249; Propeller Niagara v. Cordes (U. S.), 21 How. 7, 29, 16 L. Ed. 41; Rich v. Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017; Railroad Co. v. Manufacturing Co. (U. S.), 16 Wall. 318, 328, 21 L. Ed. 297.

Where goods are shipped and the usual bill of lading given, "promising to deliver them in good order, the dangers of the seas excepted," and they are found to be damaged, the onus probandi is upon the owners of the vessel, to show that the injury was occasioned by one of the excepted causes. Clark v. Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

New Jersey Steam Nav. Co. v. Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465.

In cases of express contracts, the onus of proving the facts necessary to relieve the carrier from the common-law liability for the loss of goods entrusted to him as such, devolves upon him, and not upon the shipper. Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Verner v. Sweitzer, 32 Pa. 208.

Where the breach of the common-law duty of a common carrier is made the ground of recovery, the burden of proof is on the carrier, not only to allege and prove the contract thus limiting its liability but the facts showing noncompliance therewith on the part of the shipper. St. Louis, etc., R. Co. v. Bryce, 49 Tex. Civ. App. 608, 610, 110 S. W. 529. See, also, Missouri Pac. R. Co. v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78; Missouri Pac. R. Co. v. Childers, 1 Tex. Civ. App. 302, 21 S. W. 76; St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476.

Alabama.—Alabama, etc., R. Co. v. Little, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; Grey v. Mobile Trade Co., 53 Ala. 387, 28 Am. Rep. 729; Louisville, etc., R. Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Mouton v. Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602; Nashville, etc., R. Co. v. Parker, 123 Ala. 683, 27 So. 323; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649.

Arkansas.—St. Louis, etc., Railway v. Lesser, 46 Ark. 236.

Connecticut.—Mears v. New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Georgia.—Savannah, etc., R. Co. v. Hoffmayer, 75 Ga. 410; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783;

§§ 1302-1303. Showing Negligence Vel Non—§ 1302. Rule Placing Burden on Shipper.—In many jurisdictions, where a common carrier is sued for the loss of goods, it is sufficient for plaintiff in the first instance to prove a delivery to the carrier and a loss. If the carrier then sets up a special contract, limiting its liability, the burden is on it to prove that the loss occurred through causes from which it was relieved by the contract. However the carrier is not required to go further and prove affirmatively an absence of negligence on its part, but the burden of proof is on the shipper to defeat the effect of the clause by affirmative proof of the carrier's negligence. In other words, where loss or damage has been occasioned by one of the excepted causes, the burden of proof is shifted upon the shipper, to show the negligence. This rule prevails in the federal courts,⁶² in the states of Arkansas,⁶³ Iowa,⁶⁴ Kansas,⁶⁵

Carter & Co. v. Southern R. Co., 3 Ga. App. 34, 59 S. E. 209; *Atlanta, etc., R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355.

Illinois.—*Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Indiana.—*Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239.

Kansas.—*Falina v. Union Pac. R. Co.*, 69 Kan. 172.

Louisiana.—*Edwards v. Cahawba*, 14 La. Ann. 224.

Maine.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606.

Maryland.—*Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

Massachusetts.—*Alden v. Pearson (Mass.)*, 3 Gray 342.

Michigan.—*Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476, 84 N. W. 722; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Minnesota.—*Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 40 Am. & Eng. R. Cas. 104, 16 Am. St. Rep. 722; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353.

Mississippi.—*Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104; *Mobile, etc., R. Co. v. Tupelo Furniture Mfg. Co.*, 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262; *Southern Exp. Co. v. Moon*, 39 Miss. 822.

Missouri.—*Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199, 9 Am. R. Rep. 201; *Schutter v. Adams Exp. Co.*, 5 Mo. App. 316; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103; *Wolf v. American Exp. Co.*, 43 Mo. 421, 97 Am. Dec. 406.

Montana.—*Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642.

Nebraska.—*Pennsylvania R. Co. v. Kenard Glass, etc., Co.*, 59 Neb. 435.

New Hampshire.—*Hall v. Cheney*, 36 N. H. 26.

New York.—*Arend v. Liverpool, etc., Steamship Co.*, 64 Barb. 118, 6 Lans. 457;

Bowden v. Fargo, 22 N. Y. S. 890, 68 Hun 607; *Fenn v. Timpson (N. Y.)*, 4 E. D. Smith 276; *Koeningsheim v. Hamburg American Packet Co. (N. Y.)*, 12 Daly 123; *Newstadt v. Adams*, 12 N. Y. Super. Ct. 43; *Robinson v. New York, etc., Steamship Co.*, 63 App. Div. 211, 71 N. Y. S. 424.

Ohio.—*Davidson v. Graham*, 2 O. St. 131; *Gaines v. Union Transp., etc., Co.*, 28 O. St. 418; *Graham & Co. v. Davis & Co.*, 4 O. St. 362; *United States Exp. Co. v. Backman*, 28 O. St. 144.

Pennsylvania.—*Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; *Verner v. Sweitzer*, 32 Pa. 208.

South Carolina.—*Baker v. Brinson (S. C.)*, 9 Rich. L. 201, 67 Am. Dec. 548; *Cameron v. Rich*, 4 Strobb. L. (S. C.), 168; *Crawford v. Southern R. Co.*, 56 S. C. 136, 34 S. E. 80; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 17 S. E. 512; *Slater v. South Carolina R. Co.*, 29 S. C. 96, 6 S. E. 936; *Swindler v. Hilliard (S. C.)*, 2 Rich. L. 286, 45 Am. Dec. 732; *Wallingford v. Columbia, etc., R. Co.*, 26 S. C. 258, 2 S. E. 19.

Texas.—*Galveston, etc., R. Co. v. Efron (Tex. Civ. App.)*, 38 S. W. 639.

Wisconsin.—*Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 47 N. W. 428, 10 L. R. A. 415, 23 Am. St. Rep. 414; *Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 130; *Falvey v. Northern Transp. Co.*, 15 Wis. 129.

62. Burden of proof as to negligence where loss due to excepted cause.—*Clark v. Barnwell (U. S.)*, 12 How. 272, 13 L. Ed. 985; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663; *Charnock v. Texas, etc., R. Co.*, 194

63. *Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208, 21 Am. & Eng. R. Cas. 97; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598.

64. *Mitchell v. United States Exp. Co.*, 46 Iowa 214.

65. *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

Louisiana,⁶⁶ Maine,⁶⁷ Maryland,⁶⁸ Missouri,⁶⁹ New York,⁷⁰ Pennsylvania,⁷¹ Tennessee,⁷² and others, and it also prevails in England.⁷³ This rule has been applied in case of exemptions from loss by nondelivery⁷⁴ and by water or by

U. S. 432, 437, 48 L. Ed. 1054, 24 S. Ct. 671; *Transportation Co. v. Downer* (L. S.), 11 Wall. 129, 20 L. Ed. 160; *New Jersey Steam Nav. Co. v. Merchants' Bank* (U. S.), 6 How. 344, 12 L. Ed. 465; *The Victory*, 168 U. S. 410, 423, 42 L. Ed. 519, 18 S. Ct. 149; *The City of Hartford*, 97 U. S. 323, 24 L. Ed. 930; *The Ludvig Holberg*, 157 U. S. 60, 39 L. Ed. 620, 15 S. Ct. 477; *Hibernia Ins. Co. v. St. Louis, etc., Transp. Co.*, 120 U. S. 166, 30 L. Ed. 621, 7 S. Ct. 550; *Memphis, etc., R. Co. v. Reeves* (U. S.), 10 Wall. 176, 19 L. Ed. 909; *Ceballos v. Warren Adams*, 20 C. C. A. 486, 74 Fed. 413; *Ullman v. Flintshire*, 69 Fed. 471; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. 421, 1 Fed. 232; *The Jefferson*, 31 Fed. 489; *Van Schaak v. Northern Transp. Co.*, Fed. Cas. No. 16,876, 3 Biss. 394; *Western Transp. Co. v. Downer* (U. S.), 11 Wall. 133, 20 L. Ed. 160; *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985.

A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was prima facie relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. *Transportation Co. v. Downer* (U. S.), 11 Wall. 129, 20 L. Ed. 160.

When a defendant, a transportation company, shows that a loss of goods, which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant rests with the plaintiff. *Transportation Co. v. Downer* (U. S.), 11 Wall. 129, 20 L. Ed. 160.

Effect where loss by collision excepted.

—Loss by collision being an exception in a bill of lading, where damage is occasioned by collision, it rests on the underwriters to defeat the operation of the exception, by proof of negligence. *The Victory*, 168 U. S. 410, 42 L. Ed. 519, 18 S. Ct. 149, citing *Clark v. Barnwell* (U. S.), 12 How. 272, 13 L. Ed. 985; *Transportation Co. v. Downer* (U. S.), 11 Wall. 129, 20 L. Ed. 160; *The City of Hartford*, 97 U. S. 323, 24 L. Ed. 930; *The Ludvig Holberg*, 157 U. S. 60, 39 L. Ed. 620, 15 S. Ct. 477.

66. *New Orleans Mut. Ins. Co. v. New*

Orleans, etc., R. Co., 20 La. Ann. 302; *Price v. The Uriel*, 10 La. Ann. 413; *Kelham v. Steamship Kensington*, 24 La. Ann. 100; *Kirk v. Folsom*, 23 La. Ann. 584.

67. *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

68. *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197, 6 Am. Rep. 321.

69. *Anderson v. Atchison, etc., R. Co.*, 93 Mo. App. 677, 67 S. W. 707; *Bushnell v. Wabash R. Co.*, 118 Mo. App. 618, 94 S. W. 1001; *Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424; *Harvey v. Terre Haute, etc., R. Co.*, 6 Mo. App. 585; *Heil v. St. Louis, etc., R. Co.*, 16 Mo. App. 363; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199, 9 Am. R. Rep. 201; *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. 676; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103; *S. C.*, 14 S. W. 743, 10 L. R. A. 602, 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; *Hance v. Pacific Exp. Co.*, 48 Mo. App. 179.

70. *Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 271, 7 Am. Rep. 327, reversing 2 Daly 454; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; *French v. Buffalo, etc., R. Co.*, 43 N. Y. (4 Keyes) 108, 2 Abb. Dec. 196; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268; *Sutro v. Fargo*, 41 N. Y. Super. Ct. 231; *Cochran v. Dinsmore*, 49 N. Y. 249.

71. *Colton v. Cleveland, etc., R. Co.*, 67 Pa. 211, 5 Am. Rep. 424; *Buck v. Pennsylvania R. Co.*, 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; *Farnham v. Camden, etc., R. Co.*, 55 Pa. 53; *Patterson v. Clyde*, 67 Pa. 500.

Where there is proof of the fact of the injury and of the manner of its occurrence under circumstances which do not import negligence on the part of the carrier, there is no liability on the carrier, where it has contracted for a limited liability only, except upon affirmative proof of its negligence as an inducing cause of the injury; and the burden of making such proof is on the plaintiff. *Buck v. Pennsylvania R. Co.*, 150 Pa. 170, 30 Am. St. Rep. 800, 24 Atl. 678.

72. *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

73. *Harris v. Packwood*, 3 Taunt. 264. See *Marsh v. Horne*, 5 B. & C. 322, 11 E. C. L. 243.

74. **Nondelivery.**—The plaintiffs' claim for loss in case of nondelivery rests upon the bill of lading, and by that the defendants clearly contracted upon the basis of a common carrier's liability; as

freight becoming wet⁷⁵ and under stipulations providing that the loss to be at shipper's risk;⁷⁶ or that the shipper assume the risk of "all damage that may happen."⁷⁷

Refusal of Carrier to Give Information as to Fire.—A presumption of negligence rises from the refusal of the carrier to give information in regard to a fire which injured a consignment of freight.⁷⁸

§ 1303. Rule Placing Burden on Carrier.—In a number of jurisdictions, if a common carrier limits its common-law liabilities by special contract; and a loss is sustained, the burden of proof is on it to show not only that such loss arose from a cause from which it was exempted from the responsibility by the terms of its special contract but also that it arose from no negligence or misfeasance of itself or its servants.⁷⁹ This doctrine prevails in Alabama,⁸⁰ Connecticut,⁸¹ Georgia,⁸² Illinois,⁸³ Indiana,⁸⁴ Kentucky,⁸⁵ Minnesota,⁸⁶ Missis-

such they were insurers, and the burthen of proof was thrown upon them to bring themselves within the exception. *Stephens, etc., Transp. Co. v. Tuckerman, etc., Co.*, 33 N. J. L. 543.

75. Damage by wet.—Where a contract exempts the carrier from liability for damages by wet, the shipper must establish that the carrier negligently permitted the freight to become wet, by proving affirmatively some specific act of negligence as the proximate cause of the injury. *Thyll v. New York, etc., R. Co.*, 84 N. Y. Supp. 175.

76. *Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co.*, 13 Ariz. 186, 108 Pac. 467.

77. Assumption of "all damages that may happen."—Where the owner in employing a bailee to transport goods for him stipulates to take upon himself the risk of "all damages that may happen" to the goods in transportation, such condition will not exonerate the bailee from liability for damage to the goods resulting from his negligence or misconduct, but such stipulation will cast upon the owner the burden of proving that the damage was so occasioned. *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

78. Failure to give information in regard to fire.—In *Pennsylvania R. Co. v. Miller*, 87 Pa. 395, it appeared that a carriage was shipped on defendant's railroad. The bill of lading provided that, except where defendant was guilty of gross negligence, it was not to be responsible for any of the dangers of railroad transportation or of fire. The carriage reached its destination much injured by fire, and defendant refused to give any information in regard thereto. It was held that by the refusal of defendant to give any account of the cause of the injury, a presumption of negligence arose which it was necessary for it to rebut; and that such presumption was not, ipso facto, repelled by evidence that defendant exercised ordinary care.

79. *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

80. *Alabama, etc., R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Louisville, etc., R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514, 11 So. 756; *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Steele v. Townsend*, 37 Ala. 247; *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; *Central, etc., R. Co. v. Burton*, 165 Ala. 432, 51 So. 643.

81. *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

82. *Berry v. Cooper*, 28 Ga. 543; *Central, etc., R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 15 S. E. 802; *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807; *Carter & Co. v. Southern R. Co.*, 3 Ga. App. 34, 59 S. E. 209; *Atlanta, etc., R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Southern R. Co. v. Montag*, 1 Ga. App. 649, 57 S. E. 933; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

83. *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57.

84. *Pittsburg, etc., R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

85. *Louisville, etc., R. Co. v. Thompson, etc., Co.*, 13 Ky. L. Rep. 973.

86. *Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373; *Shea v. Minneapolis, etc., R. Co.*, 63 Minn. 228, 65 N. W. 458; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 442, 619; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. 391, 40 Am. & Eng. R. Cas. 104, 16 Am. St. Rep. 722; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353.

issippi,⁸⁷ North Carolina,⁸⁸ Ohio,⁸⁹ South Carolina,⁹⁰ Texas,⁹¹ West Virginia,⁹² and perhaps others. This rule has been applied where, under the bill of lading, the carrier was exempt from loss by inevitable accident,⁹³ dangers of navigation or danger of the river navigation,⁹⁴ and where the exemptions in the contract of shipment excluded liability for loss or injury from breakage,⁹⁵ de-

87. Chicago, etc., R. Co. v. Moss & Co., 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; Newberger Cotton Co. v. Illinois Cent. R. Co., 75 Miss. 303, 23 So. 186; Southern Exp. Co. v. Seide, 67 Miss. 609, 7 So. 547, 42 Am. & Eng. R. Cas. 398; Southern Exp. Co. v. Moon, 39 Miss. 822.

88. Hinkle v. Southern R. Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; Smith v. North Carolina R. Co., 64 N. C. 235.

89. Erie R. Co. v. Lockwood & Son, 28 O. St. 358; Fatman & Co. v. Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152; Gaines v. Union Transp., etc., Co., 28 O. St. 418; Graham & Co. v. Davis & Co., 4 O. St. 362; Union Exp. Co. v. Graham, 26 O. St. 595; Union Mut. Ins. Co. v. Indianapolis, etc., R. Co., 1 Disn. 480, 12 O. Dec. 745; United States Exp. Co. v. Backman, 28 O. St. 144.

If the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care. Graham & Co. v. Davis & Co., 4 O. St. 362 (citing 2 Greenl. Ev., § 219); Union Exp. Co. v. Graham, 26 O. St. 595; United States Exp. Co. v. Backman, 28 O. St. 144; Gaines v. Union Transp., etc., Co., 28 O. St. 418; Pittsburgh, etc., R. Co. v. Barrett, 36 O. St. 448; Jacobson & Co. v. Adams Exp. Co., 1 O. C. C. 381, 1 O. C. D. 212.

Reason for rule.—The doctrine of casting the burden of proof upon the carrier, in cases involving negligence, arises ex necessitate from the nature of the case and from considerations of public policy. The carrier having possession of the goods can readily show the circumstances attending the loss, while the bailor can only do so by the testimony of the agents and servants of the carrier. T. & O. C. R. Co. v. Ambach, 10 O. C. C. 490, 6 O. C. D. 574.

90. Johnstone v. Richmond, etc., R. Co., 39 S. E. 55, 17 S. E. 512; Swindler v. Hilliard (S. C.), 2 Rich. L. 286, 45 Am. Dec. 732; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19; Baker v. Brinson (S. C.), 9 Rich. L. 201, 67 Am. Dec. 548; Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 S. E. 856.

91. Askew v. Gulf, etc., R. Co. (Tex. Civ. App.), 73 S. W. 846; Ryan & Co. v. M. K. & T. R. Co., 65 Tex. 13, 23 Am. &

Eng. R. Cas. 703, 57 Am. Rep. 589; St. Louis, etc., R. Co. v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346; Texas, etc., R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619.

Even when the shipment is under a contract limiting the common-law liability of the carrier, an injury, when shown to have been received during transportation, puts upon the carrier the burden of showing, not only that the injury comes within the exemptions to which it is entitled under the contract, but that it was inflicted without its negligence or that of its servants. St. Louis, etc., R. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131; Ryan & Co. v. M. K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703, 57 Am. Rep. 589; Texas, etc., R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

Where a common carrier relies on the stipulations of the bill of lading to secure immunity from liability for the loss of goods entrusted to his care, the burden is on him to prove that the loss was occasioned without his fault. Houston, etc., R. Co. v. McFadden, 40 S. W. 216, 42 S. W. 593, 91 Tex. 194.

92. Baltimore, etc., R. Co. v. Morehead, 5 W. Va. 293; Brown v. Adams Exp. Co., 15 W. Va. 812; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Where a common carrier relies on a contract of exemption, it must not only bring itself within the exemption but show that its negligence did not contribute to the result. Brown v. Adams Exp. Co., 15 W. Va. 812.

93. Inevitable accident.—Graham & Co. v. Davis & Co., 4 O. St. 362.

94. Dangers of the river navigation.—In an action against a carrier, upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after the nondelivery of the goods is shown, the burden of proof is upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it. Graham & Co. v. Davis & Co., 4 O. St. 362.

95. "Not accountable for rust or breakage."—Proof of breakage.—Where the bill of lading contains an express stipulation, that the carrier is "not accountable for breakage," proof of injury to the goods by breakage nevertheless

lay,⁹⁶ fire,⁹⁷ floods,⁹⁸ leakage,⁹⁹ and by rust;¹ and where the goods were shipped "released."² The duty of the carrier to prove the absence of negligence on his part arises from the terms of the contract, from the character of his occupation, and from the rule of evidence requiring the facts to be proven by that party in whose knowledge they peculiarly lie.³

§§ 1304-1306. Particular Stipulations—§ 1304. Perils of Navigation.—Where a loss is caused by the perils of navigation within the exceptions of the bill of lading, it is not incumbent upon the carrier to show affirmatively the particular cause of the loss.⁴

§ 1305. Loss by Fire.—The general rule is that when, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of goods lost by fire in the transit must affirmatively prove that the loss was the result of negligence of the carrier or his agents, before he can recover. A presumption of negligence does not arise from the fact that the freight was in possession of the carrier at the time of the fire, and was destroyed by it.⁵ But the

makes out a prima facie case of negligence against the carrier, and the onus is then on it to show the exercise of due care on its part to prevent the injury, unless the nature of the injury, or of the goods, of itself, furnishes evidence that due care could not have prevented the injury. *Steele v. Townsend*, 37 Ala. 247.

96. "Subject to delay."—Although a carrier accepted the shipment under a contract, "subject to delay," it has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods. *Parker v. Atlantic, etc., R. Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827.

Delay after damage to track by flood repaired.—Where a railroad company is excusable for delay in the transportation of freight, caused by damage to its track from an unprecedented flood, the burden is, nevertheless, upon it to show due care to transport the goods within a reasonable time after the track is repaired. *Burnham v. Alabama, etc., R. Co.*, 81 Miss. 46, 32 So. 912.

97. Fire.—When there is a special exemption as to loss by fire, the onus of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier. *Berry v. Cooper*, 28 Ga. 543. See, also, *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783. See post, "Loss by Fire," § 1305.

98. Floods.—*Burnham v. Alabama, etc., R. Co.*, 81 Miss. 46, 32 So. 912.

99. Leakage.—Where, in an action for damage and loss to a shipment of oil, the carrier interposed the defense that under the bill of lading it was not liable for loss by leakage, the burden was on it not only to show that the cause of the loss was within the terms of the exemption, but also that there was no negligence by it. *Baltimore, etc., R. Co. v. Oriental Oil Co.*, 51 Tex. Civ. App. 336, 111 S. W. 979.

1. Rust.—*Steele v. Townsend*, 37 Ala. 247.

2. Goods shipped "released."—Where goods are shipped "released" the burden is upon the carrier to show that the loss was within the exemption and not occasioned by his negligence. Civil Code, § 2265. *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807.

3. Chicago, etc., R. Co. v. Moss & Co., 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98.

4. Perils of navigation.—*Hill v. Sturgeon*, 35 Mo. 212, 86 Am. Dec. 149.

5. Loss by fire.—*United States.*—*Cau v. Texas, etc., R. Co.*, 51 C. C. A. 76, 113 Fed. 91; *Charnock v. Texas, etc., R. Co.*, 113 Fed. 92, 51 C. C. A. 78; *Marande v. Texas, etc., R. Co.*, 102 Fed. 246, 42 C. C. A. 317.

Arizona.—In an action for loss by fire of goods in transportation, loss to be at shipper's risk, the burden is on the shipper to show that the fire was caused by the negligence of the carrier. *Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co.*, 13 Ariz. 186, 108 Pac. 467.

Arkansas.—*Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208, 21 Am. & Eng. R. Cas. 97; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26, 11 S. W. 958.

California.—*Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

Indiana.—*Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138.

Iowa.—*Denton v. Chicago, etc., R. Co.*, 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263; *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454.

Maine.—*Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

Mississippi.—*Newberger Cotton Co. v.*

courts of Alabama,⁶ Minnesota,⁷ Ohio,⁸ and Texas,⁹ hold that where the carriage contract exempts the carrier from liability for loss by fire, to enable it to

Illinois Cent. R. Co., 75 Miss. 303, 23 So. 186; Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543.

Missouri.—Witting v. St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369, 28 Mo. App. 103; Standard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

New Jersey.—Johnson v. West Jersey, etc., R. Co., 78 N. J. L. 529, 74 Atl. 496.

New York.—Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Platt v. Richmond, etc., R. Co., 108 N. Y. 358, 15 N. E. 393; Rowan v. Wells Fargo & Co., 80 App. Div. 31, 80 N. Y. S. 226; Sutro v. Fargo, 41 N. Y. Super. Ct. 231; Whitworth v. Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; Burke v. Erie R. Co., 119 N. Y. S. 309, 134 App. Div. 413.

Tennessee.—Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314.

6. Louisville, etc., R. Co. v. Touart, 97 Ala. 514, 11 So. 756.

A common carrier relying on an exemption from liability for loss by fire of goods delivered to it for carriage must show that the goods were destroyed by fire and that such loss was without fault on its part; and where the proof shows that the goods were delivered to the carrier, sixteen and forty hours before their destruction, and fails to show that it could not have forwarded them before the fire, the plaintiff is entitled to recover. Louisville, etc., R. Co. v. Touart, 97 Ala. 514, 11 So. 756.

7. Southard v. Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619.

8. Fire can not be considered, in itself, an unavoidable danger; and in case of loss from that cause, the defendant is bound to show the origin or cause of the fire, to bring himself within the exception; otherwise the presumption is, it might have been avoided by proper care. Union Mut. Ins. Co. v. Indianapolis, etc., R. Co., 1 Disn. 480, 12 O. Dec. 745.

Although the contract of affreightment contains a clause relieving the carrier from loss by fire, he is not thereby exempted from the use of proper care for the safety of the goods while in his possession to be forwarded. It is his duty to keep them, while in his hands awaiting reshipment, in a safe and proper place; and the burden of proof is on him to show that he has done so, although the fire originated, without his fault, in adjacent property over which he had no control, and although he made all rea-

sonable efforts after it originated to prevent it from extending to the goods destroyed. Erie R. Co. v. Lockwood & Son, 28 O. St. 358, 14 Am. R. Rep. 143.

9. Under a bill of lading providing that the carrier shall not be liable for loss or damage by fire, the burden of proof is on the carrier not only to show that the cause of loss was within the exception, but also that there was no negligence on its part. Ryan & Co. v. M., K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703, 57 Am. Rep. 589; Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26, 14 S. W. 785; Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.; Texas, etc., R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Gulf, etc., R. Co. v. Zimmerman, 81 Tex. 605, 17 S. W. 239; Houston, etc., R. Co. v. McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593; St. Louis, etc., R. Co. v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346.

Where cotton was shipped over defendant's road under a contract exempting defendant from loss by fire not due to its negligence, the burden is on the defendant, in an action for the loss of the cotton to show that it was destroyed by fire, and that such fire was not due to defendant's negligence. Galveston, etc., R. Co. v. Efron (Tex. Civ. App.), 38 S. W. 639.

As to whether this was done was a question of fact, to be determined by the jury, or, in the absence of a jury, by the trial judge. Galveston, etc., R. Co. v. Efron (Tex. Civ. App.), 38 S. W. 639.

The burden of proof is upon the carrier to show that a loss by fire, where the contract exempted it from liability therefor, did not occur through its negligence; but it is not necessary that such proof exclude the possibility of negligence on its part in order to entitle it to a submission of the issue. Texas, etc., R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410.

Where plaintiffs' action against a common carrier for a failure to deliver certain cotton is based throughout on the theory that it was destroyed by fire, as shown by his testimony and otherwise, he is not entitled to judgment against the carrier on its common-law liability merely because it has failed to show that the cotton was in fact destroyed by fire without its negligence, which under its contract was an excepted risk. Houston, etc., R. Co. v. Bath & Co., 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

claim such exemption the burden of proof is on it to show that the fire was not caused by its negligence.

No Spark Arresters on Engine.—Where the railway company had no spark arresters on its engines, and the goods were burned while being carried by it, the burden is on the plaintiff to show that the carrier was negligent.¹⁰

Fire Communicated to Wharf from Steamboat.—Where goods which were carried under a bill of lading limiting the carrier's liability were carried to the place of their destination and put in a shed on the carrier's wharf, where four watchmen were employed, and while they were there, a fire, starting from an unknown cause, broke out in a steamboat lying near the wharf, while the boat was fully manned, and destroyed the goods in the shed, this proof adduced by the carrier was sufficient, *prima facie*, to relieve it from liability and to cast on the plaintiff the burden of proving negligence.¹¹

Fire the Act of a Mob.—Where goods were shipped under a provision in a bill of lading that the carrier should not be liable for "loss or damage by fire, unless it could be shown that such loss or damage occurred through the negligence or default of the agents of the company," and upon the arrival of the goods at their place of destination, the car in which they were stored was taken possession of by a mob of strikers against the military power of the state, and was burned, the owner must prove that the loss was the result of the negligence or default of the company's agents, and without such proof the company is not liable.¹²

Interstate Shipment.—A carrier in a foreign shipment, contracting against liability for loss from fire, has the burden of proving it was not caused by its negligence.¹³

Where Plaintiff Introduces Bill of Lading Containing Exemption.—Where a declaration against a carrier for loss of goods by fire alleges only its common-law liability as an insurer, and on the trial plaintiff introduces the bill of lading which exempted the carrier from loss by fire, held, that the introduction of the bill changed the issue, and that it was then incumbent on plaintiff to show not only a loss by fire, but also that it was attributable to the carrier's negligence.¹⁴

§ 1306. Mobs, Riots, Robbery and Strikes.—In an action for injury to goods while in its possession, a common carrier has the burden of showing its exemption from liability, under a provision of a bill of lading exempting it from liability from injury by robbery, riots, and strikes.¹⁵

§ 1307. Performance of Conditions Precedent to Recovery.—The rule that plaintiff, seeking to recover under a contract of shipment, must show performance of condition precedent, applies as well to a case where, during the trial, it appears that plaintiff seeks to recover on such a contract as to one where it has been counted upon in his petition or set up in his answer.¹⁶

§§ 1308-1313. Admissibility of Evidence—§ 1308. Existence and Terms of Contract.—An express contract with the shipper of the goods limit-

10. *Smith v. North Carolina R. Co.*, 64 N. Car. 235.

11. **Fire communicated to wharf from steamboat.**—*Farnham v. Camden, etc., R. Co.*, 55 Pa. 53.

12. **Fire the act of a mob.**—*Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. 421, 1 Fed. 232.

13. **Interstate shipment.**—*Houston, etc., R. Co. v. Bath*, 44 S. W. 595, 17 Tex. Civ. App. 697; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W.

366, citing *Ryan & Co. v. M., K. & T. R. Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 703, 57 Am. Rep. 589.

14. *Johnson v. West Jersey, etc., R. Co.*, 78 N. J. L. 529, 74 Atl. 496.

15. **Mobs, riots, robbery and strikes.**—*Louisville, etc., R. Co. v. Dunlap*, 148 Ala. 23, 24 R. R. R. 453, 47 Am. & Eng. R. Cas., N. S., 453, 41 So. 826.

16. **Performance of conditions precedent to recovery.**—*Kalina v. Union Pac. R. Co.*, 69 Kan. 172, 76 Pac. 438.

ing the liability of the carrier may be proved outside of the receipt given therefor, and the carrier will then be governed thereby.¹⁷

Parol Evidence.—Parol evidence is admissible to show a special contract between a shipper and a common carrier, notwithstanding the carrier's clerk had given a receipt specifying the terms on which the freight was received.¹⁸

Abandoned Petition.—Upon an issue as to whether the through carriage of plaintiff's shipment was on a verbal contract without limitation of liability, or was on a written contract limiting defendant's liability to injuries occurring on its own line, an abandoned original petition by plaintiff, alleging that a written contract had been executed, was relevant and material evidence by admission, whether such petition was verified or not.¹⁹

§ 1309. Signing.—Evidence in regard to the time when the plaintiff signed a contract of shipment relied upon by the defendant to establish its defense, which time was several months after the shipment, and what was said in connection with the signing, was competent.²⁰

§ 1310. Consideration.—Reduced Rate.—The contract of affreightment in the case of an interstate shipment having expressed no consideration for the agreement limiting the carrier's liability, the carrier may not show a reduced rate as a consideration, unless it shows that the claimed reduced rate was included in the schedule of rates filed with the interstate commerce commission and was duly posted, and so was a rate that the carrier could offer; there being no presumption that this was the case.²¹

Parol evidence is admissible to show that the rate which the carrier pretended to grant as a reduced rate was the regular rate always charged.²²

Instructions to Carrier's Agents as Evidence.—Where there is a question as to whether the carrier offered or was ready to ship on any other than the special contract limiting value, it is error to reject evidence tending to show that shippers were allowed choice of contracts under which to ship, and to show the instructions given by the carrier to his agents for their guidance when a shipper rejected the special contract.²³

As to Existence of Reduced Rate.—Where it was not shown that the agent of the carrier or the shipper knew that a special rate would be or was given, in consideration of a waiver by the shipper of liability by the carrier for loss or damage by fire, it was not error to refuse to permit a clerk in the general freight department to testify that the carrier had in force two rates, one by which less was charged in consideration of such a waiver than where there was no such waiver.²⁴

§ 1311. Knowledge and Assent of Shipper.—Circumstantial Evidence.—In attempting to prove the shipper's knowledge of, or assent to the terms of the bill of lading, the carrier may prove all the circumstances surrounding the transaction which have any tendency to establish such knowledge or assent.²⁵

17. **Existence and term of contract.**—Southern Exp. Co. v. Barnes, 36 Ga. 532.

18. **Parol evidence.**—Purcell v. Southern Exp. Co., 34 Ga. 315.

19. **Abandoned petition.**—Ft. Worth, etc., R. Co. v. Wright, 27 Tex. Civ. App. 198, 64 S. W. 1001. See S. C., 58 S. W. 846.

20. **Signing.**—Hendrick v. Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835.

21. **Reduced rate.**—Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96 S. W. 737.

22. **Cross v. Graves**, 4 Texas App. Civ.

Cas., § 100, 16 S. W. 102; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17.

23. **Instructions to carrier's agents as evidence.**—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 13 S. W. 837.

24. **As to existence of reduced rate.**—*McIntosh v. Oregon R., etc., Co.*, 17 Idaho 100, 105 Pac. 66.

25. **Circumstantial evidence.**—*Lake Shore, etc., R. Co. v. Davis*, 16 Ill. App. 425.

Execution of Similar Contracts on Previous Occasions.—The fact that the consignor had on previous occasions signed similar contracts of shipment is competent as tending to show knowledge of the restrictive conditions contained in the particular contract in question in the cause.²⁶

Parol Evidence of Non-Assent.—But the possession by the owner of goods shipped of the receipt or bill of lading of a railroad or express company, containing conditions restricting its liability as a common carrier, is only prima facie evidence that the owner assented to such conditions, and may be contradicted by parol evidence of the facts and circumstances.²⁷

Evidence of Failure to Read.—In an action against a carrier for loss or injury to freight, evidence is not admissible, in the absence of fraud, to show that the consignor did not read the bill of lading delivered to him by the carrier.²⁸ But where, in an action against an express company for loss of goods, the question whether plaintiff consented to vary the oral contract of shipment, so as to make it accord with the terms of a limited liability receipt, evidence that plaintiff did not read the receipt was admissible.²⁹

§ 1312. Fairness or Fraud.—Extrinsic Evidence.—A written contract, purporting to have been entered into for the purpose of limiting a common carrier's common-law liability, is not conclusive upon the question whether it was fairly and honestly entered into, but extrinsic evidence may be resorted to in determining such question.³⁰

§ 1313. Merger of Parol and Subsequent Written Contract.—In an action against a railroad company for breach of a verbal agreement to receive and ship freight on a certain day, a subsequent written contract between the same parties, for the transportation of the same freight, which does not contain any release of defendant's liability already incurred or waive any right of plaintiff already accrued, is not admissible in evidence to show a merger of such verbal agreement.³¹

§§ 1314-1321. Weight and Sufficiency of Evidence—§ 1314. Fact of and Terms of Contract.—The courts apply the usual rules as to weight and sufficiency of evidence to determine whether the evidence supports a finding that the shipper never entered into a special contract, limiting the carrier's liability.³²

§§ 1315-1320. Requisites and Validity of Contract—§ 1315. In General.—Recitals in Contract Prima Facie Valid.—Recitals of limitations of the common-law liability of a common carrier in the shipping contract are prima facie evidence of the validity of such restrictions, which, without further evidence, become conclusive.³³

26. Execution of similar contracts on previous occasions.—Chicago, etc., R. Co. v. Igo, 130 Ill. App. 373.

27. Possession of receipt only prima facie evidence of assent.—Parol evidence.—Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564; Boorman v. American Exp. Co., 21 Wis. 152. See, also, Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599.

28. Evidence of failure to read.—Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117.

29. Coggsell v. Weir (App. Div.), 101 N. Y. S. 188.

30. Extrinsic evidence.—O'Malley v.

Great Northern R. Co., 86 Minn. 380, 90 N. W. 974.

31. Merger of parol and subsequent written contract.—Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382; Hoskins v. Missouri Pac. R. Co., 19 Mo. App. 315.

32. Fact of and terms of contract.—McGregor v. Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668; Pacific Exp. Co. v. Rudman (Tex. Civ. App.), 145 S. W. 268.

33. Recitals in contract prima facie valid.—Wyrick v. Missouri, etc., R. Co., 74 Mo. App. 406.

§ 1316. Reasonableness.—Whether conditions in a shipping receipt are just and reasonable may be shown by the fact that the shipper was offered two forms of receipt at different risks and rates and that he chose the one in question.³⁴

§ 1317. Consideration.—A recital, in a contract to carry freight, showing the consideration to be a reduced freight rate, not overthrown by other competent evidence, is prima facie evidence of the fact and sufficient to sustain limitation of the carrier's liability for negligence.³⁵

§ 1318. Delivery.—The fact that the usual course of business between a shipper and a carrier was for the shipper to give the carrier's agents shipping directions and that the agent afterwards made out and delivered to shipper bills of lading, sometimes on the day of shipment and sometimes a day or two afterwards, is insufficient to show that a bill of lading containing a limitation of the carrier's liability was not delivered to the shippers until after the shipment was made.³⁶

§§ 1319-1320. Knowledge of Contract and Assent of Shipper—

§ 1319. Express Assent Required.—To render a contract of shipment limiting the liability of the carrier binding upon the shipper, the fact that the shipper assented to the terms and conditions of the contract must be established by a preponderance of the evidence.³⁷ Where there was no evidence that limitation of a carrier's liability was called to the shipper's attention, and there was evidence that neither the shipper's attention nor that of her agent was called to it, the common-law liability of the carrier prevailed, and it was not qualified by the limitation in the receipt.³⁸

Must Be Clear Proof of Assent.—There must be clear proof that the shipper expressly assented to restrictions upon the carrier's common-law liability contained in the shipping contract, or the shipper, notwithstanding notice of such intended restriction, may insist that the carrier shall transport his goods, burdened with the responsibilities incident to its common-law employment.³⁹

Usage or Custom.—Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability.⁴⁰

Acceptance of Bill of Lading and Previous Practice of Receiving Similar Bills.—The acceptance of a bill of lading containing a condition purporting to limit the carrier's liability and the previous practice of giving and receiving similar bills of lading, are evidence tending to show that the limitation of liability therein was assented to by the shipper, but neither one nor both such facts would be conclusive evidence thereof.⁴¹ And of course the assent of a shipper will not be conclusively inferred from the fact of the previous acceptance by the shipper of a large number of similar bills of lading, not filled up by the shipper or held in his possession to be filled up.⁴²

34. Fact of choice of contracts as evidence of reasonableness.—*Mears v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 192, 52 Atl. 610, 56 L. R. A. 884.

35. Consideration.—*Mires v. St. Louis, etc., R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

36. Delivery.—*Coats v. Chicago, etc., R. Co.*, 239 Ill. 154, 87 N. E. 929.

37. Express assent required.—*Cleveland, etc., R. Co. v. McNutt*, 138 Ill. App. 66; *Warren v. Cleveland, etc., R. Co.*, 156 Ill. App. 111.

38. *Wichern v. United States Exp. Co.*, 83 N. J. L. 241, 83 Atl. 776.

39. Must be clear proof of assent.—*Adams Exp. Co. v. Bratton*, 106 Ill. App. 563; *Elgin, etc., R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

40. Usage or custom.—*Pittsburgh, etc., R. Co. v. Barrett*, 36 O. St. 448.

41. Acceptance of bill of lading and previous practice of receiving similar bills.—*Erie, etc., Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Merchants', etc., Transp. Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541.

42. *Erie, etc., Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51.

Shipping directions given by the shipper similar to the terms and conditions of the bill of lading are strong evidence of assent.⁴³

Receipt Filled in by Owner or Clerk.—The fact that the owner of goods, by himself or clerk, filled up a receipt taken for goods shipped, is evidence tending to show that the shipper had notice of the limitations of the carrier's liability in the printed part thereof and assented to them, but is not conclusive on such question.⁴⁴

Receipt of Goods by Consignee.—The insertion of a condition against the consequences of negligence in a bill of lading, and the receipt by the consignee of the goods under such bill, are not sufficient evidence of such assent to the condition by the shipper or consignee as to make it a contract.⁴⁵

Nondelivery till Long after Receipt of Goods.—The nondelivery of a bill of lading until several days after receipt by the carrier of the goods shipped tends to prove the nonassent by the shipper to the restrictive provisions contained in such bill of lading.⁴⁶

§ 1320. Proof of Express Assent Not Required.—Failure to Read.—The presumption from the delivery and acceptance of a bill of lading containing a provision purporting to limit the common-law liability of the carrier, that the shipper assented to it; is not overcome by evidence of his ignorance of the contents of the bill arising from failure to read it or to make some effort to ascertain its contents, in the absence of fraud or the use of means to prevent the shipper from fully understanding it.⁴⁷ Thus testimony of the plaintiff in an action against an express company, where the receipt for the shipment limiting the carrier's liability to fraud and gross negligence was delivered to the shipper, that he did not read the receipt at the time of shipment, and upon cross-examination that the receipt came out of his own book of receipts, in his possession at the time of the shipment, is insufficient to support a finding that the shipper did not have notice of the limitation of liability contained in the receipt.⁴⁸

§ 1321. Proof of Negligence Vel Non.—In General.—Where there is evidence which leaves it in doubt whether damage to goods arose from causes of injury from which the carrier is exempted by the bill of lading or whether it was caused by the negligence of the carrier, it seems that the shipper can not recover.⁴⁹

43. *Lake Shore, etc., R. Co. v. Davis*, 16 Ill. App. 425.

44. **Receipt filled in by owner or clerk.**—*Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Peoria Packing Co. v. Nashville, etc., R. Co.*, 164 Ill. App. 646.

Blank receipt of another express company filled up by shipper's clerk and signed by carrier's agent.—The clerk of a shipper of goods took with him to an express office a blank receipt of a different express company, containing a printed clause purporting to limit the liability of the latter company, and inserted the articles and numbers, etc., therein, writing the name of the company with whom he was shipping over that of the company which was signed by the agent of such company. It was held that this constituted no contract with the company receiving the goods, limiting its liability; and that before the latter company could claim the benefit of the exemption contained in the receipt of the other company whose blank receipt

was used, it must be proved by evidence outside of the receipt that such was the agreement of the parties. *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191. See, also, *Wallace v. Mathews*, 39 Ga. 617, 99 Am. Dec. 473.

45. *The Guildhall*, 58 Fed. 796.

46. **Nondelivery till long after receipt of goods.**—*Coats v. Chicago, etc., R. Co.*, 134 Ill. App. 217.

47. **Failure to read.**—*Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

48. *Fried v. Wells Fargo & Co.*, 100 N. Y. S. 1007, 51 Misc. Rep. 669.

49. **Proof of negligence vel non.**—*East Tennessee, etc., R. Co. v. Wright*, 76 Ga. 532.

Thus where the contract of shipment of perishable freight provided that the freight was to be delivered in like good order as that in which it was received, excepting certain dangers of transportation, and where the freight was received by the consignee and receipted for as in good order, but the suit was

Proof That Loss Would Not Have Occurred by Exercise of Reasonable Skill.—It is sufficient to show negligence to prove that the loss would not have occurred by the exercise of reasonable skill and care.⁵⁰

Proof of Loss or Nondelivery.—Where the evidence shows that the loss or damage sued for falls within the limits or conditions expressed by the shipping contract, the burden of proof resting upon the plaintiff to establish the negligence of the carrier is not met by proof of loss or nondelivery; in other words, such negligence will not be presumed from nondelivery or loss of the freight alone;⁵¹ as, for instance, where the testimony shows the contract and a loss by fire,⁵² but proof that the loss by fire was caused by sparks from a locomotive establishes a prima facie case of negligence.⁵³

subsequently brought for damages alleged to have resulted from the carrier's negligence, if the evidence leaves it in doubt as to what the cause of injury was or if damage could be as well attributed to the dangers of transportation as to the carrier's negligence, there can be no recovery. An addition to an instruction changing this principle, which adds that the evidence must show that it was damage which occurred by an occurrence or act apart from the company, and one which they could not have guarded against, to enable the jury to find for the defendant, is error, as if not directly contradictory to the principle, it is so vague and uncertain as to be misleading. *Ocean Steamship Co. v. McAlpin*, 69 Ga. 437.

50. Mode and sufficiency of proof of negligence.—*United States*.—*Memphis*, etc., *R. Co. v. Reeves* (U. S.), 10 Wall. 176, 19 L. Ed. 909.

Arkansas.—*Little Rock*, etc., *R. Co. v. Talbot*, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598.

Iowa.—*Mitchell v. United States Exp. Co.*, 46 Iowa 214.

Missouri.—*Read v. St. Louis*, etc., *R. Co.*, 60 Mo. 199, 9 Am. R. Rep. 201; *Hanc v. Pacific Exp. Co.*, 48 Mo. App. 179; *Heil v. St. Louis*, etc., *R. Co.*, 16 Mo. App. 363; *Witting v. St. Louis*, etc., *R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636.

New York.—*Lamb v. Camden*, etc., *R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349.

Pennsylvania.—*Farnham v. Camden*, etc., *R. Co.*, 55 Pa. 53; *Patterson v. Clyde*, 67 Pa. 500.

Texas.—*Texas*, etc., *R. Co. v. Morse*, 1 Texas App. Civ. Cas. § 411.

51. Proof of loss or nondelivery.—*Mangin v. Dinsmore*, 38 N. Y. Super. Ct. Rep. 248; *Fire Ass'n v. Loeb*, 25 Tex. Civ. App. 24, 59 S. W. 617.

52. Loss by fire—Proof of negligence.—Where merchandise was intrusted to an express company under stipulation that, in case of loss by fire, the carrier should not be liable unless it occurred through its negligence, and the testimony at the close of the trial showed

the contract and the loss of the goods, but failed to show any negligence on the part of defendant, a verdict for defendant was properly directed. *Micheals v. Adams Exp. Co.*, 71 N. J. L. 41, 59 Atl. 142.

53. Proof that loss caused by sparks from locomotive.—Where one shipping goods over a common carrier sues to recover for their loss by fire, proof that the loss was caused by sparks from a locomotive, establishes a prima facie case of negligence, shifting the burden to the carrier to show a sufficient spark arrester, and a proper handling of the engine. *Fire Ass'n v. Loeb*, 59 S. W. 617, 25 Tex. Civ. App. 24.

Plaintiff shipped cotton over the defendant railroad, the bill of lading excepting the company from liability for fire, and providing that the burden of proof should be on the shipper to show that loss by fire was caused by negligence. The cotton was carried in a new car, the doors and windows of which were cleated. The car ahead and next to the engine was loaded with rotten timber, which was set on fire by a spark from the engine. It was shown that the fire in the cotton broke out just below a closed window in the end of the cotton car next to the front car. The engine was a wood burner, and had set fires almost daily for 30 days. A witness testified that it threw more sparks than an ordinary wood burner. There was evidence that it was equipped with a sufficient spark arrester, but none as to how it was handled. Held that, notwithstanding the provisions in the bill of lading, the evidence sustained a finding that the fire was caused by defendant's negligence. *Fire Ass'n v. Loeb*, 59 S. W. 617, 25 Tex. Civ. App. 24.

Cotton was destroyed at the burning of a compress. Several witnesses were near when the alarm sounded, but did not know what caused the fire. The switch engine had not been near for three and one-half hours. The cotton was on two cars on a side track near the compress. One of the cars was saved. What effort was made to save the other was not shown, nor what precautions had been taken for the protection of cot-

§ 1322. Variance.—The rule that there must be no variance between the allegations and proof applies, where it sought, in an action for loss or injury to goods, to set up a contract limiting a common carrier's common-law liability.⁵⁴

§ 1323. Questions for Court.—Reasonableness.—The question of reasonableness of limited liability clauses in a carrier's bill of lading is for the court.⁵⁵

§§ 1324-1325. Questions for Jury—§ 1324. As to the Contract.—Whether an Express Contract Made.—Whether an express contract has been made, limiting liability, in the absence of any signature of the shipper or his agent, is generally a question for the jury, if there be evidence tending to show such a contract.⁵⁶

Whether Executions of Written Contract Contemplated.—It is a question for the jury to determine whether or not the execution of the written contract was contemplated by the parties when the preliminary oral contract was made.⁵⁷

Fairness and Reasonableness.—In an action for the loss of goods shipped whether a contract attempting to limit liability of the carrier was fairly

ton in cars on the side track. Held, that the evidence did not show that the loss occurred without fault on the part of the carrier. *Missouri Pac. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

54. Limitation of liability.—In a suit against a carrier, it pleaded in defense a contract between the parties modifying or limiting its ordinary obligations, but the copy offered in evidence differed therefrom, in that it purported to be between plaintiffs and another railroad company, and did not contain a stipulation limiting the time to sue which was in the contract pleaded. Held that, though the other company was only a division of defendant's own railway, plaintiffs, under the answer, were required to respond to a contract containing specific stipulations with defendant, and could not be required to respond to a contract with any other person not a party containing other and different stipulations, and it was error to exclude such copy. *Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

55. Reasonableness.—*Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

56. Whether an express contract made.—*Central, etc., R. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197; *Southern R. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649.

Where plaintiff contended that the only written contract of shipment was contained in the bill of lading, and that one of them had a certain verbal agreement with the agent of the defendant as to obtaining a free ticket, or a ticket at a reduced rate; while the defendant contended that the shipment was made under a special written contract, signed by its agent and the person who delivered the stock as the agent for the plaintiffs, the court should have submitted to the

jury whether the contract of shipment was that contended for by the plaintiff or by the defendant. *Cincinnati, etc., R. Co. v. Disbrow & Co.*, 76 Ga. 253.

Where point of shipment occupied by army.—In a suit against a common carrier for the loss of goods shipped under a receipt which merely stated that the shipment was at the owner's risk, where there is evidence showing that the point of shipment was in possession of an army which took the cars of the carrier at its pleasure; that shipment of freight was generally understood to be at the owner's risk; that all shippers knew that it was not uncommon for the military to take possession of the cars and throw out the shipments; that the shipper knew of this risk and of the necessity that he should assume it; that the car upon which the goods were shipped was subsequently found in control of the military and the goods were found lying near the station from which shipped, it was error to charge that the stipulation in the receipt for shipment at the owner's risk was no protection to the carrier, unless the property was proved to have been removed from the cars by the military. The charge was too narrow in view of the law providing for express contracts between carriers and shippers. Owing to the presence of the military, the character of the receipt given, and the evidence as to the shipper's knowledge and consent, the case should have been submitted to the jury under the evidence to say whether or not the shipper had knowledge of the contents of the receipt containing the limitation and consented thereto. *Wallace v. Sanders*, 42 Ga. 486.

57. Whether executions of written contract contemplated.—*Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

made and was just and reasonable, is a question for the jury.⁵⁸

Whether Contract Made by Consignor or Consignee.—Where it was disputed whether the goods in controversy had been carried under an original agreement between the consignee and the carrier, or whether such alleged agreement was a mere preliminary negotiation, and that the actual shipping agreement was between the defendant and the consignors, that question was for the jury.⁵⁹

Assent of Shipper.—Where there was evidence from which a jury might infer an absence of assent by the shipper to the limitation of liability contained in a bill of lading, the question whether such assent was in fact given was for the jury.⁶⁰ But in Georgia,⁶¹ in Illinois,⁶² and in Kansas,⁶³ whether the terms of a special contract limiting the liability of the carrier are known by the consignor and assented to by him is a question of fact.⁶⁴

Knowledge of Inconspicuous Condition.—Whether the shipper had knowledge of a condition in a bill of lading limiting the common-law liability of the carrier, where there is nothing in its position or the color or style of type in which it is printed to render it conspicuous, is one of fact for the jury.⁶⁵

Whether Obscure Stipulations Understood by the Shipper.—Where a waybill, signed by the shipper, contains stipulations purporting to limit the carrier's liability, which were not very plain, and not so situated as to be plainly included within the terms of the contract, it is for the jury to determine whether the shipper understood, or should have understood, that there were such restrictions of the carrier's liability.⁶⁶

Constructive Notice of Contents of Transfer Company's Receipt.—It is a question for the jury whether, under all the circumstances as disclosed by the evidence, the shipper, in accepting a receipt or contract signed by the agent of a transfer company, had actual or constructive knowledge of the limitation of liability contained in it; and it is error to refuse to instruct the jury properly

58. Fairness and reasonableness. — *O'Connor v. Great Northern R. Co.*, 118 Minn. 223, 136 N. W. 743, 41 L. R. A., N. S., 391.

59. Whether contract made by consignor or consignee. — *Perkins Co. v. American Exp. Co.*, 85 N. E. 895, 199 Mass. 561.

60. Assent of shipper. — *Cohen v. United States Exp. Co.*, 81 N. J. L. 355, 79 Atl. 1053.

Where, in an action against an express company for loss of goods shipped from plaintiff's office, it did not appear that it would have been useless to have reclaimed the goods and asked for a return of the money paid for the transportation, on the carrier's tendering a limited liability receipt therefor, whether plaintiff assented to the terms of such receipt was for the jury. *Cogswell v. Weir* (App. Div.), 101 N. Y. S. 188.

61. *Wallace v. Sanders*, 42 Ga. 486.

Shipment at owner's risk—Car found to be loaded with confederate horses—Knowledge of circumstances.—*Wallace v. Sanders*, 42 Ga. 486.

62. *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *American Merchants' Union Exp. Co. v. Scheir*, 55 Ill. 140; *Baker v. Michigan Southern, etc., R. Co.*, 42 Ill. 73; *Chicago, etc., R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Field v.*

Chicago, etc., R. Co., 71 Ill. 458; *Illinois Cent. R. Co. v. Frankenburg*, 54 Ill. 88, 5 Am. Rep. 92; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *Anchor Line v. Dater*, 68 Ill. 369; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago, etc., R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095, 88 Am. St. Rep. 68; *Chicago, etc., R. Co. v. Montford*, 60 Ill. 175; *Field v. Chicago, etc., R. Co.*, 71 Ill. 458; *Lake Shore, etc., R. Co. v. Davis*, 16 Ill. App. 425; *Merchants', Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

The assent of a shipper to restrict provisions contained in a shipping ticket signed by him is a question of fact to be determined by the jury. *Bacon v. Cleveland, etc., R. Co.*, 155 Ill. App. 40.

63. *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298, 12 Am. & Eng. R. Cas. 52, 2 Pac. 496; *St. Louis, etc., R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. 312.

64. *Bergen v. Chicago, etc., R. Co.*, 164 Ill. App. 66.

65. *Baltimore, etc., R. Co. v. Doyl*, 142 Fed. 669.

66. Whether obscure stipulations understood by the shipper. — *Sayles v. New York, etc., R. Co.*, 81 Fed. 326.

upon the subject of constructive notice of the limitation, and that if they found he had such notice, it was no excuse for plaintiff to say that he did not read the limitation, if he had the sufficient opportunity to do so.⁶⁷ Thus where a traveler, on delivery of his baggage to a local express company, received a paper, which, from the circumstances of the transaction, he had a right to regard simply, as a receipt or voucher, to enable him to identify his property, and no notice was given to him that it embodied the terms of a special contract, or was intended to subserve any other purpose than as a voucher, his omission to read the paper was not negligence per se, and he was not, as matter of law, bound by its terms. The question whether, in a particular case, the party receiving such a receipt, accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one of evidence to be determined by the jury.⁶⁸

Failure of Consideration.—Where a carrier, in an action against it for damages to stock in transit, pleaded a written contract that it should only be liable for damages occurring on its own line, and there was evidence tending to show want of consideration therefor, it was error to submit the question of failure of consideration to the jury.⁶⁹

§ 1325. As to the Loss.—Whether Carrier Negligent.—In an action against a carrier for the loss of goods entrusted to it, where there is evidence of an express contract under which the shipper was to send a man along with the goods, which were shipped on an open car with a tarpaulin to cover them and water to protect them against fire, and that the shipper failed to do this and the goods were destroyed by fire, although the carrier was liable under the law for negligence, yet it was for the jury to determine whether the loss of the goods was caused by the negligence of the carrier or was due to the failure of the shipper to perform his part of the contract.⁷⁰

§ 1326. Instructions.—Where, in an action for damages to a shipment, the contract of affreightment recites that the rate is a reduced rate, in consideration of which the carrier was not to be liable for loss in excess of a stated valuation, and the evidence in connection with the contract shows that plaintiff was charged the regular schedule rate and the only rate then in force on live stock of the kind shipped, it is proper to instruct that if the rate charged was the only rate defendant gave, then it was not a reduced rate.⁷¹

§ 1327. Direction of Verdict.—In suit against a carrier for loss of shipment, by fire, under contract limiting defendant's liability, where the evidence did not show cause of the fire, nor conclusively show absence of defendant's negligence, a directed verdict for plaintiff was error.⁷² In suit against a carrier for loss of shipment by fire, where contract of shipment limited its liability, proof excluding the possibility of defendant's negligence was not necessary to entitle it to submission of issue of its negligence.⁷³

§§ 1328-1383. Limitation of Amount of Liability—§§ 1328-1330. Power to Limit and Validity—§ 1328. Effect of State Statutes and Constitutional Provisions.—In General.—The legality of stipulations limiting

67. Constructive notice of contents of transfer company's receipt.—*Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

68. *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Morgan v. Woolverton*, 120 N. Y. S. 1008, 136 App. Div. 351.

69. Failure of consideration.—*San Antonio, etc., R. Co. v. Botts* (Tex. Civ. App.), 57 S. W. 853.

70. Negligence a question of fact.—*Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

71. Instructions.—*Bowring v. Wabash R. Co.*, 90 Mo. App. 342.

72. Direction of verdict.—*Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 577, 63 S. W. 619, reversing 61 S. W. 410.

73. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 576, 63 S. W. 619, reversing 61 S. W. 410.

the amount of recovery against a carrier in case of loss or damage of freight is governed by statutes in Alabama,⁷⁴ Iowa,⁷⁵ Kansas,⁷⁶ Kentucky,⁷⁷ Texas,⁷⁸ and Virginia.⁷⁹

§ 1329. Under Interstate Commerce Act.—The common-law right to contract with respect to the value of an article to be transported, on the character and value of which a rate may depend, and the right to contract against loss beyond the carrier's control, are unaffected by the interstate commerce act.⁸⁰

74. Effect of state statutes and constitutional provisions.—The commodity act (Gen. Acts 1907, p. 209), and Gen. Acts Sp. Sess. 1907, p. 125, fixing rates to be charged by railroads, did not operate to validate provisions of bills of lading exempting carriers from liability for loss of goods, except as to the amount stipulated in such bills. *Alabama Great Southern R. Co. v. McCleskey*, 160 Ala. 630, 49 So. 433.

75. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663, Code § 2074.

76. Under the laws of Kansas, railroads as carriers are liable at common law to pay a shipper in full for property lost or damaged to the extent of injuries sustained and the contract limiting such liability is void unless made by the permission of the State Board of Railway Commissioners. *Atchison, etc., R. Co. v. Rodgers*, 16 N. Mex. 120, 113 Pac. 805.

77. A transportation contract arbitrarily fixing the value of the property to determine the freight and the extent of the carrier's liability is void under Const., § 196. *Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184; S. C., 117 S. W. 270.

A contract limiting a carrier's liability to the value of the shipment given by the shipper for obtaining a concession in rates is not invalid, under Const. Ky., § 196, prohibiting any carrier from contracting "for relief against common-law liability." *Order* (1906) 100 N. Y. S. 593, 115 App. Div. 44, affirmed. *Barnes v. Long Island R. Co.*, 84 N. E. 1108, 191 N. Y. 528.

78. Under Texas statute.—The general rule at common law is that the carrier, in case of loss of goods, is liable to the shipper or owner for the value of them at the place of destination, less the charges for transportation. This rule, under the provisions of our statute, can not be altered by contract, so as to limit or restrict the liability of the carrier, when the contract is to be performed entirely within this state. *Rev. Stat. Tex.*, art. 278. *Gulf, etc., R. Co. v. Booton*, 4 Texas App. Civ. Cas., § 230, 15 S. W. 909. In *Missouri Pac. R. Co. v. Ryan*, 2 Texas App. Civ. Cas., § 430, and *M. P. R. Co. v. Barnes & Co.*, 2 Texas App. Civ. Cas., § 575, the contracts were interstate. See the case of *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

79. *Southern Exp. Co. v. Keeler*, 109

Va. 459, 64 S. E. 38; *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102; *Chesapeake, etc., R. Co. v. Beasley, etc., Co.*, 104 Va. 788, 52 S. E. 566, 3 L. R. A., N. S., 183.

80. Under interstate commerce act.—*Pittsburg, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

Massachusetts.—The contract of shipment made in good faith, providing that the carriage charges are regulated by the value put on the property, and that where, as in the instant case, no value is put thereon, it is agreed that the value does not exceed \$50, and that the carrier shall not be liable for a greater sum, not being an exemption from liability for negligence, but merely a contract as to the value of the property, and so not otherwise invalid, is not invalidated by Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), providing that a carrier receiving property for interstate transportation shall issue a receipt therefor, and shall be liable to the holder for any loss of or injury to the property caused by it or any carrier to which the property is delivered, or over the line of which it shall pass, and that no contract shall exempt such carrier from such liability. *Bernard v. Adams Exp. Co.*, 91 N. E. 325, 205 Mass. 254, 28 L. R. A., N. S., 293.

Minnesota.—The Carmack Amendment to the Hepburn Act does not prevent a carrier from making valid contracts limiting liability, according to the agreed value, upon interstate shipments under legal tariff rates. *Carpenter v. United States Exp. Co. (Minn.)*, 139 N. W. 154.

New Jersey.—*Travis v. Wells Fargo & Co.*, 79 N. J. L. 83, 74 Atl. 444.

New York.—*Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218, affirming *Greenwald v. Weir*, 115 N. Y. S. 311, 130 App. Div. 696. See, also, *Schutte v. Weir*, 111 N. Y. S. 240, 59 Misc. 438.

The purpose of Interstate Commerce Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), providing that a carrier on receiving an interstate shipment shall issue a bill of lading therefor and be liable to the holder for any loss, and no contract shall exempt the carrier from the liability imposed, is to render the initial carrier of interstate shipments over connecting

It would seem that the federal interstate commerce law could not be held to render valid an arbitrary limitation upon the liability of a carrier for damages from its servants' negligence stated in a shipping receipt given when the shipment commenced, so as to be binding in the state where the goods were to be delivered and where suit was brought for delay, though such limitation be contrary to public policy and void under the laws of such states.⁸¹ The courts of Arkansas⁸² and Iowa⁸³ take the view that, under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) thereto, any contract limiting the liability of a carrier of property transported in interstate commerce, in case of loss, to a stated maximum amount is void.⁸⁴

Liability for Negligence.—Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), providing that no contract shall exempt a common carrier from liability for injury to property shipped, caused by any carrier to whom such property may be delivered, a common carrier can not limit its liability in case of loss from its own negligence to a named sum.⁸⁵

Valuation Procured by Fraud of Shipper.—The Interstate Commerce Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), does not prohibit an interstate carrier from limiting the amount of its liability for loss of property intrusted to it for shipment by an agreement with the shipper as to the value entered into in good faith, or procured by misrepresentation on the part of the shipper as to the value thereof.⁸⁶ A consignee who has not

lines liable to the holder of the bill of lading for any loss to the property, whether occurring on its line or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property after it has passed into the hands of another carrier for transportation, but it does not abrogate the right of the carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper on valuation of the property carried, and a contract limiting the carrier's liability to a specified sum in consideration of the rate charged, regulated by the value of the goods, is not invalid. *Greenwald v. Barrett*, 92 N. E. 218, 199 N. Y. 174, affirming order *Greenwald v. Weir*, 115 N. Y. S. 311, 130 App. Div. 696.

Utah.—Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), making carriers liable for freight lost in interstate shipment, does not prevent a reasonable contract limiting a carrier's liability for injury to freight to a particular valuation per hundredweight in consideration of a reduced freight rate. *Larsen v. Oregon Short Line R. Co.*, 38 Utah 130, 110 Pac. 983.

West Virginia.—*Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

81. *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944.

82. *St. Louis, etc., R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265.

83. An agreement of shipment, limiting the liability of an express company for the freight shipped to a certain sum, is void at common law as against public policy, as well as by Code, § 2074, providing that no contract shall exempt a railway corporation from the liability of a common carrier which would exist had no contract been made; and such rule is not obviated by the provisions of the interstate commerce act, making a common carrier liable to the holder of the bill of lading for any damage, etc., caused by it or by any subsequent carrier, and providing that no contract shall exempt such carrier from the liability thereby imposed. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

84. *St. Louis, etc., R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265.

85. **Liability for negligence.**—*Vigou-roux v. Platt*, 115 N. Y. S. 880, 62 Misc. Rep. 364.

86. **Valuation procured by fraud of shipper.**—*Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

Interstate Commerce Act Feb. 1887, c. 104, § 10, 24 Stat. 382, as amended by Act March 2, 1889, c. 382, § 2, 25 Stat. 857 (U. S. Comp. St. 1901, p. 3161), provides that a consignor who knowingly, by false representation, etc., obtains transportation for property at less than regular rates, shall be guilty of fraud, etc. Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595

participated in the fraud in connection with obtaining a low rate, and who has not assented to the terms of limitation, is not barred where he sues for loss resulting from the negligence of the carrier.⁸⁷ The fraud of the shipper must be alleged to make paragraph 3, § 10, of the act, as amended by Act March 2, 1889, c. 382, § 2, 25 Stat. 851, applicable.⁸⁸

§ 1330. What Law Governs.—Where the law of the state of contract of carriage prohibits a carrier from limiting his common-law liability, a stipulation in such contract limiting the carrier's liability to a certain sum, regardless of the value of the goods shipped, is void.⁸⁹ A stipulation that, in case of injury to the goods shipped, their value at the place of shipment in case of total loss should constitute the measure of damages, and, in case of partial loss, in the same proportions, being valid under the law of the state where made is enforceable, in another statute,⁹⁰ unless contrary to the public policy of the latter.⁹¹

Unreasonable Limitation.—Where the stipulation is unreasonable and it does not appear that the parties mutually understood, intended and agreed upon the limitation, it will not be enforced by the Texas courts even if valid where made.⁹²

(U. S. Comp. St. Supp. 1907, p. 909), provides that no contract, etc., shall exempt a common carrier from the liability imposed by the section for loss, etc., of property caused by it, etc. A common carrier received goods for transportation without any representation of the shipper, and issued a receipt limiting the liability to \$50. Held, that the shipper might recover the full value of the goods in case of their loss, though a shipper guilty of fraud cannot recover in case of a loss. *Schutte v. Weir*, 111 N. Y. S. 240, 59 Misc. Rep. 438; *Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

87. *Nonotuck Silk Co. v. Adams Exp. Co.*, 166 Ill. App. 519, judgment affirmed 99 N. E. 893, 256 Ill. 66; S. C., 166 Ill. App. 525, judgment affirmed 99 N. E. 897, 256 Ill. 76.

88. *Greenwald v. Weir*, 111 N. Y. S. 235, 59 Misc. Rep. 431.

89. **What law governs.**—*Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

90. *St. Louis, etc., R. Co. v. Hambrick* (Tex. Civ. App.), 97 S. W. 1072; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176, criticising *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257.

91. A contract of shipment made with an express company by a consignor in another state limiting the express company's liability to the consignees to a sum less than the actual value of the goods held contrary to public policy, and not enforceable in this state. *Nonotuck Silk Co. v. Adams Exp. Co.*, 99 N. E. 893, 256 Ill. 66, affirming judgment 166 Ill. App. 519; S. C., 99 N. E. 897, 256 Ill. 76, affirming judgment 166 Ill. App. 525.

92. **Unreasonable limitation.**—Plaintiff shipped by rail household goods worth \$300, the bill of lading reciting that in consideration of a reduced rate the car-

rier should be liable, in case of loss of the goods, only at the rate of \$5 per 100 pounds. No other freight rate than the one paid was offered the shipper, and the railroad agent was not authorized to contract at any other rate. The goods were destroyed by fire en route, and at \$5 per 100 pounds the carrier's liability would have been \$63. Held, that, even if the clause of the contract limiting the liability was valid in South Carolina, where the contract was made, it must be held invalid in Texas because the difference between the value of the property and the stipulated liability was so great as to render it unreasonable, and it did not appear that the parties to the contract mutually understood, intended and agreed upon \$5 per 100 pounds as stipulated damages in case of loss of the property. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346.

Express receipt limiting amount of recovery.—An express receipt, attempting to limit a carrier's liability to \$50 in case of transportation of non-valued goods in interstate commerce, if valid under the laws of the state where the shipment was begun, being contrary to the public policy of Georgia, is unenforceable in that state. *Adams Exp. Co. v. Chamberlin-Johnson-Du Bose Co.*, 75 S. E. 601, 138 Ga. 455.

The provision of an express company's receipt, issued in the state of New York, on a shipment of goods to Virginia, that in consideration of the rate charged, which was based upon a value not exceeding \$50, unless a greater value was declared, the shipper agreed that the value of the goods was not more than that sum, and that the company would not be liable in any event for more than that sum, though valid in New York, is contrary to the public policy of this state, as declared by Code 1904, § 1294c, sub-

§§ 1331-1344. Methods of Limiting—§§ 1331-1342. Agreed Valuation of Shipment—§ 1331. In General.—In absence of statute, a carrier and a shipper may agree, as one of the terms of the contract of shipment, on the value of the goods;⁹³ in order to avoid controversy as to the actual value if it be lost in the hands of the carrier. The parties before loss may as well by agreement fix value while each has equal means of doing so, as by proof to be made after a loss occurs; and such an agreement would not operate as a limitation on the liability of the carrier, for the valuation actually agreed upon ought to be deemed, in such cases, the actual value.⁹⁴ The valuation of the property

sec. 24, which makes a common carrier liable for any loss or injury to goods caused by its neglect or that of a connecting carrier, and provides that no receipt shall exempt any common carrier from the liability which would exist in the absence of contract, and hence furnishes no defense to an action in this state to recover the full value of the goods upon loss or injury. *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

93. Methods of limiting.—Minnesota.—Where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid. *Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

Michigan.—A shipper and carrier may, to determine transportation rates and apprise the carrier of the responsibilities assumed, honestly agree upon the value of the article to be shipped, and such agreement is binding. *Porteous v. Adams Exp. Co.*, 112 Minn. 31, 127 N. W. 429.

New Jersey.—*Saunders v. Adams Exp. Co.*, 76 N. J. L. 228, 69 Atl. 206.

New York.—*Greenwald v. Weir*, 115 N. Y. S. 311, 130 App. Div. 696.

To regulate its charges to its customers with reference to the value of the property transported, a carrier may demand of the shipper a declaration of the value, or may agree with him that in default thereof the value shall be deemed a given amount. *Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218.

Since a carrier is entitled to compensation in proportion to the value of the goods shipped and the consequent risk assumed, it may stipulate with the shipper as to the value of the goods, and contract to limit its liability to the amount fixed; such contract not being opposed to public policy. *Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278.

Ohio.—*Baltimore, etc., R. Co. v. Hubbard*, 72 O. St. 302, 74 N. E. 214, reversing 1 O. C. C., N. S., 611, 15-25 O. C. D. 477.

Texas.—*Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528. See, also, *Ft. Worth*,

etc., R. Co. v. Greathouse, 82 Tex. 104, 110, 17 S. W. 834.

Virginia prior to Virginia Code 1904 §§ 1294a, 1294i.—A valid contract to limit the liability of the carrier to a certain agreed valuation of the property even though less than actual value, may be made by the carrier, where it is just and reasonable in its terms, and a reduced rate of freight is made a consideration for it. *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749; 6 L. R. A. 849, 42 Am. & Eng. R. Cas. 370; *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556; *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116, 49 Am. & Eng. R. Cas. 712; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Wilson v. Chesapeake, etc., R. Co.*, 62 Va. (21 Gratt.) 654.

94. Agreed valuation of shipment.—*Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

"The common law and all other laws require the carrier to pay the full value of property lost or destroyed while in its possession, if lost or destroyed under circumstances which impose obligation, and the contract which provides that the carrier shall be freed from obligation or payment of a sum less than the value of the thing lost or destroyed is as much a limitation on the carrier's liability as is a contract that the carrier shall not be responsible for a loss resulting from a cause not sufficient under the law to relieve it from obligation." *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

The liability or responsibility of the carrier has relation to the extent of which it is under obligation to make compensation for loss or injury to goods, as well as to the mere existence of the obligation. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 307, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

Stipulation in carrier's contract that it will only be liable for a fixed value of goods is void. *Pacific Exp. Co. v. Hertz-*

is ordinarily no part of the terms of the shipment, as the rights and duties of the parties are fixed by law.⁹⁵ A contract of carriage imposes on the carrier the double obligation of carriage proper and of insurance, and it is reasonable and customary to fix a rate to be paid with reference to both liabilities, and to fix such rate the carrier should be apprised of the value of the article to be carried.⁹⁶

§ 1332. Public Policy.—Where a shipper was given an option of different rates, one based on full legal liability by the carrier for actual value of goods lost or damaged, and the other a lower rate for which the carrier proposed to carry the goods in case it was released and liability limited to a valuation agreed on between the parties and noted on the bills of lading, and the shipper voluntarily and with full knowledge accepted the lower rate and agreed on a valuation much less than the actual value of the goods, and that the carrier should not be liable except for gross negligence beyond the agreed value, such contract was valid and not contrary to public policy.⁹⁷ In Iowa⁹⁸ such stipulations are void as against public policy.

§§ 1333-1339. Method of Valuation—§ 1333. In General.—A carrier may limit its liability in the transportation of freight, where proper methods of valuation are pursued.⁹⁹

§ 1334. Declaration of Shipper.—To regulate its charges to its customers with reference to the value of the property transported, a carrier may, in default of a declaration of the value by the shipper, agree with him that the value shall be deemed a given amount.¹

§§ 1335-1338. Arbitrary Preadjustment of Value—§ 1335. In General.—A carrier can not by placing a mere arbitrary value upon the property limit its liability.² A railway company in its capacity as a common carrier may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure for damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value.³ This is also true where the valuation is

berg, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

There are cases where the circumstances are such that the price named in the contract might fix the measure of damages. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520, 63 S. W. 1023, affirmed in 95 Tex. 686, no op. See, also, *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

95. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

"The reasons, founded as they are on public policy, for fixing obligation on the carrier under a given state of facts, do not apply with their entire force when applied to the extent to which compensation shall be made." *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 307, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

96. Judgment 111 N. Y. S. 235, 59 Misc. Rep. 431, reversed in *Greenwald v. Weir*,

115 N. Y. S. 311, 130 App. Div. 696, application denied to resettle order in 116 N. Y. S. 172, 131 App. Div. 568.

97. **Public policy.**—*Blackwell v. Southern Pac. Co.*, 184 Fed. 489.

98. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

99. **Methods of valuation.**—*Colorado, etc., R. Co. v. Manatt*, 21 Colo. App. 593, 121 Pac. 1012.

1. **Declaration of shipper.**—*Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218.

2. **Arbitrary preadjustment of value.**—*Porteous v. Adams Exp. Co.*, 112 Minn. 31, 127 N. W. 429.

3. *Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170; *Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Central, etc., R. Co. v. Butler Marble, etc., Co.*, 8 Ga. App. 1, 68 S. E. 775.

merely arbitrary and fixed without reference to the real value of the goods and this is understood by the carrier as well as by the shipper.⁴ Public policy⁵ forbids a common carrier, by a mere arbitrary preadjustment of damages, from fixing the measure of its liability in case of loss or damage to goods shipped, though an agreement in good faith that the goods are of a given value is valid.⁶ Stipulations fixing a mere arbitrary valuation for the purpose of limiting the carrier's liability are not just and reasonable.⁷

Where a statute forbids a common carrier from limiting its common-law liability, a stipulation in a contract of carriage limiting an express company's liability to a certain sum, regardless of the value of the goods, is void.⁸

Interstate Commerce Act.—Arbitrary limitations of value and preadjustments of the damage in contracts of carriage are invalid under the general law (Act Feb. 4, 887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]),⁹ and likewise under the interstate commerce act as amended by the Hepburn Act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]).¹⁰

§ 1336. What Constitutes.—Where the carrier arbitrarily fixes the value of a particular consignment, or where by terms of the printed bill of lading there is an arbitrary fixing of value, before the goods are inspected, and without regard to their real worth, the same will be treated as a mere attempt in advance to limit liability and not a bona fide attempt to value the property shipped.¹¹ A stipulation in a bill of lading limiting the liability of a carrier

4. Georgia R., etc., Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

So where household goods were shipped by rail under a special contract in writing, expressed in the bill of lading, whereby, in consideration of a reduced rate of freight, the liability of the railroad company in case of loss was limited to an arbitrary valuation of \$5 per hundred pounds, and a portion of the goods were stolen after arrival at destination, but before the carrier's responsibility as such was terminated, there being no evidence showing how or under what circumstances the theft occurred, presumptively the loss was occasioned by the company's negligence, and this being so, it was liable for the full value of the goods so lost. The contract would exempt from the insurance liability imposed by laws, as to losses not occasioned by negligence. The contract of shipment was not one limiting value by express agreement, but one in which there was no attempt to estimate the value. Georgia R., etc., Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

Also the stipulation in an express company's receipt that if the value of the property was not stated at the time of shipment and specified in the receipt, the holder thereof would not demand of the company more than a stated sum for the loss of or damage to the shipment is ineffectual, where it appears that the goods lost were worth more than the sum to which the liability of the carrier was limited, and where it does not appear that the shipper expressly assented to the limitation. In such case, even if the shipper had expressly agreed, the stipu-

lation would not have been valid as to loss involving negligence on the carrier's part. Wood v. Southern Exp. Co., 95 Ga. 451, 22 S. E. 535.

5. Public policy.—Louisville, etc., R. Co. v. Tharpe, 11 Ga. App. 465, 75 S. E. 677.

A contract, which arbitrarily fixes the value of household goods at \$5 per hundredweight for the purpose of limiting the liability of the carrier, is contrary to public policy. Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78.

6. Louisville, etc., R. Co. v. Tharpe, 11 Ga. App. 465, 75 S. E. 677.

7. Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78; Porteous v. Adams Exp. Co., 112 Minn. 31, 127 N. W. 429; St. Louis, etc., R. Co. v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346.

8. Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949.

9. Interstate commerce act.—Louisville, etc., R. Co. v. Warfield, 6 Ga. App. 550, 65 S. E. 308.

10. Louisville, etc., R. Co. v. Warfield, 65 S. E. 308, 6 Ga. App. 550.

11. What constitutes.—Georgia, etc., R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807.

Where there is an arbitrary fixing of value by a carrier, accepting goods for transportation before an inspection and without any regard to their real worth, the assumed valuation may be treated as a mere attempt in advance to limit liability. Central, etc., R. Co. v. Butler Marble, etc., Co., 8 Ga. App. 1, 68 S. E. 775.

Where no value is placed on goods shipped by an express company, and no

for damages to goods shipped, to a sum purporting to be an agreed valuation, but which, in fact, is purely fictitious, and is nothing more than an attempt to limit the carrier's liability to an arbitrary amount, without regard to the value of the shipment, will not bind the shipper, although assented to in writing and executed upon consideration of a reduced rate of freight.¹² Where there is an issue of facts as to whether there was an actual bona fide valuation or a mere arbitrary effort to limit liability, the question is one for the jury; but where the written contract shows that it falls within the latter description, and there is no issue of fact on that subject, it is proper for the court to construe the contract.¹³

§ 1337. Burden of Proof.—Where, in an action for loss of goods shipped, plaintiff proves their actual value, and the carrier relies on a stipulation fixing the value of the goods at a sum greatly less than their actual value, the burden is on the carrier to show that such stipulation was not a mere arbitrary pre-adjustment of damages.¹⁴

§ 1338. Questions for Jury.—Even where there is an attempt to limit liability in return for a lower rate of freight, whether there was an actual bona fide valuation of a shipment accepted by the carrier for transportation or a mere effort arbitrarily to limit liability is a question of fact for the jury.¹⁵

§ 1339. Misrepresentation of Value by Shipper.—Under a statute forbidding a carrier to exempt himself by contract from his liability, the shipper is not bound by the value fixed by him, even if fixed too low in fraud of the railway company.¹⁶

Representation by Agent of Shipper.—Where the agent of the shipper truthfully answered that he did not know the value of the shipment, there is no fraudulent concealment of the true value by the owner.¹⁷

effort is made to arrive at a valuation, the fact that a receipt is signed reciting that the shipper agrees that the value is not more than \$50, unless a greater value is stated in the receipt, will not relieve the carrier, in case of loss resulting from negligence, from liability for the actual value of the goods. *Adams Exp. Co. v. Chamberlin-Johnson-Du Bose Co.*, 75 S. E. 601, 138 Ga. 455.

Where no value is put upon goods shipped by a carrier, and no effort is made to arrive at a valuation, a statement in the prepared form of receipt produced by the company, that the shipper agrees that the value of the property is not more than \$50, unless a greater value is stated, and that the company will not be liable for more than the value so stated, nor for more than \$50 if no value is given in the receipt, does not limit the company's liability to \$50 regardless of the value of the property shipped; the statement being not a valuation, but an arbitrary limitation upon the carrier's liability. *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944.

12. *Union Pac. R. Co. v. Stupeck*, 50 Colo. 151, 114 Pac. 646.

13. *Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170.

14. *Louisville, etc., R. Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677.

15. **Question for jury.**—*Central, etc., R. Co. v. Butler Marble, etc., Co.*, 8 Ga. App. 1, 68 S. E. 775.

16. **Misrepresentation of value by shipper.**—*Chesapeake, etc., R. Co. v. Beasley, etc., Co.*, 104 Va. 788, 796, 52 S. E. 566, 3 L. R. A., N. S., 183.

17. **Representation by agent or shipper.**—The facts of the case at bar do not warrant the contention of the express company that the shipper obtained a cheaper rate for her trunk by a fraudulent concealment of its true value. The agent of the company received the trunk from the shipper and removed it from an upper to a lower floor promising to return later and remove it, without making any inquiry as to its value or imparting any information as to rates. The company was afterwards three times requested over the 'phone to call for the trunk, but neglected to do so; and it was finally sent to the express office by a negro driver. When asked the value of the trunk, the driver truthfully answered that he did not know. The company issued and delivered to the driver a bill of lading which he delivered to the shipper, with the customary stamp, "value asked and not given." *Southern Exp. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38.

Loss by Negligence.—See post, "Limitation of Liability for Negligence," §§ 1368-1371.

§ 1340. Carriers of Baggage.—In the absence of fraud, the rights of a carrier and shipper are controlled by the contract made on receipt of the property for transportation, and a contract limiting the liability to a specified sum in case of loss is valid; but this rule does not apply to carriers of baggage, the receipt for baggage being only a voucher enabling the owner to follow and identify his property.¹⁸

Transfer Companies.—In case of a transfer company transporting a trunk from a train to a passenger's address, statutes regulating stipulations as to the amount of the carrier's liability for loss of baggage do not apply.¹⁹

§ 1341. Carriers of Express.—Parties may agree on the value of property to be shipped by express, and limit the carrier's liability to the agreed valuation, where the agreement as to limitation is fairly made, on a good consideration.²⁰ The statutes in California²¹ and New York²² permit carriers of express to limit their liability to a given sum; but in Illinois²³ and Vir-

18. Baggage.—*Baum v. Long Island R. Co.*, 108 N. Y. S. 1113, 58 Misc. Rep. 34.

19. Transfer companies.—Public Service Commissions Law (Consol. Laws 1910, c. 480), § 38, provides that every common carrier shall be liable for loss of property carried as baggage, up to the full value, regardless of the character thereof, but value in excess of \$150 shall be stated on delivery to the carrier, who may make a reasonable charge for the assumption of liability in excess of \$150, and for the carriage of baggage exceeding one hundred and fifty pounds in weight on a single ticket. Held, that the word "baggage," as used in such section, meant property carried as an incident to transportation of the owner as a passenger, and that the section had no application to a transfer company, carrying a trunk from a railroad terminal to a designated point as express without carriage of the owner as a passenger; the term "baggage" being confined to trunks, etc., which the traveler carries with him on a journey. *Morgan v. Woolverton*, 96 N. E. 354, 203 N. Y. 52, 36 L. R. A., N. S., 640, affirming judgment 120 N. Y. S. 1008, 136 App. Div. 351.

20. Carriers of express.—*Adams Exp. Co. v. Byers*, 177 Ind. 33, 95 N. E. 513.

An express receipt, limiting the liability of the carrier to a specified sum, constitutes the contract of the parties, and operates to limit the liability. *Clark v. Martin* (App. Div.), 135 N. Y. S. 664.

Where one shipped his trunk by express and agreed to pay a specified sum for the expressage when delivered at his residence, and there was nothing to show that he was about to become a passenger of the carrier, the shipment was one of express freight, binding him, in the absence of fraud or imposition, to the printed receipt given him limiting the carrier's liability to a specified sum. *Baum v. Long Island R. Co.*, 108 N. Y. S. 1113, 58 Misc. Rep. 34.

21. Under Civ. Code, § 2174, permitting the obligations of a common carrier to be limited by special contract as well as under the general rules of law, a contract with an express company, limiting the recovery to the value agreed upon between it and the shipper in consideration of a special rate given, is valid. *Reeder v. Wells Fargo & Co.*, 14 Cal. App. 790, 113 Pac. 342.

22. Public Service Commissions Law, Laws 1907, p. 911, c. 429, § 88, providing that no contract shall "exempt" any carrier from any liability for loss to freight from the time of its delivery for transportation until received at its destination and a reasonable time shall have elapsed after notice to the consignee of the arrival to permit the removal thereof, forming a part of art. 2 of the act, relating to railroads, street railroads, and carriers, when considered in connection with § 25 of the article (page 903), providing that the provisions thereof shall apply to the transportation of passengers, freight, or property, and to any carrier performing such service, refers solely to carriage of freight, as distinguished from carriage by express, and a carrier by express may limit its liability to a specified sum, and does not apply to a contract limiting liability, since the word "exempt," which means to free, to clear, to be not liable, to be not subject to, to be released from liability, is not synonymous with the word "limit," which means that which circumscribes or confines, a restriction, to apply a limit to, or to set a limit for. *Baum v. Long Island R. Co.*, 108 N. Y. S. 1113, 58 Misc. Rep. 34.

23. *Hurd's Rev. St.* 1905, c. 27, provides that when property is received by one carrier to be transported it shall not be lawful for the carrier to limit its common-law liability by any stipulation or limitation expressed in the receipt given for the property. Held, that a provision

ginia²⁴ such limitations are invalid.

§ 1342. Connecting Carriers.—See post, "Connecting Carriers," Part V.

§ 1343. Stipulation Prescribing Measure of Damages.—A contract of shipment of freight which limits the recovery to an arbitrary sum is invalid at common law.²⁵

§ 1344. Requiring Declaration of Value by Shipper.—To regulate its charges to its customers with reference to the value of the property transported, a carrier may demand of the shipper a declaration of the value.²⁶ It is the law in New York²⁷ and other states that, where a carrier by his contract limits his liability to a specified amount, if the value of goods delivered for carriage is not stated by the shipper, and goods of greater value are shipped, silence on the part of the shipper as to the real value, though there is no inquiry by the carrier and no artifice to conceal the value or to deceive, is a legal fraud discharging the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract.²⁸ The disclosure of the value of goods delivered to the carrier is a condition precedent to the attaching of any liability to the carrier for merely ordinary neglect, unaccompanied with any misfeasance or willful act;²⁹ aliter, as to goods lost by gross negligence.³⁰ The omission on the part of a carrier to make inquiry as to the value of goods received is not a waiver of the limitation in the contract limiting the liability to a specified sum.³¹

in an express receipt that the carrier should not be liable beyond \$50, at which sum the property was valued, unless a different value was therein stated, followed by a blank for the insertion of figures stating the value of the shipment, was a limitation of the carrier's common-law liability and invalid. *Judgment, Wells, Fargo & Co. v. Cutter*, 140 Ill. App. 324, affirmed. *Cutter v. Wells, Fargo & Co.*, 86 N. E. 695, 237 Ill. 247.

24. Under Code 1904, § 1294c, subsec. 24, declaring that any carrier issuing its receipt shall be liable for loss or damage from its own negligence or the negligence of any connecting carrier, and that no receipt shall exempt it from the liability of a common carrier, the provision of an express company's receipt limiting its liability to a certain sum, unless a greater value was declared by the shipper, would furnish no defense to the shipper's action to recover the value of goods lost or injured. *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

Under Va. Code 1904, § 1294c (24), providing that no contract shall exempt any common carrier from the liability of a common carrier which would exist had no contract been made or entered into, an express company is liable for the full value of a trunk destroyed by fire without negligence on its part, without regard to a stipulation in its receipt that, no value being given, it would be liable for only \$50. *Southern Exp. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38.

25. Stipulations prescribing measure of damages.—*Atchison, etc., R. Co. v. Smythe*, 55 Tex. Civ. App. 557, 119 S. W. 892.

A stipulation in a bill of lading, limiting the carrier's liability to the value of oil shipped at the point of shipment, is contrary to public policy and void. *Baltimore, etc., R. Co. v. Oriental Oil Co.*, 51 Tex. Civ. App. 336, 111 S. W. 979.

26. Requiring declaration of value by shipper.—*Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218.

27. *Feld v. Platt*, 110 N. Y. S. 1118, 59 Misc. Rep. 226. See, also, *Porteous v. Adams Exp. Co.*, 115 Minn. 281, 132 N. W. 296.

A shipper of goods by express valued at \$450 accepted a receipt limiting the liability of the carrier to \$50. There was no fraud or imposition. The shipper stated that he wanted the goods "insured," but he did not disclose the nature and value thereof. Held, that the liability of the carrier was limited to \$50. *Feld v. Platt*, 110 N. Y. S. 1118, 59 Misc. Rep. 226.

28. *Porteous v. Adams Exp. Co.*, 115 Minn. 281, 132 N. W. 296.

29. *Feld v. Platt*, 110 N. Y. S. 1118, 59 Misc. Rep. 226.

30. Under the law of New York, where the shipper of goods states no value, the carrier is liable for the actual value of goods negligently lost, but one who undervalues to obtain a lower rate risks the difference between the real value of the goods and the lesser value assumed in the carrier's receipt. *Townsend, etc., Dry Goods Co. v. United States Exp. Co.*, 113 S. W. 1161, 133 Mo. App. 683.

31. *Feld v. Platt*, 110 N. Y. S. 1118, 59 Misc. Rep. 226.

Failure of Agent of Owner to Disclose Value.—The failure of the agent of the owner to disclose the value of the shipment constitutes such receipt a special contract binding on the owner.³²

Failure to Insert Value in Order to Obtain Lowest Rate.—Where the express charges for carrying packages the value of which exceeds \$50 were greater than where no value was stated, and the shipper knew this, but for the purpose of obtaining the lowest rate failed to insert the value in the receipt, and the express company did not know the true value, but, if it had had such knowledge, would have made a greater charge and used greater precaution, such failure to state the value was such a fraud on the express company as to discharge it from liability beyond the value of \$50, where the package was stolen.³³

Failure to State Where Appearance of Package Indicates It.—The printed receipt for freight given by the carrier to the shipper contains stipulations limiting the carrier's liability to a certain sum, unless the value of each package is named, and stated therein, if the size or appearance of a package fairly indicates that its value is greater than the sum so named, the carrier will be presumed to waive the necessity of stating a value, unless the attention of the shipper is called to the conditions, and the value of the package is required to be given.³⁴

§§ 1345-1364. Form and Requisites of Agreement—§ 1345. In General.—The agreement by which a carrier in default of a declaration of the value, of a shipment by the shipper, agrees with him that the value shall be deemed a given amount, may be direct or it may arise indirectly out of the acceptance by the shipper of a receipt by the carrier stating that the value is to be considered a sum specified, if no other has been given.³⁵

§§ 1346-1347. Express Contract—§ 1346. Necessity.—Under the statute of Georgia an express contract between the carrier and a shipper is essential in order to limit amount of a carrier's liability for loss of or injury to a shipment. A stipulation in a receipt given by a common carrier at the time of the shipment as to the value of the goods is not binding on the owner unless expressly agreed to by him, and on loss of the goods he can recover full dam-

32. Failure of owner's agents to state value—Package of light and costly goods.—In an action against an express company, upon a contract for the transportation of a package of merchandise from the city of New York to Baltimore, it appeared that the shipping contract was evidenced by a printed receipt signed by the agent of defendant and delivered to plaintiff's agent in New York, containing a stipulation that in no event "shall the holder thereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by the company, and so specified in this receipt." The contents of the package, which were lost in transit, were known to the express company, no statement of its value made by plaintiff when it was received, and no special insurance made. The package contained light and costly goods of the value of \$675. It was held that the receipt constituted a special contract between the parties for the carriage of the package, binding upon both, and that the plaintiff

could only recover the sum at which the package was valued in the receipt, with interest. *Brehme v. Dinmore*, 25 Md. 328.

33. Failure to insert value in order to obtain lowest rate.—*Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

34. Failure to state value where appearance of package indicates it.—*Southern Exp. Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

35. Form and requisites of agreement.—*Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218.

A stipulation in a shipping contract that in case of loss or damage the carrier, shall not be liable beyond a fixed value agreed on is valid, when fairly entered into, and when the circumstances indicate that the stipulation as to value is reasonable or is based on a valuable consideration, and is not an evasion of the carrier to escape liability for its negligence. *Jones-Lane Co. v. Atlantic, etc. R. Co.*, 62 S. E. 701, 148 N. C. 580.

ages regardless of such statement as to value.³⁶

What Constitutes Express Contract.—Where a carrier gave a receipt acknowledging the delivery of certain goods “to be forwarded,” and expressing in the receipt that the company would not be liable for any loss from any cause whatever, except for fraud or gross negligence, and that where the value of the property was not specified in the receipt the company would not be liable for a sum exceeding fifty dollars for each package, such receipt was evidence only of the reception of the goods by the company for the purposes therein specified, and was not evidence of an express contract, as is contemplated by Ga. Rev. Code, § 2042. The giving of the receipt and the acceptance of it by the shipper did not relieve the company from the liability imposed by the law upon common carriers.³⁷

Question for Jury.—Where under the language of the bill of lading it is doubtful whether or not there was an actual agreement as to the value, the question whether under the evidence such an agreement existed or whether the bill of lading introduced in evidence was merely an arbitrary pre-adjustment of damages in case of loss and to limit the carrier’s liability against its own negligence, is for the jury.³⁸

§ 1347. Signature of Shipper.—In Georgia³⁹ and Ohio,⁴⁰ an express company’s or other common carrier’s receipt for freight, stating that, in no event shall the holder demand beyond a stated sum at which the article forwarded is valued, “not signed by the shipper and no statement made by him as to value,” is not a valid stipulation against a loss by fraud or negligence.

§ 1348. Use of Printed Forms Containing Arbitrary Value.—A common carrier may by a contract fairly entered into with a shipper limit the amount of its liability for negligence, and the validity of such a contract is not affected by the fact that the carrier uses printed bills of lading, which fix an arbitrary value for all packages, having no relation to their real value, beyond which it is not to be liable unless a greater value is stated by the shipper and more freight paid, where the facts are fully understood by the shipper who declines to place a valuation on the property.⁴¹

§ 1349. Certainty and Definiteness.—The valuation must be clearly fixed in a stipulation limiting a common carrier’s liability to a specified sum in case of loss.⁴²

§ 1350. Consideration.—Where a common carrier limits its liability at a certain maximum sum in case of loss of the freight shipped by it, it must appear that there was a consideration for the limited valuation, before it can reduce the damage to such maximum amount.⁴³ A carrier being required to

36. *Southern Exp. Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066.

37. **What constitutes express contract.**—*Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

38. **Question for jury.**—*Southern R. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649.

39. **Signature of shipper.**—*Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

40. *Jacobson & Co. v. Adams Exp. Co.*, 1 O. C. D. 212, 1 O. C. C. 381.

41. **Use of printed forms containing arbitrary value.**—*Pierce Co. v. Wells Fargo & Co.*, 110 C. C. A. 645, 189 Fed. 561.

42. **Certainty and definiteness.**—*McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, 30 Am.

& Eng. R. Cas. 17; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369.

43. **Consideration.**—*Indiana.*—*Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 2 N. E. 344, 21 Am. & Eng. R. Cas. 87, 53 Am. Rep. 500.

Missouri.—*Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41; *Crow v. Chicago, etc., R.*

have a reasonable rate at which it will transport freight on a common-law liability contract, a contract of limited liability, for a shipment for which the shipper paid the regular tariff rate, is unenforceable for want of consideration.⁴⁴

Carriage of Express.—An agreement limiting the value of property shipped by express must be made on a good consideration;⁴⁵ but where the evidence shows that an express company had legal rates graduated according to the value of the shipment, lower when the value was limited to a stated sum, and higher

Co., 57 Mo. App. 135; *Wilcox v. Chicago, etc., R. Co.*, 135 Mo. App. 193, 115 S. W. 1061; *Leas v. Quincy, etc., R. Co.* (Mo. App.), 136 S. W. 963; *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 120 Mo. App. 566, 97 S. W. 256.

The agreement in a contract of affreightment to limit the carrier's liability in case of loss of the goods to \$5 per hundredweight fails for lack of consideration; the contract disclosing no consideration. *Meyers v. Missouri, etc., R. Co.*, 96 S. W. 737, 120 Mo. App. 288.

The contract provided that the value of the animal shipped did not exceed fifty dollars, and the carrier should not be liable for more than that amount; it fixed no charge for the transportation, leaving that to be determined according to schedule rates. It was held that this was not such a contract as fixed an agreed valuation on which to base a rate for transportation and the extent of the carrier's liability for a loss, but left the value of the animal to be ascertained from other evidence. There was, therefore, no consideration for the attempted exemption, and it would afford no defense to the carrier. *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41. But see *Gratiot St. Warehouse Co. v. Missouri, etc., R. Co.*, 124 Mo. App. 545, 102 S. W. 11.

New Jersey.—A carrier may, in consideration of a reduced rate granted, limit its liability to a special valuation of the goods agreed upon. *Carleton v. New York, etc., R. Co.*, 117 N. Y. S. 1021, 64 Misc. Rep. 51.

North Carolina.—*Jones-Lane Co. v. Atlantic, etc., R. Co.*, 148 N. C. 580, 62 S. E. 701.

Oklahoma.—Under the law in Oklahoma prior to statehood, a provision in a shipping contract limiting, in consideration of a reduction in freight charges, the liability of a carrier of household goods lost in transit to a stipulated sum, is lawful. *Missouri, etc., R. Co. v. McLaughlin*, 29 Okla. 345, 116 Pac. 811.

Tennessee.—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

Texas.—The contract of transportation provided that any damage to shipper's freight was to be determined according to the actual cash value thereof at the time and place of shipment, and recovery was limited to a maximum amount * * *, but no reduction in the freight rate was made in consideration of such stipulation.

Held, in an action to recover for damages * * * by carrier's negligent delay en route that the stipulation limiting any damage to the value at the place of shipment, etc., was not binding, being without consideration. *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1057, affirmed, no op.

Such a provision will not be enforced where the evidence shows that the common carrier accepted the freight for transportation without any reduction of the freight rate. The evidence in this case was sufficient to show that no reduction of the freight rate was made by either the initial carrier, or the plaintiff in error in consideration of the stipulation in question, and that the contract containing it was signed by the defendant in error, without opportunity for a fair consideration of the stipulation. *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.

"Even the cases upholding contracts of the kind under consideration proceed upon the theory that to be valid the contract must have been fairly entered into with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation." *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176.

A provision in a bill of lading that, in consideration of the reduced rate at which the goods were shipped, the carrier's liability in case of loss should be limited to \$5 per hundred pounds, the provision being arbitrarily fixed by the carrier, without any consideration in fact, is an unreasonable restriction of its liability, against the settled policy of the state, and void as to one whose damages are in reality \$300, for which only \$63 would be recoverable under the bill of lading. *St. Louis, etc., R. Co. v. McIntyre*, 82 S. W. 346, 36 Tex. Civ. App. 399.

44. St. Louis, etc., R. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131.

45. Express company.—*Adams Exp. Co. v. Byers*, 177 Ind. 33, 95 N. E. 513.

An express company cannot limit its liability for loss or damage to a shipment receipted for to the sum of \$50 by a receipt containing such limitation, not based on any consideration. *Southern Exp. Co. v. Hill*, 81 Ark. 1, 98 S. W. 371.

when in excess of that sum, no further consideration need be shown for the limit of liability.⁴⁶

§§ 1351-1352. Fairness, Justness and Reasonableness—§ 1351. Necessity.—A contract between a common carrier and the shipper, limiting the carrier's liability in case of loss to a stipulated valuation, will be upheld,⁴⁷ if fairly entered into by the shipper, and is also just and reasonable,⁴⁸ and there

⁴⁶ *Carpenter v. United States Exp. Co.* (Minn.), 139 N. W. 154.

⁴⁷ **Necessity.**—*Minnesota.*—*Ostroot v. Northern Pac. R. Co.*, 111 Minn. 504, 127 N. W. 177.

Missouri.—*Gratiot St. Warehouse Co. v. Missouri, etc., R. Co.*, 124 Mo. App. 545, 102 S. W. 11.

North Dakota.—*Hanson v. Great Northern R. Co.*, 18 N. Dak. 324, 121 N. W. 78; *Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

Texas.—If it be admitted that a carrier and shipper can by contract limit the liability of the carrier to less than the real or market value of the property, the facts pleaded and proven must show that the contract was reasonable and was fairly made and entered into. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op. And see *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.

Washington.—*Windmiller v. Northern Pac. R. Co.*, 52 Wash. 613, 101 Pac. 225.

Carriage or express.—*Adams Exp. Co. v. Byers*, 177 Ind. 33, 95 N. E. 513.

⁴⁸ *Alabama.*—*Louisville, etc., R. Co. v. Sherrod*, 84 Ala. 178, 4 So. 29, 35 Am. & Eng. R. Cas. 611.

Maryland.—*De Wolff v. Adams Exp. Co.*, 106 Md. 472, 67 Atl. 1099.

Minnesota.—*Ostroot v. Northern Pac. R. Co.*, 111 Minn. 504, 127 N. W. 177.

North Carolina.—*Jones-Lane Co. v. Atlantic, etc., R. Co.*, 62 S. E. 701, 148 N. C. 580.

North Dakota.—*Hanson v. Great Northern R. Co.*, 18 N. Dak. 324, 121 N. W. 78.

Tennessee.—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

Texas.—*International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed no op.; *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed no op.

Instances of unfair and unreasonable contracts.—In an action to recover for the loss of goods shipped, the subject-matter of the shipment was household goods, including a piano, and the alleged contract on which the carrier relied to fix their value stated the same at 5 cents per pound. The evidence showed that this was a mere arbitrary valuation, and

that the plaintiff did not sign any receipt, nor any other contract as to the shipment, nor was any bill of lading delivered to him personally by defendant railroad company. Held, that the evidence was sufficient to show that the contract limiting the liability to 5 cents a pound was not fairly entered into, and was neither just nor reasonable. *Ostroot v. Northern Pac. R. Co.*, 111 Minn. 504, 127 N. W. 177.

Plaintiff shipped by rail from South Carolina to Texas household goods worth \$300, the bill of lading reciting that in consideration of a reduced rate the carrier should be liable, in case of loss of the goods, only at the rate of \$5 per 100 pounds. No other freight rate than the one paid was offered the shipper, and the railroad agent was not authorized to contract at any other rate. The goods were destroyed by fire en route, and at \$5 per 100 pounds the carrier's liability would have been \$63. Held, that, even if the clause of the contract limiting the liability was valid in South Carolina, where the contract was made, it must be held invalid in Texas because the difference between the value of the property and the stipulated liability was so great as to render it unreasonable. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Sanger v. Jesse French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656.

Instances of reasonable stipulations—Value at place and time of shipment.—A clause in a bill of lading that the value of goods lost or injured shall be computed at the place and time of shipment is reasonable and valid. *Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

A clause of a bill of lading fixing the carrier's liability for loss at the value at the point of shipment is reasonable and valid. *Matheson v. Southern R. Co.*, 79 S. C. 155, 60 S. E. 437.

Value of property declared at stated sum.—An express receipt provided that the rate was based on the value of the property which must be declared by the shipper, a provision that unless a greater value was declared the shipper agreed that the value of the property was not more than \$50, and that the carrier should

must be an affirmative showing of such facts.⁴⁹ The court, in determining whether a contract of carriage, which stipulates that the carrier shall not be liable for damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the value stated in the contract, is reasonable, will not consider the question whether the agreed value reasonably approximates the real value, and the contract establishing the value will be construed to embrace the real value.⁵⁰

§ 1352. Fraud or Duress.—Act Constituting Fraud.—Fraud vitiating a contract of carriage, limiting the amount of carrier's liability, in case of loss, may not be found from the fact of the carrier's agent being furnished with blanks stamped, "Value asked and not given," and the shipper not being asked the value; the carrier not relying for a defense on such provision, but on that that the shipper expressly agreed that the value of the goods was no more than a certain amount, and that, no greater value being stated, the shipper was estopped in case of loss to claim any greater value.⁵¹

Shipper Inserting Valuation.—Where a carrier did not refuse to transport freight, except under a special contract limiting liability for gross negligence, and then only to the extent of a valuation fixed in the contract, but such contract was thoroughly discussed before executed, and no objection was made to it by the shipper, who inserted in the contract in his own handwriting the valuation on the property, the contract was not imposed on the shipper and the carrier's liability was as fixed by it.⁵²

§ 1353. Choice of Full or Limited Liability.—Where a carrier seeks to limit its liability to a specified sum it must give the shipper an actual choice between full and limited liability.⁵³ And such contract is valid, although the carrier did not actually tender another without the clause as to value, if it offered to ship, upon reasonable terms, under a bill of lading containing no limitation as to value, or was ready to do so upon demand being made by the shipper.⁵⁴

Evidence as to Shipper's Option.—Where there is controversy as to whether the carrier offered or was ready to ship under any other than the special contract limiting value, it is error to reject evidence, offered on his behalf, tending to show that shippers were allowed choice of contract under which to ship, and to show the instructions given by carrier to his agents for their guidance when shipper executed the special contract.⁵⁵

not be liable for a greater amount, was not objectionable as limiting the carrier's liability for negligence, but was reasonable and binding on the shipper. *De Wolff v. Adams Exp. Co.*, 67 Atl. 1099, 106 Md. 472.

49. A shipper signed a printed receipt and agreed that an express company should not be liable beyond the sum of \$50, at which sum the property shipped was valued. The freight paid was \$330, and the testimony showed that the value of the shipment was \$2,000. Held, that there being no affirmative showing that the exemption was just and reasonable, the clause was void. *Murphy v. Wells, Fargo & Cos. Exp.*, 108 N. W. 1070, 99 Minn. 230.

50. *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

51. **Acts constituting fraud.**—*Noonan v. Wells Fargo & Co.*, 123 N. Y. S. 903, 68 Misc. Rep. 322.

52. *Mering v. Southern Pac. Co.*, 161 Cal. 297, 119 Pac. 80.

53. **Choice of full or limited liability.**—*California.*—*Mering v. Southern Pac. Co.*, 161 Cal. 297, 119 Pac. 80.

Indiana.—*Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

North Carolina.—A shipping contract, which gives to the owner a reduced rate in consideration of his agreeing to a reduced value of the property, which is reasonable and is not entered into on the part of the carrier to evade its liability for its negligence, is valid, where the shipper had the option of paying the full charges fixed by law, without limit as to value. *Jones-Lane Co. v. Atlantic, etc., R. Co.*, 62 S. E. 701, 148 N. C. 580.

54. *Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

55. **Evidence as to shipper's option.**—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

§§ 1354-1363. Knowledge and Assent of Shipper—§§ 1354-1355. Necessity—§ 1354. In General.—In order that a common carrier may, by fixing the value of the goods received by it for transportation, restrict its liability, it must show that the shipper had knowledge of such restriction and for a sufficient consideration assented thereto, or that his statements and conduct justified the carrier in so fixing the value.⁵⁶ In absence of misrepresentations, as to the nature and value of the goods, the carrier must make known the value which it proposes to attach at a specified rate, and procure the shipper's assent thereto.⁵⁷

§ 1355. Illegible, Unintelligible and Unexplained Terms.—Test of Validity of Contract Limiting Liability.—The test heretofore applied to determine the validity of a contract between a shipper and carrier limiting the amount for which the carrier may be held liable, in consideration of a reduced rate of carriage, has been, was the contract fairly entered into, and its terms just and reasonable. Even if the correctness of the test be conceded, it can not be said to have been fairly entered into if it contains unintelligible and unexplained terms to which the attention of the shipper was not called, and which are sought to be enforced against him.⁵⁸

Almost Illegible Abbreviations Inserted in Bill of Lading by Carrier.—Where it is expressly provided in a bill of lading that "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the same," the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations which are interpreted by the carrier to mean "leaks and outs excepted \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the point of shipment.⁵⁹

§§ 1356-1362. What Constitutes—§ 1356. Acceptance of Bill of Lading.—Where a shipper knowingly receives a bill of lading containing a contract fixing the value of the goods and limiting the carrier's liability to such value, he can not claim the full value, since the carrier may infer from the shipper's silence that the value fixed is proper, for the purpose of determining the carrier's liability.⁶⁰ But mere acceptance by a shipper, without objection,

56. Necessity.—Georgia.—In the case of an agreement limiting the amount recoverable, as in the case of other limitations of the carrier's liability, to be binding on the parties, it must have been assented to by the shipper. *Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287. 44 Am. St. Rep. 197; *Wood v. Southern Exp. Co.*, 95 Ga. 451, 22 S. E. 535.

Indiana.—*Rosenfield v. Peoria, etc., R. Co.*, 103 Ind. 121, 2 N. E. 344, 21 Am. & Eng. R. Cas. 87, 53 Am. Rep. 500.

Massachusetts.—*Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462.

New Jersey.—*Hayes v. Adams Exp. Co.*, 73 N. J. L. 105, 62 Atl. 284.

Tennessee.—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

Texas.—In an action against a carrier for the loss of goods, where the defense was based on the provisions of the bill of lading, limiting defendant's liability to \$5 per 100 pounds in case of loss, evidence held insufficient to show that the terms of the bill of lading were agreed

to by the plaintiff, as the owner of the goods, or by his son, as his agent in the shipment, and \$5 per 100 pounds mutually intended as stipulated damages in case of loss. *St. Louis, etc., R. Co. v. McIntyre*, 82 S. W. 346, 36 Tex. Civ. App. 399.

57. Faulk v. Columbia, etc., R. Co., 82 S. C. 369, 64 S. E. 383.

58. Illegible, unintelligible and unexplained terms.—*Norfolk, etc., R. Co. v. Harman*, 104 Va. 501, 52 S. E. 368.

59. Almost illegible abbreviations inserted in bill of lading by carrier.—*Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 2 N. E. 344, 21 Am. & Eng. R. Cas. 87, 53 Am. Rep. 500.

60. Acceptance of bill of lading.—*Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278.

On delivery of certain household goods for shipment, the agent of the shipper accepted without objection a bill of lading stamped, "Valuation restricted to \$5 per one hundred pounds." Held, that a recovery for damages to the goods while in transit would be limited to the amount

of a bill of lading tendered by the common carrier, containing a stipulation importing limitation of liability on an assumed valuation of goods, not corresponding with their real value, is not conclusive against the shipper.⁶¹

Failure to Object to Stated Value.—If a bill of lading issued by a common carrier states the value of the property received for shipment, or the maximum value thereof, either as declared by the shipper or without specifying the same to be so declared, and the latter, without objecting to such stated value, delivers his property to the carrier and receives the bill, he thereby assents to the terms thereof as regards such value.⁶²

Arbitrary Value Assented to in Consideration of Reduced Rate.—The validity of a contract with a common carrier, limiting the amount of its liability for negligence in the transportation of a shipment of goods, is not affected by the fact that the carrier uses printed bills of lading which fix an arbitrary value for all packages, having no relation to their real value beyond which it is not to be liable, unless a greater value is stated by the shipper and more freight paid, where the shipper assents to the limitation in consideration of a reduced rate.⁶³

Loss by Negligence.—A provision in a bill of lading reciting that the shipping charge is based on a specified valuation, and declaring that the carrier shall not be liable for loss by negligence or otherwise in excess of the amount so specified, is binding on the shipper, if knowing of the existence of such a provision therein, he receives it without objection.⁶⁴

§§ 1357-1358. Acceptance of Freight or Shipping Receipt—§ 1357. In General.—Acceptance of Shipping Receipt.—While an agreement that the value of the property shipped shall be deemed a given amount may arise out of the acceptance by the shipper of a receipt by the carrier stating the value to be a sum specified, if no other has been given,⁶⁵ a common carrier can not limit its liability for the loss of goods by means of a printed receipt stating that it will not be liable beyond a specified sum,⁶⁶ unless the shipper has knowledge of the stipulation and expressly or impliedly assents thereto.⁶⁷ Where the

stated, though the agent testified she did not understand the provision. *Lansing v. New York, etc., R. Co.*, 102 N. Y. S. 1092, 52 Misc. Rep. 334.

61. *Hill v. Adams Exp. Co.*, 82 N. J. L. (53 Vr.) 373, 81 Atl. 859, affirming judgment 77 Atl. 1073, 80 N. J. L. 604.

62. **Failure to object to stated value.**—*United States*.—*Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8,224.

Kansas.—*Kallman v. United States Exp. Co.*, 3 Kan. 205.

New York.—*Fibel v. Livingston (N. Y.)*, 64 Barb. 179.

Wisconsin.—*Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 23 Am. & Eng. R. Cas. N. S., 782, 88 N. W. 41, 88 Am. St. Rep. 949.

Inability to read.—Failure to apply for information.—Plaintiff, on delivering to a common carrier goods for transportation, received a bill of lading, or receipt, containing, in its body, an express provision, that plaintiff should not demand, in any event, beyond the sum of fifty dollars, at which the goods forwarded were thereby valued, unless otherwise therein expressed, or unless expressly insured by the carrier, and so specified in the receipt; that plaintiff accepted such bill of lading, without making any objection to its terms, or giving any statement of the

value of the property shipped or informing the carrier of his inability to read, or applying for any information as to the contents of the instrument. It was held that the liability of the defendant, to the plaintiff, under this contract, was limited to \$50 and interest. *Fibel v. Livingston (N. Y.)*, 64 Barb. 179.

63. **Arbitrary value assented to in consideration of reduced rate.**—*Pierce Co. v. Wells Fargo & Co.*, 110 C. C. A. 645, 189 Fed. 561.

64. **Loss by negligence.**—*Hill v. Adams Exp. Co.*, 78 N. J. L. 333, 74 Atl. 674.

65. **Acceptance of shipping receipt.**—*Greenwald v. Barrett*, 199 N. Y. 174, 92 N. E. 218.

66. *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. (U. S.)*, 16 Wall. 318, 21 L. Ed. 297; *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Exp. Co. v. Armstead*, 50 Ala. 350; *Malone v. Metropolitan Exp. Co.*, 86 N. Y. S. 1039; *Woodruff v. Sherrard (N. Y.)*, 9 Hun 322.

67. In *Southern Exp. Co. v. Armstead*, 50 Ala. 350 the court said: "The limitation as expressed in the body of the receipt, but the receipt was a printed one, and appears to have been such as was generally used by the appellant, without reference to the nature or value of the goods

shipper accepts such receipt without objection, he is presumed, at least prima facie, to have read and assented to it.⁶⁸

Freight Receipt Introduced by Plaintiff.—A provision of a freight receipt limiting the amount of recovery in case of loss, is binding on plaintiff, where he introduced it for the purpose of establishing his case.⁶⁹

§ 1358. Express Receipts.—Where the consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading filled out by him, the alternative provision thereof limiting the value to a given sum will prevent any further recovery.⁷⁰ This is the rule in the federal court of Pennsylvania,⁷¹ in Massachusetts,⁷² Maryland,⁷³ Michigan,⁷⁴ New York⁷⁵

received. When such a limitation of liability is indiscriminately made, whether the goods be of great value, and put up in small compass, or of large bulk, and of value visibly beyond the limitation, no presumption of assent can, or ought to be indulged. It is more than questionable whether the law will permit a common carrier to make such a stipulation, except in a case where the shipper expressly agrees to it after being informed of some sufficient reason why the carrier is not compelled to carry the goods. *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* (U. S.), 16 Wall. 318, 21 L. Ed. 297." *Hayes v. Adams Exp. Co.*, 74 N. J. L. 537, 65 Atl. 1044, 23 R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506; *Woodruff v. Sherrard* (N. Y.), 9 Hun 322.

Loss of trunk—Receipt given by local transfer company.—*Woodruff v. Sherrard* (N. Y.), 9 Hun 322.

68. *Kallman v. United States Exp. Co.*, 3 Kan. 205.

A shipper delivering packages to an express company received a receipt stating that in consideration of the rate charged for carrying the packages, which rate was regulated by the value thereof, and based upon a valuation not exceeding \$50 unless a greater value was declared, the shipper agreed that the value was not more than \$50, unless a greater value was stated, and that the company should not be liable in any event for more than the value so stated, nor for more than \$50, if no value was stated. No greater value was declared. Held, that the shipper must be presumed, at least prima facie, to have read the receipt and assented to it. *Florman v. Dodd, etc., Exp. Co.*, 79 N. J. L. 63, 74 Atl. 446.

Where the freight receipt of a common carrier stipulated that the carrier was not to be held liable for any loss or damage on any package or thing for over \$150, unless its true value was stated in such receipt, and the receipt was silent as to the value of the goods, the shipper, having received the receipt without objection, was bound by its terms. So held in *Kallman v. United States Exp. Co.*, 3 Kan. 205.

69. Freight receipt provision introduced by plaintiff.—*Springer v. Westcott*, 78 Hun 365, 29 N. Y. S. 149, 60 N. Y. St. Rep. 713.

70. Express receipt.—*D'Arcy v. Adams Exp. Co.*, 162 Mich. 363, 127 N. W. 261.

71. U. S. C. C. Pa.—Plaintiff shipped a package of furs, worth \$2,000 by defendant express company. Plaintiff marked no value on the package and gave none in her communications to the express company; but the box had been previously used, and a \$150 valuation was marked thereon, and this amount was stated by the express company in the receipt as the value of the package. Plaintiff accepted the receipt without demur, and after the loss of the package made no claim of mistake in valuation, but claimed the right to recover the full value of the furs in spite of the limitation of liability contained in the receipt. Held, that plaintiff's recovery was limited to \$150. *Taylor v. Weir*, 162 Fed. 585.

72. *Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462.

73. *Brehme v. Dinsmore*, 25 Md. 328.

74. *D'Arcy v. Adams Exp. Co.*, 162 Mich. 363, 127 N. W. 261.

75. *Goodfield v. Platt* (App. Div.), 130 N. Y. S. 180; *Braus v. Manhattan Delivery Co.*, 138 N. Y. S. 324, 78 Misc. Rep. 371; *Sage-man v. Weir* (App. Div.), 109 N. Y. S. 43; *Jonasson v. Weir*, 115 N. Y. S. 6, 130 App. Div. 528.

A receipt given by an express company for the transportation of goods held to limit its liability to \$50, in the absence of a declaration of greater value of the goods. *Cohen v. Morris, etc., Exp. Co.*, 136 N. Y. S. 489, 151 App. Div. 672, reversing judgment 132 N. Y. S. 347; *Rapaport v. White's Exp. Co.*, 131 N. Y. S. 131, 146 App. Div. 576. See, also, *Ginsburg v. Adams Exp. Co.*, 160 Ill. App. 566; *Carpenter v. United States Exp. Co.* (Minn.), 139 N. W. 154.

Receipt for storage receipt and contract limiting liability.—*Cohen v. Morris, etc., Exp. Co.* (App. Div.), 132 N. Y. S. 347.

Express receipt to enable owner to trace property.—Plaintiff, when accepting express company's receipt for her trunk, did not know that it embraced a proposal for a special contract, and took it simply

and Ohio.⁷⁶ The rule is otherwise in Georgia⁷⁷ and New Jersey.⁷⁸ The stamping by the messenger on the receipt of the words "value asked and not given" without the knowledge or consent of the shipper is immaterial.⁷⁹

Notice at Head of Express Receipt.—A notice, at the head of a receipt given by an express company for freight, stating that shippers must have the value of their packages inserted in such receipt, otherwise the company will not be responsible for an amount over a stated sum, is insufficient to constitute a contract, where it is not proven to have been brought to the shipper's knowledge.⁸⁰

Memorandum on Express Receipt for Baggage.—A memorandum on a receipt for baggage, issued by an express company, stating that the "liability" of the company was "limited to a stated sum, except by special agreement to be noted" thereon, in the absence of any knowledge by the owner of the baggage of such condition or consent to it by him, does not constitute a bargain between the parties, limiting the liability of the company.⁸¹

§ 1359. Acceptance of Coupon Receipts of Local Carriers.—The mere delivery by a transfer company and acceptance of a receipt for a trunk, in which receipt is embodied a special contract limiting the carrier's liability, does not constitute the contract, unless such acceptance was with notice of the contents of the receipt.⁸²

as a receipt to enable her to trace her property. It was held that defendant was not exempt from liability for loss of the trunk, in excess of the sum limited in the receipt. *Malone v. Metropolitan Exp. Co.*, 86 N. Y. S. 1039.

76. When a shipper accepts a receipt from an express company for goods delivered to the carrier which contains a condition limiting the liability of the company to \$50 unless another value is stated and fails to fix any value to the goods, he is thereby precluded from recovering more than \$50 for the loss of the goods, where the charges for carrying are determined by the value of the goods, and the interstate commerce act does not change this rule. *Cohn-Goodman Co. v. Wells Fargo Exp. Co.*, 32 O. C. C. 190.

77. The giving of a receipt by an express company to a shipper delivering goods for shipment, which receipt contained a stipulation that, in the absence of valuation, the company's liability should be limited for a certain amount, and the taking of such receipt by the shipper, does not constitute fraud on his part relieving the carrier from liability for damages. *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944.

An express contract, attempting to limit a carrier's liability to \$50 in case the value of the property is not stated in the receipt, being unenforceable, as contrary to the public policy of Georgia, it was not material that the form of receipt was filled out by the consignor for the signature of the carrier's agent. *Adams Exp. Co. v. Chamberlin-Johnson-Du Bose Co.*, 75 S. E. 601, 138 Ga. 455.

Where a jeweler in New York delivered to an express company a ring for shipment to plaintiff in Georgia, and the

carrier's agent, in signing the jeweler's receipt book, stamped thereon, "Value asked and not given," without in fact asking whether the jeweler desired to value the package, plaintiff's recovery for loss of the ring through the carrier's negligence was not limited to \$50, as provided in the receipt. *Adams Exp. Co. v. Mellichamp*, 75 S. E. 596, 138 Ga. 443, Ann. Cas. 1913D, 976.

78. Where a shipper accepted in silence from an express company a receipt, limiting the carrier's liability to \$50, and did not know of such limitation, the court, sitting as a jury was justified in concluding that such limitation was not a part of the contract. *Hill v. Adams Exp. Co.*, 82 N. J. L. (53 Vr.) 373, 81 Atl. 859.

79. *Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462.

80. Notice at head of express receipt.—*Fibel v. Livingston* (N. Y.), 64 Barb. 179.

81. Memorandum on express receipt for baggage.—*Shwartz v. Fargo*, 129 N. Y. S. 926, 145 App. Div. 574.

82. Acceptance of coupon receipts of local carriers.—*Morgan v. Woolverton*, 120 N. Y. S. 1008, 136 App. Div. 351.

Plaintiff delivered baggage to defendant, to be transferred to a railroad station, and received a coupon check, marked "Claim Coupon No. 5947." On the reverse side of the check was printed: "It is agreed by the person receiving coupon receipt that he, for himself or as agent of the owner of the articles shipped, will limit the value of the same to \$25." Held, that, as it did not appear that plaintiff knew of the limitation, he was not bound thereby. *Smith v. Hughes*, 117 N. Y. S. 162, 63 Misc. Rep. 326.

§ 1360. Knowledge of Shipper That Rates Based on Value of Goods.

—Knowledge of shipper that a carrier's rates are based on the value of the goods shipped will not lessen the liability of a carrier to answer for the value of the goods, in the absence of the shipper's assent to such restriction.⁸³

§ 1361. Misrepresentation of Value by Shipper.—Where a shipper fraudulently misrepresents to the carrier the value of the goods consigned, he can not claim full indemnity.⁸⁴

§ 1362. Authority of Agent or Consignor.—In the absence of proof to that effect, mere consignors ought not to be presumed to have been authorized to fix or consent for the owner to the valuation of his goods at greatly less than their true value.⁸⁵ No wrong is done to the carrier by so holding in any case where the thing to be shipped is open to the inspection of the carrier, or though boxed or otherwise enclosed, is one of ordinary commerce whose value can be ascertained by inquiry, for in such cases the carrier may for himself determine the value and regulate his charges thereby. It ought not to be presumed that a shipping agent had power to make a contract other than the carrier may lawfully require.⁸⁶

Agent Not Knowing Value of Goods.—Where goods which have been delivered to an express company have been destroyed in transit through the negligence of the carrier, the owner is entitled to recover their full value, although the owner's agent who did not know the value of the goods, and therefore could not state the value, had accepted a receipt in which the company had limited its liability to a sum much less than the real value of the goods.⁸⁷

Failure to Read Receipt.—Where it appeared that upon the delivery of freight to the agent of a common carrier, he filled a blank in a receipt prepared by the company, stipulating against liability beyond a stated sum; that the freight was delivered by the consignor's agent, who neither read such receipt nor understood its conditions, nor signed a printed endorsement accepting such conditions, and the consignor never saw the receipt until the goods were lost, the testimony of the consignor's agent is admissible to prove that he did not

83. Knowledge of shipper that rates based on value of goods.—*Hayes v. Adams Exp. Co.*, 73 N. J. L. 105, 62 Atl. 284, affirmed in 65 Atl. 1044.

On delivering to a common carrier a drop curtain, the shipper received as a voucher an instrument stating that, where the shipper omits to declare the value of the goods, he agrees that it does not exceed \$50. Held, that the responsibility of the carrier for the real value, in case of loss, was not thereby restricted, unless the shipper had knowledge of the stipulation, and his knowledge that the carrier's charges depended on the value of the goods is not sufficient to render the limit of liability obligatory. *Hayes v. Adams Exp. Co.*, 73 N. J. L. 105, 62 Atl. 284.

Questions for jury.—In an action against a carrier for loss of goods, where the court instructed that the sole question was whether plaintiff knew that defendant's rates depended on the value of the goods, and if "yes," the verdict should be for \$50, and if "no" the verdict should be for \$300, the value of the goods, and the jury rendered a verdict for \$50, it could not be supported as

against plaintiff on the theory that he voluntarily accepted a bill of lading stating that the value of the goods did not exceed \$50; it being in dispute whether he did assent to such contract, and this question not having been submitted to the jury. *Hayes v. Adams Exp. Co.*, 73 N. J. L. 105, 62 Atl. 284, affirmed in 65 Atl. 1044.

84. Misrepresentation of value by shipper.—*Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278.

A common carrier may require the nature and value of the goods to be made known to him, and may avail himself of any fraudulent acts or sayings of the shipper's employees. *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393.

85. Authority of agent or consignor.—*Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

86. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 306, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

87. Agent not knowing value of goods.—*Howard v. American Exp. Co.*, 47 Pa. Super. Ct. 416; *Solomon v. Adams Exp. Co.*, 47 Pa. Super. 423.

read or understand the receipt and did not accept its conditions purporting to limit the liability of the carrier.⁸⁸

Presentation of Shipping Order by Cartman.—The presentation of a shipping order to a railroad company was notice that the authority of the cartman delivering the goods was not discretionary, but consisted only in delivering the goods and paying the freight, and that there was no authority in him to contract to exempt the railroad company from liability.⁸⁹ In order to constitute a ratification of the act of a cartman in modifying a shipping order, there must be a ratification of the results of the act, with an intent to ratify, and with full knowledge of all the material circumstances.⁹⁰

§ 1363. **Question for Jury.**—Whether the value of goods shipped, as respects the limitation contained in the supposed contract of shipment, has been agreed upon between the carrier and shipper, is a question for the jury.⁹¹

§ 1364. **Notice to Carrier of Character of Goods.**—A carrier which received a package of gold, with knowledge of its character and contents, is liable for this value of the package, though the receipt given by the company showed that it was an ordinary package, valued at \$50.⁹² A contract limiting a carrier's liability to \$5 per hundredweight, or to a maximum of \$120, is invalid, where the freight is worth over \$900, and the carrier had knowledge thereof.⁹³ But a valuation of \$5 per hundredweight, to which the liability of a carrier of household goods, "consisting of a roll of carpet, including one feather bed, four pillows, and three boxes of other household goods," was limited, is not so inadequate as to be fraudulent on its face, or show valuation below actual value.⁹⁴

Agent Informed That Shipment of Greater Value than Allowed by Receipt.—Where the agent of a common carrier is informed by the shipper that the article shipped is of greater value than the amount allowed by the receipt he is authorized to issue and such greater value is noted on the receipt, such value may be recovered by the shipper in event of loss.⁹⁵

Delivery to Carrier of Storage Receipt Declaring Value.—A greater value is declared, so as to render inoperative the provision in a contract for carriage of furs, limiting the carrier's liability to \$50 in the absence of a declaration of a greater value, where the furs are in storage, and there is delivered to the carrier, with which to get the furs, a storage receipt, declaring their value to be \$1,500; anything apprising the carrier of such excess value being enough.⁹⁶

88. *Adams Exp. Co. v. Nock* (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

89. **Presentation of shipping order by cartman.**—*Russell v. Erie R. Co.*, 70 N. J. L. 808, 67 L. R. A. 433, 59 Atl. 150.

90. *Russell v. Erie R. Co.*, 70 N. J. L. 808, 67 L. R. A. 433, 59 Atl. 150.

91. **Question for jury.**—*Walker-Edmond Co. v. Adams Exp. Co.*, 146 Ill. App. 176.

In an action against a carrier for loss of goods, where the court instructed that the sole question was whether plaintiff knew that defendant's rates depended on the value of the goods, and if "yes," the verdict should be for \$50, and if "no," the verdict should be for \$300, the value of the goods, and the jury rendered a verdict for \$50, it could not be supported as against plaintiff on the theory that he voluntarily accepted a bill of lading stating that the value of the goods did not exceed \$50; it being in dispute whether

he did assent to such contract, and this question not having been submitted to the jury. Judgment 62 Atl. 284, affirmed in *Hayes v. Adams Exp. Co.*, 74 N. J. L. 537, 65 Atl. 1044, 23 R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506.

92. **Notice to carrier of character of goods.**—*Kember v. Southern Exp. Co.*, 22 La. Ann. 158, 2 Am. Rep. 719.

93. **Carrier having knowledge of inadequacy of valuation.**—*Colorado, etc., R. Co. v. Manatt*, 21 Colo. App. 593, 121 Pac. 1012.

94. *Larsen v. Oregon Short Line R. Co.*, 38 Utah 130, 110 Pac. 983.

95. **Express agent informed that article is of greater value than that he is allowed to insert in receipt.**—*Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

96. *Cohen v. Morris, etc., Exp. Co.* (App. Div.), 132 N. Y. S. 347.

§§ 1365-1381. Operation and Effect—§§ 1365-1367. As Dependent upon Form of Stipulation—§ 1365. Agreed Valuation Placed on Shipment.—A shipping contract voluntarily entered into, which fixes an agreed valuation of the property which forms the basis for the freight charges, is an agreement fixing the valuation of the property, and not a contract limiting the liability of the carrier, and under the contract the carrier is only liable as stipulated, and then only to the extent of the valuation fixed.⁹⁷

Operation as Estoppel.—A shipper who by special contract agrees on a value of the goods in case of loss, and in consideration thereof obtains a reduced rate, is estopped from showing that the real value of the goods was greater than that contracted.⁹⁸ Where the written receipt constituting the contract of shipment contains a clause by which the shipper agrees that the value of the property is not more than a stated sum unless a different value is stated, and no greater value is stated, the shipper is estopped from claiming in case of loss that the value was greater.⁹⁹ Where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering any other and higher valuation after the loss occurs, although the loss may be a result of negligence on the part of the carrier, provided the same is not gross, wanton or willful. But such a contract will not be upheld as exempting the carrier from all liability but as limiting the liability in case of loss to the amount fixed by agreement.¹

Express Receipt.—In an action against an express company for damages for nondelivery, the shipper, upon whose valuation of the goods the contract was based could not recover a greater amount.²

Mistaken Recital in Some of the Bills of Lading.—Where bills of lading on a shipment of stone stated a value of 20 cents per cubic foot, and other bills of lading expressed a value of 40 cents, but parol evidence showed that the latter entry should have been 20 cents, it was not error not to hold that plaintiffs were limited in recovery of damages to the value of the stone as set out in the bill of lading.³

§§ 1366-1367. Stipulation Fixing Measure of Damages—§ 1366. In General.—Where an express company receives a package without notice as to its value, and gives a receipt limiting its liability, and receives the minimum rate for transportation; in the event of a loss, the company is liable only for the amount specified.⁴

^{97.} *Mering v. Southern Pac. Co.*, 161 Cal. 297, 119 Pac. 80.

A limitation on the value of the goods shipped in consideration of a reduced rate of carriage is binding in the event of loss, and the shipper can not recover above the value fixed, where the contract is fairly made. *Windmill v. Northern Pac. R. Co.*, 101 Pac. 225, 52 Wash. 613.

^{98.} **Operation as estoppel.**—*California.*—A shipper, who stipulates when the shipment is received that the goods are of a certain value, is estopped from claiming a greater amount in an action for damages for their loss or injury. *Reeder v. Wells Fargo & Co.*, 14 Cal. App. 790, 113 Pac. 342.

Georgia.—Where by act of the parties there is a bona fide valuation, or where the contents of packages are unknown to the carrier, and the valuation is placed thereon by the shipper, who thereby gets a lower rate of freight, and the goods are lost or damaged, the shipper

is estopped from recovering beyond the valuation thus fixed by him. *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807.

South Carolina.—*Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383.

^{99.} *Bates v. Weir*, 105 N. Y. S. 785, 121 App. Div. 275; *Greenwald v. Weir*, 115 N. Y. S. 311, 130 App. Div. 696; *Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383.

^{1.} *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116, 49 Am. & Eng. R. Cas. 712.

^{2.} **Express receipt.**—*Pastore v. American Exp. Co.* (App. Div.), 138 N. Y. S. 316.

^{3.} **Mistaken recital in some of the bills of lading.**—*Louisville, etc., R. Co. v. Venable*, 132 Ga. 501, 64 S. E. 466.

^{4.} **Stipulation fixing measure of damages.**—*Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 42 So. 670.

Value Not Stated Amount of Liability Fixed.—A stipulation in a receipt given by a common carrier for freight, limiting the liability of the carrier to a specified sum in case of loss or damage, where the value of a package is not stated, does not constitute an agreement as to the value of the package, and the inference is to the contrary.⁵

Contract Offered in Evidence by Carrier.—A shipper of goods by express under a contract limiting liability for loss to a specified sum can not recover a greater sum in case of loss, though the contract is offered in evidence by the carrier.⁶

§ 1367. **Value at Time and Place of Shipment.**—A clause of a bill of lading fixing the carrier's liability for loss at the value at the point of shipment precludes recovery by consignee for the difference between the market value at the place of delivery and what he paid.⁷

Market Value Greater than Cost.—A bill of lading, which stipulates that, in the event of the loss of the property, "the value or cost of the same at the point of shipment shall govern the settlement," will authorize a judgment for the market value of the goods at the time of shipment, which was greater than the cost thereof.⁸

As Including Freight Paid and Interest.—A stipulation in the bill of lading, that the amount of damage for which the carrier should be liable should be computed upon the basis of the property's value at the time and place of shipment, meant the value when received under a contract for transportation, and would include reasonable freight paid by the consignor or consignee,⁹ and interstate on the whole amount.¹⁰

Failure to State Invoice Price.—Where there is a special contract making the invoice price of the freight at the point of shipment the measure of damages, and no invoice price was actually made out and agreed upon, that expression must be understood as indicating the actual value of the freight at the point of shipment when loaded and ready for transportation.¹¹

§§ 1368-1377. **Losses Covered**—§§ 1368-1371. **Limitation of Liability for Negligence**—§ 1368. **In General.**—The question of the validity of a contract limiting a carrier's common-law liability as to the measure of damages for injuries occasioned by its own negligence has often been considered by the courts and the conclusions reached are conflicting.¹²

5. Value not stated amount of liability fixed.—*Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683, 50 Pac. 847; *Louisville, etc., R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 6 R. R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22, 71 S. W. 437.

6. Contract offered in evidence by carrier.—*Cohen v. Morris, etc., Exp. Co.*, 136 N. Y. S. 489, 151 App. Div. 672.

7. Value at time and place of shipment.—*Matheson v. Southern R. Co.*, 79 S. C. 155, 60 S. E. 437.

In an action for damage to goods shipped under a bill of lading providing that any loss or damage should be computed at the value of the property at the time and place of shipment, the provision controls. *Merchants', etc., Transp. Co. v. Eichberg*, 71 Atl. 993, 109 Md. 211.

8. Market value greater than cost.—*M. P. R. Co. v. Barnes & Co.*, 2 Texas App. Civ. Cas., § 579.

9. As including freight paid and interest.—*Kelly v. Southern R. Co.*, 84 S. C. 249, 66 S. E. 198.

Where freight was prepaid by the consignor in accordance with the contract of sale, the measure of the consignee's damage in an action against the carrier for loss of the goods was their value at the point of shipment, plus the freight; a limitation of liability, specifying the damages as the value of the goods at the place of shipment, being construed to mean the value when delivered to the carrier, which would include freight paid either by the shipper or consignee. *De Schamps v. Atlantic, etc., R. Co.*, 66 S. E. 414, 84 S. C. 358.

10. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 10 Am. & Eng. R. Cas., N. S., 88.

11. Failure to state invoice price.—*Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 10 Am. & Eng. R. Cas., N. S., 88.

12. Limitation of liability for negligence.—*St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176; *Southern Pac. R. Co. v. Maddox*, 75

§ 1369. Rule That Carrier Not Liable.—Stipulations in a contract of carriage fixing the limit of the carrier's liability, in event of loss or injury, made in consideration of a reduced freight rate, are valid, although the loss results from the carrier's own negligence.

Agreements as to Valuation.—Where a contract, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. This is the doctrine in the federal courts¹³ and in the courts of Alabama,¹⁴ Arkansas,¹⁵ Connecticut,¹⁶ Georgia,¹⁷ Kan-

Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *St. Louis, etc., R. Co. v. Robbins*, 4 Texas App. Civ. Cas., § 43, 14 S. W. 1075; *Galveston, etc., R. Co. v. Febo*, 8 Tex. Ct. Rep. 629; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

13. Agreements as to valuation.—*United States.*—*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151; *New York, etc., R. Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531; *The Kensington*, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; *Queen of the Pacific*, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278; *Calderson v. Atlas Steamship Co.*, 170 U. S. 272, 278, 42 L. Ed. 1033, 18 S. Ct. 588; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair-dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." *Hart v.*

Pennsylvania R. Co., 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151.

As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151.

14. *Louisville, etc., R. Co. v. Sherrod*, 84 Ala. 178, 4 So. 29, 35 Am. & Eng. R. Cas. 611, holding that the valuation must be reasonable. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. 781, 45 Am. & Eng. R. Cas. 351; *Alabama, etc., R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37. *Compare South, etc., R. Co. v. Henlein*, 56 Ala. 368; *Central, etc., R. Co. v. Smitha*, 85 Ala. 47, 4 So. 708; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 So. 62.

15. *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 381.

16. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 55 Am. & Eng. R. Cas. 381, 15 L. R. A. 534.

17. A contract signed by the shipper and fairly made agreeing to the value of the goods, the freight rate being based on the condition limiting the carrier's liability to the agreed valuation, is a valid contract and will be upheld even where the loss arises from negligence. *Central, etc., R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

sas¹⁸ Massachusetts,¹⁹ Michigan,²⁰ Minnesota,²¹ Missouri,²² New Hampshire,²³ New York,²⁴ Pennsylvania,²⁵ Rhode Island,²⁶ South Carolina,²⁷ Ten-

18. *Pacific Exp. Co. v. Foley*, 46 Kan. 457, 26 Pac. 665, 26 Am. & Eng. R. Cas. 690, 12 L. R. A. 799, 26 Am. St. Rep. 107. Compare *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104, 16 Am. & Eng. R. Cas. 158.

19. *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 10 N. E. 836, 28 Am. & Eng. R. Cas. 87; *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33, 50 Am. & Eng. R. Cas. 282; *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Graves v. Adams Exp. Co.*, 176 Mass. 280, 57 N. E. 462.

20. *Smith v. American Exp. Co.*, 108 Mich. 572, 66 N. W. 479; *Porteous v. Adams Exp. Co.*, 112 Minn. 31, 127 N. W. 429.

21. Where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the values so agreed upon will be the limit of recovery. *Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

In *Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588, 55 Am. & Eng. R. Cas. 357, a contract for the carriage of live stock provided that the liability of the company should not exceed a stated amount, viz, "one hundred dollars for each horse, \$50 for each ox," etc. Upon a demurrer to the shipper's declaration, claiming a large sum as damages, the court held that if the contract was freely and fairly entered into by the shipper, and the stipulation as to the value of the property "fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier will be held responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The court held further that it made no difference whether the value was fixed at a specified sum or "not more than" such a sum; nor was it material whether the valuation was one previously named by the shipper or inserted in the contract by the carrier. In any event, if the contract was fairly made, it limited the liability of the carrier, regardless of whether the loss occurred through its negligence or not. Cases holding differently in that state were distinguished. See, also, *Douglas Co. v. Minnesota Transfer R. Co.*, 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860. Compare *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, 46 N.

W. 333, 45 Am. & Eng. R. Cas. 351; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781, 12 Am. & Eng. R. Cas. 13.

22. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; *Mires v. St. Louis, etc., R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *Gratiot St. Warehouse Co. v. Missouri, etc., R. Co.* 124 Mo. App. 545, 102 S. W. 11.

A carrier of goods can limit its liability for negligence when the shipper fixes a valuation upon the goods, and agrees that the carrier's liability shall not exceed such value, where a higher rate is charged on goods of greater value. *Townsend, etc., Dry Goods Co. v. United States Exp. Co.*, 113 S. W. 1161, 133 Mo. App. 683.

23. *Duntley v. Boston, etc., R. Co.*, 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610, 45 Am. & Eng. R. Cas. 327.

24. *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642, 55 Am. & Eng. R. Cas. 354; *Magnus v. Platt*, 115 N. Y. S. 824, 62 Misc. Rep. 499. But see contra *Boyle v. Bush Terminal R. Co.*, 136 N. Y. S. 355, 151 App. Div. 551.

An agreement that a carrier of an express package, the value of which is not stated, shall not be liable in any sum above \$50, is good, whether the carrier is careless or not. *Magnus v. Platt*, 115 N. Y. S. 824, 62 Misc. Rep. 499.

25. If the valuation is an agreed one, made in consideration of reduced charges, it will bind the shipper. But otherwise any stipulation fixing the limit of the carrier's liability in case of loss or injury is void if the loss is the result of the carrier's negligence. *Elkins v. Empire Transp. Co.*, 81 Pa. 315; *Grogan v. Adams Exp. Co.*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, 30 Am. & Eng. R. Cas. 10; *Pennsylvania R. Co. v. Weiller*, 134 Pa. 310, 19 Atl. 702, 19 Am. St. Rep. 700, 42 Am. & Eng. R. Cas. 390; *Adams Exp. Co. v. Holmes (Pa.)*, 6 Sad. 167, 9 Atl. 166, 30 Am. & Eng. R. Cas. 14; *American Exp. Co. v. Sands*, 55 Pa. 140; *Farnham v. Camden, etc., R. Co.*, 55 Pa. 53.

26. *Ballou v. Earle*, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31, 14 L. R. A. 433.

27. *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

While a carrier can not by contract exempt itself from liability for negligence, it and the shipper may make a special contract upon consideration, agreeing on

nessee,²⁸ West Virginia,²⁹ and formerly Virginia.³⁰ The theory of the cases affirming the validity of such contracts, generally speaking, is that in express and other cases where packages are sealed, and in cases where the carrier has not the opportunity of fairly learning the value of articles shipped, it is reasonable that the carrier be accorded the right to agree with the shipper upon amounts beyond which it will not be liable, in order to protect itself against fanciful or extravagant values.³¹

Express Mention of Loss by Negligence Unnecessary.—A clause in a contract of shipment in consideration of reduced rates limiting the liability of a carrier to a specified valuation will include loss arising from negligence without express mention thereof.³²

Arbitrary Valuation.—A carrier can not, by placing an arbitrary value upon property in his possession for carriage, limit his liability for loss through negligence.³⁴

§ 1370. Rule That Carrier Liable.—In Georgia,³⁵ Illinois,³⁶ Indiana,³⁷ Iowa,³⁸ Kentucky,³⁹ Maryland,⁴⁰ Mississippi,⁴¹ Nebraska,⁴² New Jer-

a valuation of property shipped in case of damage. *Black v. Atlantic, etc., R. Co.*, 64 S. E. 418, 82 S. C. 478.

28. *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837, 49 Am. & Eng. R. Cas. 166; *Starnes v. Louisville, etc., R. Co.*, 91 Tenn. (7 Pickle) 516, 19 S. W. 675, 55 Am. & Eng. R. Cas. 355, note. Compare *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, 45 Am. & Eng. R. Cas. 312.

29. The West Virginia cases are conflicting. Such limitations are upheld by *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116, 49 Am. & Eng. R. Cas. 712. And see, also, *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664, overruled by *Maslin v. Baltimore, etc., R. Co.*, 11 W. Va. 180, 35 Am. Rep. 748, but affirmatively held invalid by *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871.

30. *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, 42 Am. & Eng. R. Cas. 370.

31. *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 211, 103 S. W. 1176.

33. **Express mention of loss by negligence unnecessary.**—*Gardiner v. New York, etc., R. Co.*, 94 N. E. 876, 201 N. Y. 387, 34 L. R. A., N. S., 826, affirming order, 123 N. Y. S. 865, 139 App. Div. 17, and answering certified question, 125 N. Y. S. 1121, 140 App. Div. 907.

34. **Arbitrary valuation.**—*Porteous v. Adams Exp. Co.*, 112 Minn. 31, 127 N. W. 429.

35. **Rule that carrier liable.**—*Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Wood v. Southern Exp. Co.*, 95 Ga. 451, 22 S. E. 535.

While a bona fide agreement made with a carrier as to the value of property to be transported as a basis for

fixing charges is valid, the carrier can not, even by express contract, limit its liability for damages arising from its agent's negligence; such a contract being against public policy. *Southern Exp. Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944.

Shippers of stone damaged in transit were not limited in their recovery to an amount stated in the bills of lading, if such damage resulted from the carrier's negligence. *Louisville, etc., R. Co. v. Venable*, 64 S. E. 466, 132 Ga. 501.

36. *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 42 Am. & Eng. R. Cas. 392, 24 N. E. 417, 8 L. R. A. 508; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54.

37. *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 87, 2 N. E. 344; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 150, 21 N. E. 340, 7 L. R. A. 214.

38. *McCune v. Burlington, etc., R. Co.*, 52 Iowa 600, 3 N. W. 615.

39. *Baughman v. Louisville, etc., R. Co.*, 94 Ky. 150, 21 S. W. 757, 14 Ky. L. Rep. 775; *Louisville, etc., R. Co. v. Owens*, 93 Ky. 201, 19 S. W. 590, 14 Ky. L. Rep. 118; *Adams Exp. Co. v. Hoeing*, 88 Ky. 373, 11 S. W. 205, 10 Ky. L. Rep. 999; *Orndorff & Co. v. Adams Exp. Co.* (Ky.), 3 Bush 194, 96 Am. Dec. 207.

40. *De Wolff v. Adams Exp. Co.*, 106 Md. 472, 67 Atl. 1099.

41. *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *Chicago, etc., R. Co. v. Moss & Co.*, 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; *Southern Exp. Co. v. Seide*, 67 Miss. 609, 7 So. 547, 42 Am. & Eng. R. Cas. 398.

42. *Chicago, etc., R. Co. v. Witty*, 52 Neb. 275, 49 N. W. 183, 29 Am. St. Rep. 436, 49 Am. & Eng. R. Cas. 169, note.

sey,⁴³ North Carolina,⁴⁴ Ohio,⁴⁵ Tennessee,⁴⁶ Texas⁴⁷ and Wisconsin,⁴⁸ such

43. A common carrier can not limit the amount of its liability for losses caused by its negligence. *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442, 57 Atl. 139.

44. *Stringfield v. Southern R. Co.*, 152 N. C. 125, 67 S. E. 333.

A clause in a bill of lading fixing the value of the goods shipped will not relieve the carrier from liability for the full value of the goods, if they are destroyed by its negligence. *Pace Mule Co. v. Seaboard, etc., R. Co.*, 160 N. C. 215, 76 S. E. 513; *Herring v. Atlantic, etc., R. Co.*, 161 N. C. 213, 76 S. E. 527.

Damages to property injured in transit are estimated upon the net value of the property at the place of delivery, notwithstanding a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment, since such stipulation is void, as limiting liability, for negligence. *McConnell Bros. v. Southern R. Co.*, 144 N. C. 89, 56 S. E. 559.

45. *United States Exp. Co. v. Backman*, 28 O. St. 144; *Ambach v. Baltimore, etc., R. Co.*, 30 O. L. J. 111; *Railway Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61; *Baltimore, etc., R. Co. v. Hubbard*, 1 O. C. C., N. S., 611, 15-25 O. C. D. 477, declining to follow *Railway Co. v. Simon*, 15 O. C. C. 123, 8 O. C. D. 540, following the decision of the United States court in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151.

Pennsylvania Co. v. Yoder, 25 O. C. C. 32, refused to follow the rule as laid down in *Railway Co. v. Simon*, 15 O. C. C. 123, 8 O. C. D. 540, on the ground that it was not in harmony with the decisions of the supreme court upon the subject, and followed the rule laid down in *United States Exp. Co. v. Backman*, 28 O. St. 144. And see *Baltimore, etc., R. Co. v. Hubbard*, 1 O. C. C., N. S., 611, 15-25 O. C. D. 477.

In *United States Exp. Co. v. Backman*, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144, it was held that when a clause in a bill of lading exempts a common carrier of goods from liability for their loss beyond a certain fixed amount, such clause does not protect the carrier against paying full value if the goods are lost by his neglect or breach of duty. The contract is one, at most, against liability, as an insurer, for such losses as may happen from mistake or accident; and the fact that less is charged and paid for carriage by reason of the insertion of such clause will not change the rule. See also, *Toledo, etc., R. Co. v. Bowler, etc., Co.*, 63 O. St. 274, 58 N. E. 813.

In *Ambach v. B. & O. R. Co.*, 30 Wkly.

L. Bull. 111, 11 O. Dec. Reprint 829, it was held that an agreement between a public carrier and a shipper, signed by the agents of both, by which a valuation of the property to be carried is agreed upon as a basis for computing the rate of the freight charges, and by which it is stipulated that no more than that valuation shall be, by the shipper, recovered in case of loss or injury to the property, even when it is caused by the negligence of the company, is not binding upon the shipper, and can not defeat his right to recover the market value of the property which was lost by the carrier's negligence—its market value at the time and place of shipment.

In *Jacobson & Co. v. Adams Exp. Co.*, 1 O. C. C. 381, 1 O. C. D. 212, the court was of the opinion that there was no special contract. The second syllabus is as follows: In the foregoing case, a receipt of the company, stating that in no event shall the holder demand beyond the sum of \$50, at which the article forwarded is valued, not signed by the shipper and no statement made by him as to value, is not a valid stipulation against a loss by fraud or negligence. *Railway Co. v. Simon*, 15 O. C. C. 123, 8 O. C. D. 540.

46. *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, 45 Am. & Eng. R. Cas. 312.

47. *St. Louis, etc., R. Co. v. Robbins*, 4 Texas App. Civ. Cas., § 43, 14 S. W. 1075; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528, 12 S. W. 815.

A stipulation in the contract of carriage limiting the carrier's liability to a value fixed in the contract is not binding, when the goods are injured through the carrier's negligence, in the absence of a statute permitting such a limitation of liability. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op. See, also, *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 649, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

In Texas it has been definitely decided that a restriction as to liability less than the true or market value of the property lost or damaged, will not be enforced

48. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713. See, also, *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; *Boorman v. American Exp. Co.*, 21 Wis. 152.

a stipulation is void if the loss or injury results from the negligence of the carrier. The theory of the cases denying the validity of such contracts is that the common law determines what shall relieve a common carrier for liabilities for goods carried and, in absence of such facts, a carrier is liable for the full value of goods lost or damaged, and a contract making a less sum payable on the loss of goods than the real value is a limitation on the carrier's liability contrary to public policy.⁴⁸ Thus the Alabama court has held that it is violative of public policy for a carrier, as a paid bailee, to limit the extent of its liability for the negligence of itself or its agents or servants by an agreed valuation upon consideration of reduced charges for carriages of goods, when such agreed valuation is disproportionate to the real value of the goods, though the contents of the package or its real value be not disclosed to the carrier.⁵⁰ The law fixes the carrier's liability at the value of the goods at the place of destination, and in a case involving the carrier's negligence, a stipulation in the contract limiting the liability to anything less than the value at destination, is invalid as against public policy.⁵¹

Interstate Shipments.—The fact that the shipment is an interstate one does not vary the rule.⁵²

when such loss arises from the negligence of the carrier. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 368, 107 S. W. 560, affirmed, no op.; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834.

When a carrier receives freight, any contract which relieves from liability for its full value, if lost through the carrier's negligence, violates the wholesome rule so long and well established in other cases, in which the carrier attempts by contract to relieve itself from liability for the negligence of itself or employees. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 108, 17 S. W. 834; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656.

A carrier having an opportunity to see and know the nature and value of freight to be carried can not by contract relieve itself from liability for full value for loss through its negligence. *Galveston, etc., R. Co. v. Crippen* (Tex. Civ. App.), 147 S. W. 361.

There were stamped on the face of a bill of lading the following words: "Twenty dollars per barrel valuation and owner's risk of leakage, caused by cracked or broken staves, wormholes, or for any other cause, not the gross negligence of the company" and in the body of the bill of lading there was also the following provision: "It is further agreed that, in case of loss, * * * the amount of the loss or damage shall be computed at the value or cost of said goods or property at the place and time of shipment." Held, that these provisions amounted to a stipulation limiting

the liability of the carrier for loss caused by negligence, and are therefore void, as against public policy. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 402, 82 S. W. 346.

^{49.} *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

The liability of a common carrier to make compensation for goods or property lost by it extends at common law not only to the duty imposed upon it by law to safely transport the goods, but also to its responsibility to make reparation by way of damages in favor of the owner of the property to the fullest extent fixed and allowed by law in such cases. Any agreement that diminishes or destroys its liability in either of these respects would be contrary to public policy and void—certainly when the loss is attributable, in the eyes of the law, to the negligence of the carrier. Such is the character of the stipulation in this case, because no exception is made allowing full recovery in case the loss should be the result of even ordinary negligence. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528. The stipulation being void, it could not lessen the defendant's liability under the law. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 402, 82 S. W. 346.

^{50.} *Southern Exp. Co. v. Gibbs*, 155 Ala. 303, 46 So. 465, 18 L. R. A., N. S., 874.

^{51.} *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.

^{52.} **Interstate shipments.**—*Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.; *Missouri Pac. R. Co. v. Ryan*,

Determination of Value in Fixing Freight Rate.—The value of the thing to be carried may be properly considered in fixing the freight rate, but when the carrier knows what the goods are, and what degree of care is essential to carry them safely, it seems that to permit the carrier to grade his care by his compensation would be to permit him to contract against full liability for loss resulting from failure to use ordinary care.⁵³ A shipper is under no obligation to make an agreement with the carrier as to the value of the goods shipped, as the carrier may determine a reasonable freight rate without such an agreement, by determining for itself the value of the goods shipped.⁵⁴

Partial or Total Exemptions.—The carrier can not by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. It is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced the other can, if either be invalid, both must be held to be so, the same considerations of public policy operating in each case.⁵⁵

Damages Limited to Specified Amount.—In absence of statutory permission, a shipping contract providing that the carrier shall not be liable for a greater sum than therein mentioned for loss resulting from its negligence, although real value is greater than mentioned, is void.⁵⁶ When the injuries and damages result from a violation of the contract of shipment growing out of the negligence of the carrier, it can not restrict and limit its liability to less than the true value of the property.⁵⁷

Value at Place and Date of Shipment.—A provision in a contract of carriage that in case of loss the measure of damages shall be the value of the

2 Texas App. Civ. Cas., §§ 430, 432; *M. P. R. Co. v. Barnes & Co.*, 2 Texas App. Civ. Cas., §§ 575, 579; *Gulf, etc., R. Co. v. Booton*, 4 Texas App. Civ. Cas., § 230, 15 S. W. 909.

A stipulation in the contract of a carrier for an interstate shipment, limiting its common-law liability for the full value of the goods in case of loss, however reasonable, is invalid under art. 320, Rev. Stat. of Texas, providing that common carriers of goods entirely within the body of the state shall not limit or restrict their liability as it exists at common law in any manner whatever. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 43 S. W. 795.

53. Determination of value in fixing freight rate.—*Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

A common carrier is entitled to an opportunity to fix a freight rate with a view to the labor necessary and the risk incurred in carrying the goods which depends to some extent on the value and character of the goods, but when such opportunity is given and the carrier receives the freight, any contract which relieves from liability, for its full value, if lost through the carrier's negligence, is an attempt to relieve it from its own negligence. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 301, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

54. *Southern Pac. R. Co. v. Maddox*,

75 Tex. 300, 307, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

55. Partial or total exemptions.—*Chesapeake, etc., R. Co. v. Beasley, etc., Co.*, 104 Va. 788, 798, 52 S. E. 566, 3 L. R. A., N. S., 183.

56. Damages limited to specified amount.—*Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 307, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

In a bill of lading for a bull, a provision limiting the liability of the carrier to \$30 is not valid, and the shipper may recover according to the measure of damages fixed by law. *St. Louis, etc., R. Co. v. Robbins*, 4 Texas App. Civ. Cas., § 43, 14 S. W. 1075, following *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528 overruling *International, etc., R. Co. v. Caldwell*, 3 Texas App. Civ. Cas., § 439.

Provisions in a contract for the shipment of live stock which arbitrarily fix the amount of the damages and which relieve the carrier from damages resulting from certain named risks, and from "any and all other causes whatever," are void as contrary to public policy. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

57. *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

goods at the place of shipment⁵⁸ is reasonable and valid,⁵⁹ and it is error to award as damages for the loss of such goods the value thereof at the place of destination.⁶⁰ Under the Texas statute a stipulation in a shipping contract limiting to carriers liability for loss of goods to the value at the place of shipment is contrary to public policy and void,⁶¹ and the court does not err in allowing proof of value at the point of destination.

Interstate Shipments.—A stipulation in the contract of shipment limiting the liability to value at the place of shipment will be disregarded, as against public policy, notwithstanding it was an interstate shipment.⁶² Such a stipulation is void, as unreasonable.⁶³

Gross Negligence.—Although the special contract under which goods are shipped fixed upon them a valuation less than their real market value, which stipulation the shipper agrees to in consideration of a reduced freight rate, it does not relieve the carrier from damages occasioned by its own gross negligence in making a wrong delivery.⁶⁴

Misrepresentations of Value by Shipper.—The shipper, it is true, may, by his representations or agreement as to the value of the goods, estop himself from recovering their full value, notwithstanding they are lost through the carrier's negligence. This would be the case, if upon being required at the time of shipment to state the value of the goods, the shipper misled the carrier by stating a sum less than their value or if the shipper and the carrier agreed upon a certain sum as the actual value of the goods and the charge for freight was based upon that valuation.⁶⁵

§ 1371. Burden of Proof of Negligence.—There is a conflict of authority as to whether the burden of proof of negligence is on the carrier or the shipper. The courts of most states hold that the burden is on the shipper.⁶⁶

58. Stipulation in a bill of lading, that in event of loss or damage to property, value or cost at place of shipment should govern, is reasonable and valid. *M. P. R. Co. v. Barnes & Co.*, 2 Texas App. Civ. Cas., § 575.

59. *Southern Pac. Co. v. Phillipson* (Tex. Civ. App.), 39 S. W. 958, citing *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528.

60. *Missouri Pac. R. Co. v. Ryan*, 2 Texas App. Civ. Cas., § 430.

61. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.; *T. B. & H. R. Co. v. Montgomery*, 4 Texas App. Civ. Cas., § 238, 16 S. W. 178; *Texas Rev. St.*, art. 278; *Gulf, etc., R. Co. v. Booton*, 4 Texas App. Civ. Cas., § 230, 15 S. W. 909.

Where the carrier is not deceived as to the value of property shipped, a stipulation that the measure of damages, in case of injury, should be governed by the value of the property at the place of shipment, instead of at the place of destination, is not binding. *Houston, etc.,*

R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815, 42 Am. & Eng. R. Cas. 528; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

62. **Interstate shipments.**—*Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813.

63. *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556.

64. **Gross negligence.**—*Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118; *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219.

Under California Civ. Code, § 2175, providing that a carrier can not be exonerated by any agreement from liability for gross negligence, a contract which attempts to fix a liability for half the actual value of the property carried, or any other proportion less than the actual value, is void. *Donlon Bros. v. Southern Pac. Co.*, 91 Pac. 603, 151 Cal. 763, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

65. **Misrepresentation of value by shipper.**—*Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

66. See ante, "Showing Negligence Vel Non," §§ 1302-1303.

Among them Missouri,⁶⁷ while others, among which is Tennessee,⁶⁸ place the burden on the carrier.

§§ 1372-1377. Losses Not Involving Negligence—§ 1372. In General.—An express contract entered into between a shipper and a common carrier by which the former agrees, in consideration of a reduced rate of freight, that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, will be upheld as to a loss not involving negligence on the part of the carrier.⁶⁹

§ 1373. Delay in Transportation.—A bill of lading, providing that carrier shall not be liable beyond value fixed, relates to loss of goods, and does not preclude recovery for delay, or fix amount of such damages,⁷⁰ and provision in a bill of lading that, in case of loss of the property, its value or cost at place of shipment shall govern the settlement does not cover the owner's damages from delay in transportation.⁷¹

§ 1374. Change of Route.—A provision in a contract for transportation which limits the liability of the carrier so as to relieve it in a measure from the consequences of its own negligence, does not apply to a claim for damages where the carrier's liability depends on it having arbitrarily changed the route of the shipment.⁷²

§ 1375. Delivery to Wrong Person.—A contract limiting the liability of a carrier to a certain amount in case of loss or of injury to the goods in consideration of a reduced rate does not limit the recovery in case of delivery to a wrong person,⁷³ since a wrongful delivery is deemed not to have been within the contemplation of the parties.⁷⁴

As Estoppel.—A carrier can not avail itself of an estoppel against a shipper to recover the full value of goods delivered to the wrong person, on the ground that the shipper understated the value and thereby procured a lower rate, under a plea setting up a provision of the contract (which was void because in contravention of the statute) restricting the liability for loss to a specified sum unless the true value was stated, and providing that such sum was the value agreed upon as the basis of freight charges.⁷⁵

§ 1376. Embezzlement of Goods by Employee of Carrier.—An action of trover will lie by a shipper against a carrier for conversion of the goods shipped, and recovery may be had for the full value of the goods, where the goods were embezzled by an employee of the carrier, although the shipping receipt limits the liability of the carrier to a specified sum, which is less than such value. Such a limitation applies only in case of loss of the goods by negligence.⁷⁶

67. Where, in an action against an express company for loss of certain silk in transit, which was not valued, there was no proof as to how the silk was lost, nor to show the carrier's negligence, the consignee was bound by a clause in the bill of lading limiting the carrier's liability to \$50 for packages not valued. *Norton v. Adams Exp. Co.*, 100 S. W. 502, 123 Mo. App. 233.

68. *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, 45 Am. & Eng. R. Cas. 312.

69. *Losses not involving negligence.*—*Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

70. *Delay in transportation.*—*Delaney v. United States Exp. Co.*, 70 W. Va. 502, 74 S. E. 512.

71. *Morrow v. Missouri Pac. R. Co.*, 140 Mo. App. 200, 123 S. W. 1034.

72. *Change of route.*—*Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

73. *Delivery to wrong person.*—*Savannah, etc., R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

74. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

75. *As estoppel.*—*Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795.

76. *Embezzlement of goods by employee of carrier.*—*Adams Exp. Co. v. Berry, etc., Co.*, 35 App. D. C. 208.

§ 1377. Conversion by Carrier.—A carrier's contract for the transportation of property, providing that it shall only be liable for a given sum for the contents of a car, has no application to a cause of action for the carrier's conversion of property in the car not destroyed, and to which plaintiff was entitled to recover the value of the property at the time it was converted.⁷⁷ In an action of trover or damages for conversion the tortfeasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage.⁷⁸

§ 1378. Goods Included.—Wearing apparel is not necessarily included within the term "household goods," when the question of good faith or fraud in fixing the value of such goods in a contract for carriage is involved.⁷⁹

Liability for Packages Exceeding \$100 in Value Not Excluded.—A stipulation in a bill of lading that the carrier should not be liable "for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made," should be construed, not as excluding any liability for packages exceeding \$100 in value, but as excluding liability for the excess over \$100.⁸⁰

§ 1379. Computing Amount of Recovery.—Partial Loss—Valuation of Per Hundredweight.—A bill of lading valuing goods at \$5 per hundred pounds, and limiting recovery to that amount, does not require that \$5 per hundred pounds be taken as the actual value of the goods, and that the injury be estimated by reference to a percentage of that value, but the inquiry is as to the amount in which the goods were injured by reference to their actual value, subject to the limitation that the recovery can not exceed \$5 per hundred pounds.⁸¹

Goods Transported by Full Car.—In an action for injuries to various pieces of goods, transported by full car load under a bill of lading for "Goods, 12,000 (lbs.)," "value restricted to \$5.00 per 100 lbs.," plaintiff's recovery was not restricted to the rate of \$5 per 100 pounds for each article damaged, but her whole recovery was limited to \$600.⁸² The provision stating the value at so much per hundredweight is a substitute for the total valuation as the basis of gross weight.⁸³

77. **Conversion by carrier.**—*Shelton v. Canadian Northern R. Co.*, 189 Fed. 153.

78. *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807; *Merchants', etc., Transp. Co. v. Moore & Co.*, 124 Ga. 482, 52 S. E. 802; *Central, etc., R. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87.

79. **Goods included.**—*Larsen v. Oregon Short Line R. Co.*, 38 Utah 130, 110 Pac. 983.

80. **Liability for packages exceeding \$100 in value not excluded.**—*Calderon v. Atlas Steamship Co.*, 16 C. C. A. 332, 69 Fed. 574.

81. **Valuation of per hundredweight.**—*Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985.

82. **Goods transported by full car.**—*Carleton v. New York, etc., R. Co.*, 117 N. Y. S. 1021, 64 Misc. Rep. 51.

83. There was stamped in a blank space on the bill of lading, under the descrip-

tion of the articles shipped, a provision that the consignor had an option of shipping at a higher rate without limitation as to value in case of damage, but agreed to the valuation named in consideration of the lower rate, and the shipper's agent signed his name on a blank dotted line thereunder, marked "Shipper," and beneath that was stamped, "Valuation restricted to \$5 per hundred pounds." The gross weight, which was the only weight given, was 12,000 pounds, and the column of the bill of lading in which the weight was written was headed: "Weight. Subject to correction." There were more than one hundred and twenty items of household goods in the shipment, and no particular article was identified by the hundredweight. Held, that the stamped provision restricting the valuation to \$5 per hundred pounds was a mere substitute for the total valuation on the basis of the gross weight, and

Proportion Which Value of Lost Portion Bore to Whole Shipment.—

Where a carrier's transportation contract provided that it should not be liable for more than \$1,200 for the contents of plaintiff's car, it was liable for such proportion of that amount as the value of the property destroyed bore to the value of all the property in the car.⁸⁴ Under a shipping receipt for three articles, limiting the liability to \$50, and in case of partial loss to not more than such proportion as \$50 bears to the actual value, if greater, the shipper could recover for one lost article only such proportion of \$50 as the value of the lost article bore to the whole shipment.⁸⁵

Whole Value of Part Lost Not in Excess of Agreed Value.—Where one delivered to an express company for transportation property worth \$700, and declared a valuation of \$400, to which amount the carrier's liability was thereby limited, its liability in case of loss of a part of the property not exceeding \$400 in value is the whole value of the part lost, and not merely four-sevenths thereof.⁸⁶

Recovery of Aggregate Value of Several Articles.—A condition in a common carrier's receipt of a trunk providing that it would not be liable for an amount exceeding a stated sum upon any article, refers to the separate articles contained in the trunk, and their separate value not exceeding that sum, therefore, a recovery might be had for their aggregate value, although the amount exceeds such sum.⁸⁷

Recovery of Amount for Each Case in Package.—Where the freight receipt of a common carrier contained a clause limiting his liability to \$50 for "the article" forwarded, and the receipt was for "one package (3 cases Drugs)," it was held that the shipper could recover \$50 for each case lost.⁸⁸

§ 1380. Measure of Damages Where Stipulation Void.—In case of loss of goods by a common carrier, the measure of damages is the valuation of the goods at the place of destination, with interest from the time they should have been delivered, less costs of transportation, notwithstanding the bill of lading limits liability to value at place of shipment. The limitation will be disregarded as against public policy.⁸⁹

§ 1381. Partial Loss.—See post, "Pleading and Proof," § 1383.

§ 1382. Waiver of Stipulation.—In an action for damages to a shipment, the parties may waive a provision of the bill of lading that the amount of damage should be computed at the value of the property at the time and place of shipment.⁹⁰

§ 1383. Pleading and Proof.—In a suit against a railway company, if the petition alleges facts which if true would entitle the plaintiff to damages on account of injury to specific articles of freight, to be measured by their value at the point of destination, the defendant can not introduce evidence of a special

the shipper's right to recover was not limited to \$5 per hundredweight of that part of the goods weighed separately, so that he need not show the weight of the goods damaged. Judgment, *Carleton v. New York, etc., R. Co.*, 117 N. Y. S. 1021, 64 Misc. Rep. 51, affirmed. *Carleton v. Union Transfer, etc., Co.*, 121 N. Y. S. 997, 137 App. Div. 225.

84. Proportion which value of lost portion bore to whole shipment.—*Shelton v. Canadian Northern R. Co.*, 189 Fed. 153.

85. Greenfield v. Wells Fargo & Co. (App. Div.), 134 N. Y. S. 913.

86. Whole value of part lost not in

excess of agreed value.—*Visanska v. Southern Exp. Co.*, 92 S. C. 573, 75 S. E. 962.

87. Recovery of aggregate value of several articles.—*Earle v. Cadmus* (N. Y.), 2 Daly 237.

88. Recovery of amount for each case in package.—*Wetzell v. Dinsmore* (N. Y.), 4 Daly 193.

89. Measure of damages where stipulation void.—*Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

90. Waiver of stipulation.—*Eichberg v. Central, etc., R. Co.*, 109 Md. 211, 71 Atl. 993.

contract to limit its liability to a more restricted measure of damages, in the absence of plea setting it up.⁹¹

Allegation of Consideration.—An allegation of the answer, in an action against an express company for injuries to goods, that the charge for carrying the goods was based upon a valuation not to exceed a stated sum, and that the shipper agreed that the company should not be liable for more than such sum, for failure to deliver in good order, and, in case of partial damage, should not be liable for more than such a proportion of the same as such sum bore to the actual value, if greater than that sum, did not allege a sufficient consideration for an agreement to limit the carrier's liability for loss to that sum, not alleging a special rate given in consideration of such agreement.⁹²

Replication.—Replications in a suit by a shipper against a carrier for injury to a shipment, in which the latter pleaded specially a contract, limiting value to a specified sum, not sworn to, which denied that the shipper had assented to said contract, averred that it was illegal and invalid, and also put at issue other allegations of the plea, are bad upon objection for duplicity, and because they were not sworn to.⁹³

Burden of Proof of Value in Case of Partial Loss.—Where, in an action for loss of one of three articles shipped, plaintiff introduces the shipment receipt, providing that on partial loss he can recover only such part of the agreed valuation as the value of the part lost bears to the whole shipment, he must prove the relative value of the article lost.⁹⁴

Burden of Proof of Negligence.—See *ante*, "Burden of Proof of Negligence," § 1371.

§§ 1384-1470. Requirement of Notice of Loss and Presentation of Claim—§§ 1384-1387. Power to Stipulate Validity—§ 1384. In General.—The carrier may provide that he shall not be liable for loss or damage to goods carried unless a claim therefor is filed within a named and reasonable time after the delivery of the goods for shipment,⁹⁵ or after the loss occurred.⁹⁵

91. Pleading and proof.—*Missouri Pac. R. Co. v. Edwards*, 75 Tex. 334, 12 S. W. 853.

92. Allegation of consideration.—*Reeder v. Wells Fargo & Co.*, 14 Cal. App. 790, 113 Pac. 342.

93. Replication.—*Railway Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

94. *Greenfield v. Wells Fargo & Co.* (App. Div.), 134 N. Y. S. 913.

95. Stipulation against liability unless claim made within prescribed time.—*United States*.—*Southern Exp. Co. v. Caldwell* (U. S.), 21 Wall. 264, 22 L. Ed. 556; *Queen of the Pacific*, 180 U. S. 49, 54, 45 L. Ed. 419, 21 S. Ct. 278; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873, 6 S. Ct. 750, 1176; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 339, 28 L. Ed. 717, 5 S. Ct. 151.

An agreement made by an express company, a common carrier in the habit of carrying small packages, that the company shall not be held liable for any loss of or damage to a package whatever, delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, is an agreement which such company can rightfully make, the time required for transit between the place where the package is delivered to the company and that to

which it is consigned not being long; in the present case, a single day. *Southern Exp. Co. v. Caldwell* (U. S.), 21 Wall. 264, 22 L. Ed. 556.

Alabama.—*Atlantic, etc., R. Co. v. Ward*, 4 Ala. App. 374, 58 So. 677.

Arkansas.—*St. Louis, etc., R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

North Carolina.—Carriers may by special contract require claims for damages to be presented within a given time provided the time allowed be reasonable. *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 137, 65 S. E. 757.

Ohio.—A common carrier and a shipper may, in the absence of fraud, enter into an enforceable special agreement requiring the shipper, in case of loss, to make a verified claim for damages, in writing, within a specified time, and in default thereof the carrier shall not be liable, if such time is a reasonable one. *Pennsylvania Co. v. Sheares*, 79 N. E. 431, 75 O. St. 249, 9 Am. & Eng. Ann. Cas. 15.

Oklahoma.—An agreement that in case of failure of the carrier to deliver the

96. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 320, 4 S. W. 567; *Texas, etc., R. Co. v. Jackson*, 3 Texas App. Civ. Cas., § 41.

It is not an unreasonable condition in a shipper's contract that he be required as a condition precedent to the carrier's liability to give notice of his claim.⁹⁷ A stipulation for notice of loss of damage within thirty hours after arrival does not affect the carrier's liability, caused by negligence, but is a regulation which the parties agreed the performance of which should be a condition precedent to a recovery, and is therefore valid.⁹⁸

Public Policy.—A stipulation in a shipping contract requiring notice of claim for injuries is not contrary to public policy.⁹⁹

Purpose.—The manifest object of a provision of a contract of shipment limiting the time for presenting claims for damages to freight is to compel those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of the parties and witnesses and to prevent the carrier from being harassed or imposed upon by dishonest claimants.¹

§ 1385. **Effect of Federal Statutes.**—Act Cong. June 29, 1906, § 7, does not prohibit an agreement providing a reasonable time within which a shipper shall present his claim for loss or damage, and that the carrier shall not be liable unless the notice is given or claim made within the prescribed time.²

Effect of Act of Congress Making Initial Carrier Liable for Loss of Consignment.—A bill of lading of an interstate shipment, which stipulates that claims for loss must be made in writing to the carrier at the points of origin or delivery within four months after delivery, or in case of failure to deliver within four months after a reasonable time for delivery has elapsed, and unless claims are so made the carrier is not liable, is reasonable and enforceable, and not invalidated by the act of congress making the initial carrier liable for loss of a consignment; and a shipper, to sustain an action for loss of freight during transportation, must present a claim in writing within the time specified, though the carrier's agent at the point of delivery was apprised of the loss and demand was made on him for delivery.³

§ 1386. **Effect of State Statutes.**—The right of a carrier to stipulate for notice of a claim for a loss within a specified time is controlled by statute in

goods he shall not be liable unless a claim shall be made by the shipper or his consignee within a specified time, if reasonable, is valid. *St. Louis, etc., R. Co. v. Phillips*, 87 Pac. 470, 17 Okla. 264, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201.

South Carolina.—A stipulation in a bill of lading that claims for loss or damages must be made within a reasonable time after delivery, is valid. *Deaver-Jetter Co. v. Southern R. Co.*, 74 S. E. 1071, 91 S. C. 503, Ann. Cas. 1914A, 230.

Virginia.—*Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

97. *McElvain v. St. Louis, etc., R. Co.*, 151 Mo. App. 126, 131 S. W. 736.

98. *St. Louis, etc., R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

99. **Public policy.**—*United States. — Southern Exp. Co. v. Caldwell (U. S.)*, 21 Wall. 264, 22 L. Ed. 556.

Illinois.—*Black v. Wabash, etc., R. Co.*, 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388.

Missouri.—*McKinstrey v. Chicago, etc., R. Co.*, 153 Mo. App. 546, 134 S. W. 1061; *Ward v. Missouri Pac. R. Co.*, 158 Mo. 236, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Ohio.—*Pennsylvania Co. v. Sheares*, 75 O. St. 249, 79 N. E. 431, 9 Am. & Eng. Ann. Cas. 15.

Oklahoma.—*St. Louis, etc., R. Co. v. Phillips*, 17 Okla. 264, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 57 Pac. 470.

Virginia.—*Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

1. **Purpose.**—*Baltimore, etc., R. Co. v. Ross*, 105 Ill. App. 54.

2. **Effect of federal statutes.**—*Post v. Atlantic, etc., R. Co.*, 138 Ga. 763, 76 S. E. 45.

3. **Effect of act of congress making initial carrier liable for loss of consignment.**—*Chicago, etc., R. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826.

Dakota,⁴ Kentucky⁵ and Texas.⁶

Statutory Prohibition against Limiting Liability.—A statutory or constitutional provision declaring that the common-law liability of a common carrier shall not be limited renders a stipulation in a shipping contract, requiring notice of a claim for loss or damage to a shipment, to be filed within a stipulated time.⁷ It has been held otherwise by the court of Virginia.⁸

Under Texas Statutes—In General.—Under Texas Rev. St., art. 278, providing that carriers for hire within the state can not limit their liability as it exists at common law, a stipulation in a contract of shipment, to be wholly performed within the state, providing that all damages for loss of freight shall be considered as waived, if not made in writing within a specified time after delivery of freight, is invalid, since it is a limitation on the common-law liability of the carrier.⁹

§ 1387. Laws Governing and Foreign Laws.—In an action in Georgia on a contract of shipment from Florida or Michigan, where the law of neither of those states is shown, it will be held that the delivery by the carrier of the

4. **Loss of trunk—Verbal claim within contract period—Necessity of written claim under statute—Carrier's knowledge of loss.**—In *Hartwell v. Northern Pac. Exp. Co.*, 5 Dak. 463, 37 Am. & Eng. R. Cas. 635, 41 N. W. 732, 3 L. R. A. 342, an action to recover for the loss of a trunk shipped, the defense was an omission to make a written claim within the time required by the shipping receipt, which was not signed by the consignor, the court charged the jury that, if they found that plaintiff made a claim to the company's agent at the point where the trunk was shipped within the time required by the shipping receipt, and that the company had knowledge of the loss, they would be authorized in finding a verdict for plaintiff. It was held that under § 1263, Dak. Civ. Code, the express company had no reason to complain of the charge.

5. **Void under Kentucky constitution, § 126.**—*Brown v. Illinois Cent. R. Co.*, 100 Ky. 525, 38 S. W. 862.

6. See post, "Under Texas Statute," § 1393.

7. **Statutory prohibition against limiting liability.**—*Iowa*.—*Grieve v. Illinois, etc.*, R. Co., 104 Iowa 659, 74 N. W. 192. *Kentucky*.—*Brown v. Illinois Cent. R. Co.*, 100 Ky. 525, 38 S. W. 862; *Illinois Cent. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511.

Nebraska.—*Cook v. Chicago, etc., R. Co.*, 78 Neb. 64, 23 R. R. R. 606, 46 Am. & Eng. R. Cas., N. S., 606, 110 N. W. 718; *Missouri Pac. R. Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; *Union Pac. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598.

Texas.—*Gulf, etc., R. Co. v. Maetze*, 2 Texas App. Civ. Cas., § 631, 18 Am. & Eng. R. Cas. 613; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

8. A stipulation in a bill of lading of

a carrier that unless claims for damages are made within thirty days, the carrier shall not be liable in any event, does not exonerate the carrier from negligence, in violation of Va. Code 1904, § 12941, providing that no contract shall exempt any carrier from liability, and is a reasonable regulation, and the failure to present a claim for damages within the time prescribed relieves the carrier from liability. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

9. **Under Texas statutes.**—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Gulf, etc., R. Co. v. Maetze*, 2 Texas App. Civ. Cas., § 631, 18 Am. & Eng. R. Cas. 613.

Such a contract would seem necessarily to operate as a limitation on the carrier's common-law liability, for under the rules furnished by that system of laws for the determination of the liability of a common carrier to a shipper for an injury done to the property of the latter while in course of transportation, a cause of action arises at once upon the infliction of the injury, and the requirement of an additional fact before a cause of action exists, and may be enforced, restricts or limits the right which the shipper would have at common law. In the absence of the special contract relied upon, when an unnecessary delay occurred and injury resulted therefrom, the shipper's cause of action was complete, and to require notice, as does the special contract, as a condition precedent to the accruing of the cause of action, is but to say that the contract limits the liability of the carrier, in that it makes its liability depend on the existence of a fact not necessary to fix liability at common law. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574. And see *Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

bill of lading containing a clause requiring notice of claim for loss or damage and acceptance thereof by the shipper constituted a contract.¹⁰

Reasonableness.—In the absence of evidence to the contrary, the presumption arises that under the laws of New Mexico, as under those of Texas, a provision requiring notice of a claim for damages to be filed within ninety-one days must be reasonable or the same will not be enforced.¹¹

§§ 1388-1403. Reasonableness of Stipulations—§ 1388. General Rule.—A stipulation in a contract requiring that notice of a claim for damages shall be given within a specified time to be valid, it must be reasonable, and adapted to the circumstances of the particular case.¹² When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable when considered in the light of the subject-matter of the contract and the circumstances and surroundings of the parties.¹³ Such a contract stands upon the same footing as a regulation or rule of the carrier regarding shipments over its line. Although the contract is in a certain sense a voluntary and mutual act of the parties to it, as a fact, the unequal standing of the parties in their relation to each other over the matter of shipment and the terms and conditions that shall govern it, is as great in the matter of providing the terms of the contract as in making the regulations and rules by the carrier. The carrier has it in its power to force upon the shipper such provisions and terms in the contract of shipment as the exercise of its will or pleasure may dictate. The unequal position occupied by the shipper in making such contract, and his weakness in this respect, are relieved by a rule of public policy that imposes upon the carrier the authority to exercise its great power in this respect in contracting with reference to shipments only when the stipulations agreed upon are reasonable.¹⁴

§ 1389. Interstate and Foreign Shipments.—In a foreign bill of lading, evidencing a contract for an interstate shipment, the stipulation requiring written notice, as a condition precedent to a right to sue and recover damages, to be valid, must be reasonable.¹⁵ The fact that the shipment may be interstate does not accord the carrier the right to impose upon the shipper a contract that is unreasonable in its terms.¹⁶

10. Laws governing and foreign laws.—*Post v. Atlantic, etc., R. Co.*, 138 Ga. 763, 76 S. E. 45.

11. Reasonableness of foreign law.—*Southern Kansas R. Co. v. Curtis Bros.*, 14 Tex. Civ. App. 474, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

12. Reasonableness.—*Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Brown v. Adams*, 3 Texas App. Civ. Cas., § 390; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Texas, etc., R. Co. v. Jackson*, 3 Texas App. Civ. Cas., § 41.

13. Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834, citing *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; and *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574. See, to the same effect, *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76; *Galveston, etc., R. Co. v. Thompson (Tex. Civ. App.)*, 23 S. W. 930; *Galveston, etc., R. Co. v. Williams (Tex. Civ. App.)*, 25 S. W. 1019.

14. International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354, citing *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834, and *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

15. Interstate and foreign shipments.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308, affirmed in 88 Tex. 593, and citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776, and *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

16. International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354, citing *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, and *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

§§ 1390-1393. Reasonableness of Time Allowed—§ 1390. Necessity.—A stipulation in a shipping contract requiring notice of claim for injuries is valid when reasonable in its application to the particular facts of the case;¹⁷ if the time limited is unreasonably short with reference to the circumstances of any particular case the stipulation will not be allowed to affect the shipper's rights, though the time fixed might be abundantly reasonable in all ordinary cases.¹⁸

17. Necessity.—*McKinstrey v. Chicago, etc., R. Co.*, 153 Mo. App. 546, 134 S. W. 1061; *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 137, 65 S. E. 757; *Pennsylvania Co. v. Sheares*, 75 O. St. 249, 79 N. E. 431, 9 Am. & Eng. Ann. Cas. 15.

18. United States.—*Southern Exp. Co. v. Caldwell* (U. S.), 21 Wall. 264, 22 L. Ed. 556; *The Arctic Bird*, 109 Fed. 167; *The Naranja*, 104 Fed. 160; *The St. Hubert*, 46 C. C. A. 603, 107 Fed. 727; *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 59 Fed. 879, 61 Am. & Eng. R. Cas. 151; *Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 2 McCrary 48; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, 36 C. C. A. 135, 94 Fed. 180.

Alabama.—*Southern Exp. Co. v. Bank*, 108 Ala. 517, 18 So. 664; *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118.

A stipulation in a bill of lading, limiting the time within which claims for damages shall be presented, is valid, provided the time fixed is reasonable. *Nashville, etc., Railway v. Long & Son*, 163 Ala. 165, 50 So. 130.

Arkansas.—*St. Louis, etc., R. Co. v. Law*, 68 Ark. 218, 57 S. W. 258.

Georgia.—*Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Illinois.—*Baltimore, etc., R. Co. v. Ross*, 105 Ill. App. 54; *Black v. Wabash, etc., R. Co.*, 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; *Chicago, etc., R. Co. v. Bozarth*, 91 Ill. App. 68; *Chicago, etc., R. Co. v. Simms*, 18 Ill. App. 38; *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607; *Baxter v. Louisville, etc., R. Co.* (Ill.), 7 Am. & Eng. R. Cas., N. S., 618.

Indiana.—*Anderson v. Lake Shore, etc., R. Co.*, 26 Ind. App. 196, 59 N. E. 396; *Baltimore, etc., R. Co. v. Ragsdale*, 11 Ind. App. 406, 42 N. E. 1106; *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517, 39 N. E. 426; *Louisville, etc., R. Co. v. Widman*, 10 Ind. App. 92, 37 N. E. 554; *Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638, 55 N. E. 1026; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *Cleveland, etc., R. Co. v. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685.

Kansas.—*Atchison, etc., R. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Atchi-*

son, etc., R. Co. v. Crittenden, 4 Kan. App. 512, 44 Pac. 1000.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Sanford v. Housatonic R. Co.* (Mass.), 11 Cush. 155.

Minnesota.—*Carpenter v. Eastern R. Co.*, 67 Minn. 188, 69 N. W. 720; *Bardwell v. American Exp. Co.*, 35 Minn. 344, 28 N. W. 925; *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, 54 N. W. 1059.

Mississippi.—*Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385.

Missouri.—*Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445; *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268; *Popham v. Barnard*, 77 Mo. App. 619; *Harned v. Missouri, etc., R. Co.*, 51 Mo. App. 482.

New York.—*American Grocery Co. v. Staten Island, etc., R. Co.*, 23 Misc. Rep. 356, 51 N. Y. S. 307; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98, affirming 52 Hun 227; *Bruning v. Long Island R. Co.* (N. Y.), 2 Daly 117; *Hirschberg v. Dinsmore* (N. Y.), 12 Daly 429, 67 How. Prac. 103.

North Carolina.—*Capehart v. Seaboard, etc., R. Co.*, 81 N. C. 438, 31 Am. Rep. 505; *Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 27 S. E. 73.

Oklahoma.—*St. Louis, etc., R. Co. v. Phillips*, 17 Okla. 264, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

Pennsylvania.—*Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781, 107 Am. St. Rep. 571; *Wolf v. Western Union Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387.

Tennessee.—*Glenn v. Southern Exp. Co.*, 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627; *Southern Exp. Co. v. Glenn*, 84 Tenn. (16 Lea) 472, 1 S. W. 102; *Smith v. Louisville, etc., R. Co.*, 86 Tenn. (6 Pickle) 198, 6 S. W. 209; *Memphis, etc., R. Co. v. Holloway*, 68 Tenn. (9 Baxt.) 188.

Texas.—*Galveston, etc., R. Co. v. Boothe*, 3 Texas App. Civ. Cas., § 364; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Missouri*

Stipulations made on the back of shipping contracts relative to making claims for losses, can be upheld only on the ground that they are reasonable regulations, rather than contracts in true sense.¹⁹

§ 1391. What Constitutes.—Reasonable time within which the shipper is required to give notice to the express company of his claim, is such as would be ample to ascertain the nondelivery of the parcel at the place of destination, depending on the distance and facilities of communication.²⁰

Absence of Reference to Time of Loss.—A clause in the contract of shipment, providing that the carrier shall not be liable for any claim arising from the contract unless presented within a named number of days from its date, no reference being made to the time of loss, is unreasonable.²¹

Where Transportation May Consume Entire Period.—A condition in a shipping contract or bill of lading which requires a written claim for loss or damage to be made within a specified number of days after the loss or damage occurs, where the transportation may reasonably consume the whole period, is invalid as unreasonable, and will not be enforced.²²

Where Extent of Injury Can Not Be Determined in Stipulated Time.—Where the injury is of such a character that its extent and effect can not be determined for some time, the stipulation can not bar the shipper's action,²³ and especially where the carrier is as well informed as the shipper as to the damage.²⁴ Thus, where a shipment was injured in transitu, but it was some months before the owner could discover the effect of the injury, it was held that he might maintain his action although the stipulated time had long been passed.²⁵

Interruption of Transportation Due to War.—A provision in shipping contract requiring notice of a loss to be given to the carrier within a specified time, which is otherwise reasonable, may be unreasonable where a state of war exists and transportation is disturbed thereby.²⁶

Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

Virginia. — Norfolk, etc., R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

19. *Lasky v. Southern Exp. Co.*, 92 Miss. 268, 45 So. 869.

20. *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385.

Periods ranging from five to sixty days have been held reasonable. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 320, 4 S. W. 567.

21. **Absence of reference to time of loss.**—*Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765, 32 Am. & Eng. R. Cas. 543.

22. **Where transportation may consume entire period.**—*Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 59 Fed. 879, 61 Am. & Eng. R. Cas. 151.

23. *Harned v. Missouri, etc., R. Co.*, 51 Mo. App. 482.

Grain in elevator held subject to order for shipment.—A stipulation in a bill of lading, under which grain is transported from Chicago to Ogdensburg, and there unloaded into an elevator and held subject to order for shipment by rail to various parts of New England, that the carrier shall not "be liable in any case or event unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within

thirty days," is invalid as unreasonable. *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

24. **Nature and extent of loss not ascertained in time—Carrier's knowledge of injury.**—Where a shipping contract stipulates that verified notice of loss or damage shall be given the carrier within five days after the freight reaches the place of delivery, and the consignor does not learn of the nature and extent of the loss for more than a month after the same occurred, the application of the rule is unreasonable, and especially where the carrier is as well informed as to the damage as the shipper. *Popham v. Barnard*, 77 Mo. App. 619.

25. *Harned v. Missouri, etc., R. Co.*, 51 Mo. App. 482.

26. **Interruption of transportation due to war.**—*Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

Where a package was shipped from Clayton, Indiana, to Savannah, Georgia, during the civil war, when transportation was interrupted, it was held that a stipulation that the carrier should not be liable for any loss, unless a claim therefor was presented within thirty days after the shipment at Clayton, was unreasonable and void. *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

Notice on Reshipment.—A stipulation that the shipper must give notice of his claim for damages on reshipment of the freight was void as unreasonable.²⁷

Adjustment before Removal from Station.—A condition in a contract of affreightment that claim for the loss of any article shipped, while in transit or before delivery, shall be given within a specified number of days to a trace agent of the carrier, and that the extent of the damage or loss shall be adjusted before removal of the freight from the station, is void as an unreasonable stipulation.²⁸

Consignor Not Notified of Nondelivery Till after Expiration of Time for Notice.—A stipulation that the common carrier shall not be liable for the loss or damage of goods, unless demand for indemnity on account of such loss or damage is made within a specified number of days from the date of the bill of lading, is void where the common carrier's instructions to its agents contemplate the detention of the goods for more than that number of days at the receiving point before the shipper is informed that the consignee can not be found.²⁹

As to Undelivered Packages Not Returned Till after Expiration of Time for Notice.—Where an express company's bill of lading contained a condition that the company should not be liable for loss or damage, unless claim therefor should be made within a specified number of days from the date of the bill of lading, and the carrier instructed its agents not to return undelivered packages until the expiration of thirty days from their arrival at their destination, such stipulation is invalid for unreasonableness.³⁰

Twenty-Four Hours.—A provision in a shipping contract requiring notice of a loss or injury to the goods within twenty-four hours after delivery is unreasonable and the shipper may recover although no notice was given.³¹ But where the consignee is required to receive the goods as discharged over the ship's side, a stipulation for notice within twenty-four hours after discharge of the cargo, where all the shipment was delivered, bars a recovery where such claim was not made for several weeks.³²

Thirty-Six Hours.—A provision in a bill of lading that a written notice of intention to claim damage should be presented to the carrier within thirty-six

27. *Notice on reshipment.*—*Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480.

28. *Adjustment before removal from station.*—*Capehart v. Seaboard, etc., R. Co.*, 81 N. C. 438, 31 Am. Rep. 505.

29. *Consignor not notified of nondelivery till after expiration of time for notice.*—*Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 27 S. E. 73, 10 Am. & Eng. R. Cas., N. S., 863, 58 Am. St. Rep. 795, citing *Railroad Co. v. Lockwood (U. S.)*, 17 Wall. 357, 21 L. Ed. 627.

30. *As to undelivered packages not returned till after expiration of time for notice.*—*Dixie Cigar Co. v. Southern Exp. Co.*, 120 N. C. 348, 27 S. E. 73, 58 Am. St. Rep. 795, 10 Am. & Eng. R. Cas., N. S., 863.

31. *Twenty-four hours.*—A provision in a bill of lading that consignees are requested to notify the company of any errors within twenty-four hours "or the company will consider their liability as ended," will not prevent a shipper from suing for damages to goods caused by the

carrier's negligence, although no notice was given of the loss. *Sanford v. Housatonic R. Co. (Mass.)*, 11 Cush. 155; *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

32. *Twenty-four hours after discharge of cargo.*—*Proof that all bags were delivered on deck.*—In *The Naranja*, 104 Fed. 160, it appeared that the bill of lading for a shipment of almonds in bags required the consignee to receive the goods as delivered over the ship's side, and also provided that notice of any claim should be given within twenty-four hours after discharge; that, although having due notice, the consignee did not appear until three days after the discharge had commenced and on the day it was completed, and did not count the bags until four days after, and that several weeks afterwards a claim was made for a shortage of several bags. It was held that under the terms of the shipping contract and the facts shown the vessel was not liable for the shortage, it being shown that all the bags shipped were delivered on the deck.

hours after delivery³³ or after notice of arrival³⁴ is not unreasonable, but such stipulation was held unreasonable by the New York court.³⁵

Five Days.—A provision in a shipping contract requiring notice of a loss or injury to the shipment to be delivered to the carrier within five days after the freight reaches the place of delivery,³⁶ is unreasonable. A provision requiring such notice or within five days after a shipment of cotton was taken from the cars³⁷ is not unreasonable, but a provision that no claim for damages to live stock growing out of the negligence of the carrier should be sued upon, unless claim therefor be made in writing within five days, is unreasonable, against public policy, and not binding upon the shipment.³⁸

Six Days.—Where notice was given in six days under such a stipulation, the question is not whether the notice was given in a reasonable time; but whether one day was a reasonable time for giving notice, as, if it was, then the notice given was insufficient, and if it was not, then the entire stipulation was invalid.³⁹

Thirty Days.—The decisions are not in harmony as to whether a provision in a shipping contract requiring notice of a loss within thirty days is unreasonable. A provision requiring notice thirty days after delivery at destination⁴⁰ has been held to be reasonable by the United States Circuit Court of Appeals of Georgia and the court of Tennessee.⁴¹ A provision requiring notice thirty days after due time for delivery has been held reasonable by the court of Virginia⁴² and

33. **Thirty-six hours.**—*Cumbe v. St. Louis, etc., R. Co.*, 105 Ark. 406, 151 S. W. 237.

34. **Thirty-six hours after notified of arrival.**—*Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

35. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98, affirming 52 Hun 227.

36. **Five days.**—*Popham v. Barnard*, 77 Mo. App. 619.

37. A common carrier may stipulate with a shipper of live stock that a claim for loss or damage against the initial or any connecting carrier shall be made out, sworn to, and delivered to the carrier within five days after the cattle are taken from the cars. Such a clause in the contract of carriage is no exemption from liability and contravenes no rule of public policy. *Pennsylvania Co. v. Sheares*, 75 O. St. 249, 79 N. E. 431, 9 Am. & Eng. Ann. Cas. 15. See *Southern Exp. Co. v. Caldwell (U. S.)*, 21 Wall. 264, 22 L. Ed. 556.

38. *Baltimore, etc., R. Co. v. Hubbard*, 1 O. C. C., N. S., 611, 15-25 O. C. D. 477.

39. **Six days.**—*St. Louis, etc., R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517.

40. **Thirty days.**—Where shippers had ample time and opportunity to notify the carriers of damage to cotton which occurred before ocean transportation began, a provision in the bills of lading requiring notice of damage within thirty days after delivery of the cotton at destination was not unreasonable. *Inman & Co. v. Seaboard, etc., R. Co.*, 159 Fed. 960.

41. An express company, in its receipt for goods received for shipment, expressly contracted that in cases of loss it should have actual notice of loss within thirty days after the company received the consignment for transportation. It was held, that this provision is valid, and that where a package was shipped by the express company, and there was a loss which caused a depreciation in its value during transportation, that the express company was entitled to notice within thirty days in order that the property could be traced. *Southern Exp. Co. v. Glenn*, 84 Tenn. (16 Lea) 472, 1 S. W. 102.

Loss of money by express companies.—A stipulation that an express company shall not be liable for money lost by its default, unless claim therefor is made in writing, at its office, within thirty days after its delivery to the company, is reasonable and valid. *Glenn v. Southern Exp. Co.*, 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627.

42. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753; *Virginia Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838; *Old Dominion Steamship Co. v. Flanary*, 111 Va. 816, 69 S. E. 1107.

A provision in a bill of lading that, in case of loss of goods, a claim for the "loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after * * * due time for delivery thereof," the carrier shall not be liable is reasonable. *Atlantic, etc., R. Co. v. Bryan*, 65 S. E. 30, 109 Va. 523.

unreasonable by those of Alabama⁴³ and North Carolina.⁴⁴ A provision requiring notice within thirty days from the date of the loss⁴⁵ has been held unreasonable by the courts of Missouri and North Carolina respectively. A provision requiring notice within thirty days from date of shipment,⁴⁶ or within thirty days after the date of the bill of lading or receipt has been held unreasonable and void as tending to fraud in Alabama,⁴⁷ North Carolina⁴⁸ and by the United States Circuit Court of Appeals for California,⁴⁹ but it has been held valid in Tennessee.⁵⁰

Thirty-Two Days.—A condition requiring notice of a loss within thirty-two days from the date of the bill of lading has also been held to be unreasonable and void in Alabama.⁵¹

Sixty Days.—A provision in a shipping receipt requiring notice of a loss or injury to be delivered in sixty days from the date of the shipment is usually held to be reasonable,⁵² but such limitation was held unreasonable by the court of Texas on the ground that it had no reference to the time of the loss.⁵³

Ninety Days.—A provision requiring notice of a loss to be given to the carrier within ninety days from delivery of the shipment is reasonable and binding.⁵⁴

43. A stipulation, in a bill of lading for the carriage of freight from Alabama for delivery at St. Louis, that claims for damage must be made to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery, or in due time for the delivery, no carrier shall be liable, is invalid, because unreasonable. *Nashville, etc., Railway v. Long & Son*, 163 Ala. 165, 50 So. 130.

44. A stipulation in a bill of lading that notice of loss or damage to freight must be given in writing to a carrier within thirty days after delivery thereof, or after due time for such delivery, is invalid as unreasonable. *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 38 S. E. 894, 21 Am. & Eng. R. Cas., N. S., 429, 83 Am. St. Rep. 675.

45. *Copehart v. Seaboard, etc., R. Co.*, 81 N. C. 438.

46. *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268.

47. **Thirty days from date of receipt for express package.**—A stipulation in a receipt given by a common carrier, that it should not be liable for loss of a package of money unless a claim for the loss was made within thirty days from the date of the receipt is unreasonable, tends to fraud, and is invalid. *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118.

48. **Thirty days from date of bill of lading.**—A condition of a bill of lading issued by an express company that it shall not be liable for loss or damage, unless claim therefor is made within thirty days from the date of the bill of lading is void as an unreasonable attempt to limit its liability. *United States Watch Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 27 S. E. 74.

49. **Thirty days from date of bill of lading.**—A stipulation in a bill of lading re-

quiring all claims against the carrier steamship company for damages to be presented within thirty days from the date thereof is void as unreasonable. *Pacific Coast, etc., Co. v. Bancroft-Whitney Co.*, 36 C. C. A. 135, 94 Fed. 180.

50. **Thirty days after loss of money to express company.**—A provision in a receipt issued by an express company that the company shall not be liable for money lost by its default, unless claim therefor is made in writing, at its office, within thirty days after its delivery to the company, is valid. *Glenn Co. v. Southern Exp. Co.*, 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627.

51. **Thirty-two days from date of bill of lading—Loss of money.**—A condition in a bill of lading that "in no event should the defendant be liable for any loss unless a claim therefor should be made in writing at the office of defendant where the money is alleged to have been shipped from, within thirty-two days from the date of said contract," is unreasonable, tends to fraud, and is void. *Southern Exp. Co. v. Bank*, 108 Ala. 517, 18 So. 664.

52. **Sixty days.**—A common carrier may require that in case of loss the company must be notified within 60 days from the issuance of the receipt. *Vigouroux v. Platt*, 115 N. Y. S. 880, 62 Misc. Rep. 364.

53. *Pacific Exp. Co. v. Darnell (Tex.)*, 6 S. W. 765.

54. **Within ninety days from delivery to express company.**—But in *Southern Exp. Co. v. Caldwell (U. S.)*, 21 Wall. 264, 22 L. Ed. 556, it is held that an agreement made by an express company, as a common carrier, that it shall not be held liable for any loss or damage to a package whatever, delivered to it, unless claim be made therefor within ninety days from its delivery to the carrier, is an agreement which the company can

Four Months.—A stipulation in a shipping contract that any claim for loss or damage shall be presented in writing within four months after delivery, or reasonable time for delivery, is reasonable and valid.⁵⁵

§ 1392. Power of State Court to Determine.—State courts have power to determine and adjudicate the question whether the time limited in a carrier's contract, within which to sue and of giving notice, is reasonable or unreasonable, and the exercise of such jurisdiction does not regulate or interfere with interstate commerce.⁵⁶

§ 1393. Under Texas Statute.—Since the passage of Act March 4, 1891, Rev. Stat. 1895, art. 3397, Sayles' Civ. Stat., it is permissible and lawful for the parties to enter into a contract, providing it is reasonable, requiring a notice not less than ninety days after injury of the presentation of a claim for damages, and upon failure to do so, suit will be barred.⁵⁷ Section 2, Act of March 4, 1891, requires stipulations for notice of a claim of damage to be reasonable and provides that a stipulation of carrier's contract requiring less than ninety days' notice of injury to freight shall be void.⁵⁸ Under Rev. St. 1895, art. 3379, as amended by Laws 1907, c. 129, a stipulation requiring notice before the expiration of ninety days from the accrual of a cause of action is invalid;⁵⁹ because the statute gives the claimant full ninety days as the shortest time within which he may contract to present his claim, and any abridgment annuls the contract; while the stipulation in this case requires notice to be given before the expiration of ninety days.⁶⁰ Under Texas Rev. St. 1895, art. 3379, a provision in a contract between a shipper and a carrier, requiring notice of a claim for damages to be filed within ninety-one days, will not be enforced unless that time is a reasonable one.⁶¹ A stipulation allowing ninety-one days for the giving of notice can not be declared unreasonable and void as a matter of law, but the question is one of fact for the jury.⁶²

rightfully make, the time required for transit between the place where the package is delivered to the carrier and that to which it is consigned not being long, in the present case a single day. In this case it is said in the opinion: "It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants."

55. Four months.—Atlantic, etc., R. Co. v. Ward, 4 Ala. App. 374, 58 So. 677.

56. Power of state court to determine.—Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

57. Under Texas statute.—Houston, etc., R. Co. v. Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318. See, also, Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 24, 32 S. W. 163; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

58. Galveston, etc., R. Co. v. Williams (Tex. Civ. App.), 25 S. W. 311; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593; Houston, etc., R. Co. v. Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318.

One day after delivery.—A stipulation requiring notice of claim for damages to

be given within one day after delivery of the property, is void under Texas Act March 4, 1891 (Rev. St. 1895, art. 3379). St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476.

Thirty days.—Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

59. Texas, etc., R. Co. v. Langbehn (Tex. Civ. App.), 150 S. W. 1188.

60. Smith v. International, etc., R. Co. (Tex. Civ. App.), 138 S. W. 1074.

61. Southern Kansas R. Co. v. Curtis Bros., 44 Tex. Civ. App. 477, 99 S. W. 566.

A stipulation, in a transportation contract, requiring written notice of any claim for damages to be given to the carrier within ninety-one days, was held valid where the plaintiff's own testimony shows that before half of the time had expired he presented another claim to defendant's agent with whom the contract was made, and there is no reason why he could not at the same time have presented his claim in writing for damages to his horses. International, etc., R. Co. v. Heittner, 42 Tex. Civ. App. 617, 94 S. W. 189.

62. St. Louis, etc., R. Co. v. Honea (Tex. Civ. App.), 84 S. W. 267.

Interstate shipments.—Act March 4, 1891, § 2, requiring stipulations for notice of claim of damage to be reasonable, and avoiding such as require notice at a less period than ninety days, does not apply

§ 1394. Notice before Removal from Destination.—See post, "Limitation of Liability of Carriers of Live Stock," Part III, chapters I-IX.

§ 1395. Amount of Damages, etc., on Reshipment.—See post, "Limitation of Liability of Carriers of Live Stock," Part III, chapters I-IX.

§ 1396. Statement of Full Amount of Claim.—See post, "Limitation of Liability of Carriers of Live Stock," Part III, chapters I-IX.

§ 1397. Notice to Delivering Carrier.—Stipulation in contract of carriage requiring notice of claim for damages to be given to delivering carrier, is valid if reasonable.⁶⁵

§ 1398. Statement of Nature and Place of Injury.—A stipulation in a freight contract requiring a notice of the nature and place of the injuries to be given short of the point of destination, and before those injuries are fully developed and could in their extent and nature with reasonable diligence be ascertained, is unreasonable.⁶⁶

§ 1399. Respecting Officer or Agent to Be Notified.—Necessity for Agent at or Near Place of Delivery.—If a carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier.⁶⁷ The contract to give notice was not the entire contract; the notice was required to be given to an officer or the nearest station agent of the carrier, and the situation of such officer or agent, with reference to the place from which the notice must necessarily come, and at which an inspection, if desired, would necessarily have to be made, would largely determine whether the contract was reasonable or not.⁶⁸ This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given and an inspection, if desired, speedily made,

to interstate shipments. *Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 311; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308, affirmed in 88 Tex. 593. But see *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

The act prescribing minimum time for stipulated notice, etc., may be considered a statute of limitation, and as simply affecting the remedy and not attempting to effect the rights of parties, or to control or regulate in any manner interstate commerce. Such legislation by the states has been recognized as constitutional and valid by the supreme court of the United States. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614.

65. Notice to delivering carrier.—*Brown v. Adams*, 3 Texas App. Civ. Cas., § 390; *Texas, etc., R. Co. v. Jackson*, 3 Texas

App. Civ. Cas., § 41; *Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 311.

66. Statement of nature and place of injury.—*Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565.

67. Necessity for agent at or near place of delivery.—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Good v. Galveston, etc., R. Co.* (Tex.), 11 S. W. 854, 4 L. R. A. 801, 40 Am. & Eng. R. Cas. 98.

In *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776, it is said: "If the shipper should make a contract to give such notice, it might be binding under our law if it was shown that there was such officer or agent at the point of destination, upon whom the notices could be conveniently served." *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76.

68. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

then a contract requiring notice to be given to an officer or agent of the carrier is not reasonable in its character.⁶⁹

Giving Name of Officer or Agent.—If a carrier seeks to make its liability to depend on notice to its officer or agent of a claim for damages, it would seem that the responsibility of determining who is an officer or agent of the carrier, within the meaning of the contract, should not be cast upon the shipper, but that the person and his locality to whom the notice must be given ought to be made certain by the contract itself, and especially so when the carrier is a corporation and the property is to be delivered beyond the line of its road through another carrier.⁷⁰ A contract requiring the shipper to give notice is unreasonable and can not be enforced unless it be made to appear that the person to be notified is so conveniently accessible to the person who is to give the notice as that the latter can reasonably discharge that duty within the time limited by the contract. The burden rests upon the carrier to show that this condition exists, either by the terms of the contract indicating that the requisite information is thus furnished to the shipper, or that the latter is in fact possessed of such information, from what source soever it may come.⁷¹ Contracts requiring the shipper to give notice of his claim for damage which fail to give the name and location of the agent to whom the notice is to be given, are *prima facie* unreasonable, and it devolves upon the carrier to allege and prove the necessary facts to show their validity.⁷²

Carrier Having a Number of Agents at Destination.—Where a carrier has a large number of agents at the destination of shipment, a shipping contract requiring a shipper to give notice to an agent of loss is unreasonable unless it designates the name and residence of such agent.⁷³ It would be unreasonable to require the shipper to take the responsibility of deciding which one of these is the authorized station agent, or which one of these is a general officer, within the meaning of a contract using these general terms.⁷⁴

Wrong Name Given.—A clause in a contract in regard to notice of damages as a condition precedent to recovery is not reasonable, where the name of neither the agent at the point of destination nor at the point of shipment is given, although a name is given, but the testimony shows that it was not the name of the agent at point indicated.⁷⁵

Shipper Knowing Agent at Station.—The stipulation in a contract of carriage, authorized, when reasonable, by Sayles' Ann. Civ. St. of Texas 1897, art. 3379, that the shipper give the carrier a ninety days' notice of claim of damages as a condition to the right to sue, notice to any local agent being enough, is reasonable; the shipper knowing that at the place where the contract was made there was an agent who had signed his name to the contract.⁷⁶

69. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

70. **Giving name of officer or agent.**—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 173, 2 S. W. 574; *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593, no op.; *Good v. Galveston, etc., R. Co.* (Tex.), 11 S. W. 854, 4 L. R. A. 801, 40 Am. & Eng. R. Cas. 98.

71. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78. See *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76.

Where a bill of lading does not state the location of a claim agent's office, a stipulation that notice of a claim must be given within five days is unreasonable and void. *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

72. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76; S. C., 29 S. W. 559.

73. **Carrier having a number of agents at destination.**—*Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 306, 21 S. W. 76.

74. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76.

75. **Wrong name given.**—*Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142.

76. **Shipper knowing agent at station.**—*Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

§§ 1400-1402. Pleading and Proof of Reasonableness—§ 1400. In General.—Where a carrier in a suit for damages for injuries to goods shipped relies on a stipulation providing for notice of loss or damage as defense, it must allege and prove reasonableness of such stipulation in the particular case.⁷⁷ To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence the existence of facts that call for the enforcement of the conditions.⁷⁸ Stipulations of this nature in contracts of this character are enforced against the shipper only when it appears from the facts averred and those proven that they are reasonable.⁷⁹ The circumstances to sustain such a contract must be set forth in the pleading and evidence of the carrier.⁸⁰

Interstate Shipments.—The burden is upon the carrier to allege and prove the facts and circumstances showing such stipulation to be reasonable even if it is a contract for an interstate shipment.⁸¹

Time Prescribed.—The burden of proof is on the carrier, where there is a stipulation requiring the shipper, as a condition precedent to any right of recovery, to give notice of his claim within the prescribed time, to prove facts and circumstances showing the stipulation to be a reasonable one and to prove a violation of the stipulation on the part of the shipper,⁸² and such facts should be pleaded by the carrier.⁸³

Respecting Officer or Agent to Be Notified.—When a carrier sets up a shipping contract, requiring notice of loss, which fails to give the name and location of the agent to whom the notice is to be given, it devolves upon such carrier to allege and prove the necessary facts to show reasonableness.⁸⁴ Where the carrier pleads such a contract, in which the name of the agent or officer upon

77. Pleading and proof of reasonableness.—Galveston, etc., R. Co. v. Boothe, 3 Texas App. Civ. Cas., § 364.

78. Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

79. Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

80. Missouri Pac. R. Co. v. Childers, 1 Tex. Civ. App. 302, 21 S. W. 76.

The reasonableness of the limitation must appear from the matters set forth in the answer. Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

In the case of Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574, the court said: "If the contract were even valid, whether reasonable or not, the shipper would be bound by its terms; but where its validity depends upon its being reasonable, the party who asserts its validity must allege the facts which make it so." Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163.

81. Interstate shipments.—Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308, affirmed in 88 Tex. 593, no op., citing Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Missouri

Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834.

82. Time prescribed.—Cox v. Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; S. C., 88 Tex. 593, 32 S. W. 510; St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476; Missouri Pac. R. Co. v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Good v. Galveston, etc., R. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98, 4 L. R. A. 801; Galveston, etc., R. Co. v. Boothe, 3 Texas App. Civ. Cas., § 364; Missouri Pac. R. Co. v. Childers (Tex. Civ. App.), 29 S. W. 559; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

Thirty-six hours after arrival.—Brown v. Adams, 3 Texas App. Civ. Cas., § 390.

83. Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510.

84. Respecting officer or agent to be notified.—Missouri Pac. R. Co. v. Childers, 1 Tex. Civ. App. 302, 21 S. W. 76; S. C., 29 S. W. 559, second appeal; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 241, 32 S. W. 163. See ante, "Respecting Officer or Agent to Be Notified," VIII, G, 2, b, (4), (d).

whom notice is to be served is not given, the pleading should be held bad, unless there be an additional allegation from which the jury might be authorized to find such contract to be reasonable as applied to the facts of that particular case.⁸⁵ Where the facts pleaded do not show that there was any agent at that place to whom notice could be given, and do not show that the shipper could by the exercise of reasonable diligence have ascertained who was the proper person to receive such notice, and that he was accessible for such purpose, the plea is defective.⁸⁶

No Objection to Answer.—Where the answer was defective, but no exceptions were taken by plaintiff, and the contract was admitted without objection, a charge that, under the pleadings, the jury can not consider the contract as a defense, is erroneous, but not prejudicial to defendant, where it does not introduce any testimony to sustain its plea of failure to give notice of damages.⁸⁷

§ 1401. Admissibility of Evidence.—The usual rules as to admissibility, competency and relevancy, apply to evidence offered to show the reasonableness of stipulations for notice of loss in contracts of carriage.⁸⁸

§ 1402. Weight and Sufficiency of Evidence.—The ordinary rules as to weight apply to evidence admitted to show the reasonableness of stipulations for notice of a loss contained in freight contracts.⁸⁹

§ 1403. Questions for Jury.—Time Allowed.—Since the law does not undertake to define when a provision of a contract is reasonable, but the determination of that fact must be gathered from the facts of each particular case, the question of the reasonableness of the time within which a claim for loss of or damage to freight must, under the contract requirement, be made, is generally one for the determination of the jury.⁹⁰

85. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76.

86. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

87. *No objection to answer.*—*Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930.

88. *Admissibility of evidence.*—*St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

89. *Weight and sufficiency of evidence.*—Proof that the shipper, while at the point of destination, saw and talked with the station agent there of the delivering road, does not conclusively establish that the contract for notice was reasonable, such proof failing to show that the shipper saw such agent within twenty-four hours after arrival of the cattle there. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

90. *Time allowed question for jury.*—*Alabama.*—*Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. 781.

Illinois.—*Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607.

Oklahoma.—*St. Louis, etc., R. Co. v. Phillips*, 87 Pac. 470, 17 Okla. 264.

Texas.—*Missouri, etc., R. Co. v. Leibold* (Tex. Civ. App.), 55 S. W. 368; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480; affirming 29 S. W. 806; *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op.; *Galveston, etc., R. Co. v. Wil-*

liams (Tex. Civ. App.), 25 S. W. 311; *Texas, etc., R. Co. v. Barber* (Tex. Civ. App.), 30 S. W. 500; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354, citing *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834, and *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 465, 21 S. W. 399.

Where a carrier pleads a shipping contract stipulating that notice of loss should be served on certain of its officers within a certain time, it is for the jury on the allegations and evidence of each particular case to determine reasonableness of such stipulation. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 306, 21 S. W. 76.

Thirty-six hours after delivery.—A bill of lading providing that claims for loss or damage must be presented to the delivering line in 36 hours after the arrival of the freight. The consignee resided a short distance from the depot, and received the goods Saturday afternoon, but did not open them until Monday morning, having been sick in the interval. Held, that the reasonableness of the stipulation was a question for the jury. *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56. See, also, *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 305, 21 S. W. 76.

Thirty days after delivery.—Where a shipment of celery was made from Florida

Reasonableness Respecting Officer or Agent to Be Notified.—Where the carrier pleads a contract requiring notice of a claim, in which the name of the agent or officer upon whom notice is to be served is not given, and the pleading contains an additional allegation from which such contract might be found to be reasonable as applied to the facts of that particular case, it then becomes a question for the jury to decide as to whether or not the contract, under the evidence, is a reasonable one.⁹¹

Under Texas Statute.—Under Texas Rev. Stat. 1895, art. 3379, allowing reasonable notice of not less than ninety days, the question of whether or not ninety-one days is a reasonable time under the circumstances of the case, is for the jury.⁹²

§ 1404. Losses Arising from Carrier's Negligence.—Attempt to Limit Liability for Negligence.—The general rule seems to be that a condition of a shipping contract requiring notice of loss or damage to the shipment within a specified time will not be applied where to do so would in effect relieve the carrier from liability for the consequences of its fault or negligence or that of its servants.⁹³

Printed Request to Notice Errors within Twenty-Four Hours.—A receipt given by the consignees of freight to the carrier, acknowledging their receipt in good order, and in which the consignees are requested to notice any errors therein in twenty-four hours, or the carrier will consider itself discharged, does not estop the consignor from suing the carrier for damages caused by negligence in transporting the goods, although no notice thereof was given to the

to Michigan, it can not be held as a matter of law that a contract that claims for loss should be made in writing to the agent at the point of delivery promptly after the arrival of property, and, if delayed any more than thirty days after delivery or due time for delivery, no carrier should be liable, was unreasonable. *Post v. Atlantic, etc., R. Co.*, 76 S. E. 45, 138 Ga. 763.

One day after delivery—No agent at station.—Stipulation, in a contract for carriage of freight, that as a condition to recovery for injury to the property the carrier shall be given notice within a certain time of claim for damages, must be reasonable, and whether it is reasonable, where the notice is required to be given within a day after delivery at destination, is a question for the jury; the stock shipped having arrived at 2 p. m., there having been no agent at such station, and the nearest agent to whom notice might have been given having been thirty-five miles away. *St. Louis, etc., R. Co. v. Furlow*, 117 S. W. 517, 89 Ark. 404.

91. Reasonableness respecting officer and agent to be notified.—*Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 306, 21 S. W. 76.

92. Under Texas statute.—*Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

93. Attempt to limit liability for negligence.—*Alabama.*—*Southern Exp. Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

Massachusetts.—*Sanford v. Housatonic R. Co. (Mass.)*, 11 Cush. 155.

Kansas.—*Atchison, etc., R. Co. v. Poole*, 73 Kan. 466, 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449, 87 Pac. 465; *Cornelius v. Atchison, etc., R. Co.*, 74 Kan. 599, 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222, 87 Pac. 751.

Mississippi.—*Baltimore, etc., Exp. Co. v. Cooper*, 66 Miss. 558, 6 So. 327, 40 Am. & Eng. R. Cas. 97, 14 Am. St. Rep. 586.

Missouri.—*Klass Comm. Co. v. Wabash R. Co.*, 80 Mo. App. 164; *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Texas.—*Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

New Jersey.—*Westcott v. Fargo (N. Y.)*, 63 Barb. 349, 6 Lans. 319.

New York.—Where a carrier is sued for damages occasioned by the freezing of apples in transportation, due to the failure of the carrier promptly to transport them, the action is one for negligence, and not for breach of contract; and hence it is unnecessary for plaintiff to comply with a condition that if a claim for damages be not presented within thirty days after delivery there shall be no liability therefor. *Richardson v. New York, etc., R. Co.*, 106 N. Y. S. 702, 122 App. Div. 120.

North Carolina.—*United States Watch-Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 27 S. E. 74.

Tennessee.—*Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

carrier,⁹⁴ yet the courts have held that a railroad, as a common carrier, may, for a valuable consideration, contract that, if damage result to freight by reason of its negligence, or that of its agents, servants, or employees, the shipper shall give notice of the damage within a reasonable time.⁹⁵ But in some cases such a stipulation, when rendered unreasonable by the circumstances, has been held void as an attempt to limit the carrier's common-law responsibility for the fault or negligence of itself or its employees⁹⁶ by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover.⁹⁷ This is the holding under the North Dakota⁹⁸ and Virginia⁹⁹ statutes.

Loss from Fraud or Gross Negligence—Simple Negligence.—While a stipulation of a shipping contract that any claim for loss or damage must be presented within thirty days from the accruing of the cause of action, does not apply where the loss or damage was occasioned by the fraud or gross negligence of the carrier or its employees, it may apply, by virtue of an express provision of the contract, to claims for loss or damage arising from absence of ordinary care, as the presentation of the claim within the time and in the manner specified is not a condition precedent to the right of action.¹

§§ 1405-1410. Form and Requisites of Stipulation—§ 1405. Instruments in Which Contained.—The stipulation respecting notice of a loss or injury to the goods may be contained in a receipt by consignee of freight to carrier,² or be printed at the foot of a receipt of an express company for a package.³

94. Printed request to notice errors within twenty-four hours.—*Sanford v. Housatonic R. Co.* (Mass.), 11 Cush. 155.

95. Kansas.—*Atchison, etc., R. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651.

Arkansas.—A stipulation for notice of loss or damage within thirty hours after arrival does not affect the carrier's liability, caused by negligence, but is a regulation which the parties agreed the performance of which should be a condition precedent to a recovery, and is therefore valid. *St. Louis, etc., R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

Missouri.—A provision in a contract of shipment that all claims for damages against the carrier growing out of the shipment and transportation of freight should be reported by the consignee within a specified time, does not relieve the common carrier of its common-law responsibility for negligence. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Virginia.—Provisions in carriers' receipts requiring claims to be presented in writing within 30 days are not deemed contracts against negligence, but are upheld as reasonable provisions, binding the shipper. *Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 66 S. E. 838, 110 Va. 666.

Such a provision is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

96. United States Watch-Case Co. v. Southern Exp. Co., 120 N. C. 351, 27 S. E. 74; *Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

97. As attempt to limit liability for negligence, see ante, "Limiting Liability from Negligence," § 1416.

North Carolina.—*United States Watch-Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 27 S. E. 74.

Tennessee.—*Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

98. A clause in special contract with a common carrier, providing that when property is injured the shipper must, as a condition precedent to recovery therefor, give notice in writing before the property is removed from the place of destination, is not prohibited by Rev. Code 1905, § 5678, providing that a common carrier can not be exonerated by any agreement in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of himself or his servants. *Cooke v. Northern Pac. R. Co.* (N. Dak.), 133 N. W. 303.

99. Liquid Carbonic Co. v. Norfolk, etc., R. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753.

1. Loss from fraud or gross negligence—Simple negligence.—*Westcott v. Fargo* (N. Y.), 63 Barb. 349, 6 Lans. 319.

2. Instrument in which contained.—*Sanford v. Housatonic R. Co.* (Mass.), 11 Cush. 155.

3. Condition printed at foot of receipt of express company for package.—A condition in print, at the foot of a receipt of an express company for a package, "that the express company shall not be liable

§ 1406. Stipulation Placed on Margin.—The fact that a stipulation requiring notice of claim for loss or damage is placed on the margin instead of in the body of the contract does not forbid its consideration as a part thereof, the shipper being bound to take notice of it.⁴

§ 1407. Certainty and Definiteness.—A shipping contract providing that "claims for loss or damages must be presented in thirty days from date of shipment" in order to receive attention, is void, its language being too vague to be allowed effect.⁵

§ 1408. Consideration.—A stipulation in a shipping contract that the carrier shall not be liable for injury unless notice thereof is given within a specified time is a limitation on the common-law liability and to be valid must be supported by an independent consideration.⁶

Reduced Freight Rates as Consideration.—A reduction of freight rate is a sufficient consideration for the stipulation in the contract of carriage that, as a condition to recovery for injury, notice of claim of damages shall be given the carrier within a reasonable time,⁷ whether or not there was an actual reduction from the ordinary freight rate may be shown aliunde.

§ 1409. Assent of Shipper.—A stipulation in a bill of lading which exempts the carrier from liability unless notice is given of the damages within a specified time, is one of the matters forbidden by § 2068 of the Code (Ga. Civ. Code of 1895, § 2276), and is not effectual without proof of assent thereto by the shipper.⁸

§ 1410. Signature of Consignor or Consignee.—The signature of the consignor or consignee is not necessary to the validity of a provision in a shipping contract requiring notice of a loss to be presented within a stipulated time.⁹

§§ 1411-1412. Construction—§ 1411. In General.—Contracts limiting the time within which a claim for damages to freight must be presented stands on the same footing as regulations or rules of a carrier regarding shipments over its line.¹⁰

for any loss, unless claim therefor shall be made in writing at this shipping office within thirty days from this date, in a statement to which this receipt shall be attached," is a condition with which the shipper must comply, or lose his claim. *Southern Exp. Co. v. Hunnicutt*, 54 Miss 566, 28 Am. Rep. 385.

4. Stipulation placed on margin.—*Brown v. Adams*, 3 Texas App. Civ. Cas., § 390.

Such stipulation is part of contract and binding on parties. *Brown v. Adams*, 3 Texas App. Civ. Cas., § 390.

In *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441, the bill of lading was not signed by either the consignee or his consignor. Below the signature of the receiving carrier's agent on the receipt or bill of lading, and as a foot note, the following was printed. "Claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." Quære, if this can be evidenced as any part of the contract.

5. Certainty and definiteness.—*Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268.

6. Consideration.—*Libby v. St. Louis,*

etc., R. Co., 137 Mo. App. 276, 117 S. W. 659; *Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co.*, 137 Mo. App. 479, 119 S. W. 1; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673, but see *Crow v. Chicago, etc., R. Co.*, 57 Mo. App. 135.

A written agreement for notice of any claims for damages to a shipment of freight within a specified time must be upon a valid consideration. *St. Louis, etc., R. Co. v. Boshear (Tex. Civ. App.)*, 108 S. W. 1032; *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 37 S. W. 466, affirming 42 Tex. Civ. App. 60; *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 406, 21 S. W. 80.

7. Reduced freight rate as consideration.—*St. Louis, etc., R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517.

8. Assent of shipper.—*Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

9. Signature of consignor or consignee.—*Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Brown v. Adams*, 3 Texas App. Civ. Cas., §§ 390, 392.

10. Construction.—*International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354.

§ 1412. "Removal."—**Removal from Destination by Carrier.**—A provision in a shipping contract that the shipper shall give notice of any claim for damages before the freight is removed from the place of delivery, does not apply to a removal by the carrier.¹¹

Removal of Goods Construed to Mean Removal from Dock.—A stipulation of a bill of lading that the shipowner is not to be liable for any claim, "notice of which is not given before the removal of the goods," properly construed, does not require such notice to be given before the goods are taken from the ship, but before their removal from the dock where they are deposited by the ship, and where, after they are released from the ship's tackle, they may be inspected, by the consignees and the officers of the ship. And, so construed, the condition is reasonable and valid.¹²

§§ 1413-1431. Operation and Effect.—**§ 1413. In General.**—A stipulation for notice of loss or damage within thirty hours after arrival does not affect the carrier's liability, caused by negligence, but is a regulation which the parties agreed the performance of which should be a condition precedent to a recovery.¹³

§ 1414. Strict Enforcement.—A provision in a shipping contract for notice to the carrier of a claim for damages because of negligence in the transportation is strictly enforced only when it is reasonable, and where the circumstances justify a strict enforcement as a means to protect the carrier against possible fraud.¹⁴

§ 1415. Limiting Liability.—A provision in a special contract of carriage requiring claims for damages to be presented within a given time is not a condition by which the liability of the carrier is restricted.¹⁵

§ 1416. Limiting Liability for Negligence.—The stipulation requiring notice of any claim for damages to be given, can not be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. Such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause.¹⁶ A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required.¹⁷

§ 1417. Limitation of Right to Sue.—The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He

11. **Removal from destination by carrier.**—*Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 98.

12. **Removal of goods construed to mean removal from dock.**—*The St. Hubert*, 46 C. C. A. 603, 107 Fed. 727.

13. **Operation and effect.**—*St. Louis, etc., R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

14. **Strict enforcement.**—*Holland v. Chicago, etc., R. Co.*, 139 Mo. App. 702, 123 S. W. 987.

15. **Limiting liability.**—*Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 137, 65 S. E. 757.

16. **Limiting liability from negligence.**—*Southern Exp. Co. v. Caldwell (U. S.)*, 21 Wall. 264, 22 L. Ed. 556; *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 328, 58 S. E. 569, 13 L. R. A., N. S., 753.

17. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 330, 58 S. E. 569, 13 L. R. A., N. S., 753.

is only required to make his claim within a specified number of days, in season to enable the carrier to ascertain what the facts are, and having made this claim, he may delay his suit.¹⁸

§ 1418. Limitation of Time within Which Action May Be Brought.—A carrier may, by a provision in a special contract of carriage, require claims for damages to be presented within a given time, provided the time is not a limitation of the time within which an action may be brought to recover damages for negligence or breach of contract.¹⁹

§ 1419. Carriers Entitled to Benefit.—Inurement to Final Carrier's Benefit.—A stipulation in a bill of lading for notice of claim within ninety days is restricted to claims against the initial carrier, and can not inure to the final carrier's benefit.²⁰

Right to Maintain Suit against Ship.—A provision in the shipping receipts that all claims against the steamship company or any of its stockholders for damage to the shipment must be presented within thirty days from the date thereof, as a condition precedent to suing the company or its stockholders, does not cover the right to maintain a suit against the ship, in which the steamship company appears as claimant.²¹

§ 1420. Shipments to Which Applicable.—Shipments Beyond Terminus of Carrier's Line.—A condition in a bill of lading to the effect that no claim for loss or detention should be allowed unless notice in writing and particulars of the claim was given to station freight agent at or nearest to the place of delivery within a specified time after the goods, in respect to which said claim is made, are delivered, is applicable to shipments beyond the terminus of the defendant's railway.²²

§§ 1421-1430. Losses to Which Applicable—§ 1421. Claims Accruing before Execution of Contract.—A stipulation in a bill of lading requiring a shipper to give notice within a certain time if he claims damages does not apply to a claim accruing under a prior verbal contract before the bill of lading was signed.²³ Such stipulation does not apply to a claim accruing under prior verbal contract to furnish cars at a specified time.²⁴

§ 1422. Delay in Furnishing Cars.—A stipulation of a bill of lading that claim for loss of or damage to freight must be made within a specified number of days does not apply to damages from delay in furnishing cars for transportation of the freight.²⁵

§ 1423-1424. Special Damages from Delay—§ 1423. In General.—The provision in a bill of lading that as a condition to liability of the carrier all claims for damages must be reported by the consignee in thirty-six hours after arrival of the goods, refers solely to loss of or damage to articles shipped, and not to special damages to the owner from delay in transportation.²⁶

18. Limitation of right to sue.—Southern Exp. Co. v. Caldwell (U. S.), 21 Wall. 264, 22 L. Ed. 556.

19. Limitation of time within which action may be brought.—Austin-Stephenson Co. v. Southern R. Co., 151 N. C. 137, 65 S. E. 757.

20. Carriers entitled to benefit.—Grayson County Nat. Bank v. Nashville, etc., R. Co. (Tex. Civ. App.), 79 S. W. 1094.

21. Right to maintain suit against ship.—Pacific Coast, etc., Co. v. Bancroft-Whitney Co., 36 C. C. A. 135, 94 Fed. 180.

22. Shipments beyond terminus of carrier's line.—Jennings v. Grand Trunk R.

Co., 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98, affirming 52 Hun 227.

23. Claims accruing before execution of contract.—Cross v. Graves, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102; Pecos, etc., R. Co. v. Evans-Snyder-Buel Co., 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

24. Cross v. Graves, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102.

25. Delay in furnishing cars.—Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716.

26. Special damages from delay.—Morrow v. Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

Failure of Express Office to Promptly Forward Goods.—A stipulation in the receipt given by an express company for goods to be transported, "that the company shall not be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date," is not applicable where the claim is on account of negligence by the express office which issued the receipt in not promptly forwarding the goods.²⁷

§ 1424. Loss of Market or Decline in Value.—A provision of a shipping contract, requiring certain notice of any claim for damages for loss or injury to the freight shipped during the transportation, was not applicable to a claim for loss of market or depreciation in the market value on account of a decline in the market during the time lost in delay in transportation. A depreciation in the market price resulting from negligent delays is not covered by the stipulation for a notice in writing for loss or injury to the shipment.²⁸

§ 1425. Loss by Misdelivery.—A provision in a contract requiring claims for loss or damage to freight to be presented within a certain time is not available where the carrier misdelivers the goods to an unauthorized person.²⁹ In such case the carrier is guilty of a conversion.³⁰

Freight Billed to Wrong Party by Carrier without Authority—Goods Lost.—Failure to give notice of loss as required by the bill of lading, will not preclude a right of action for the loss, where the loss resulted from the initial carrier billing the goods direct to a party other than the consignee, whereby the goods were lost to plaintiff, since the carrier lost the benefit of the exceptions from liability by billing the freight to a party other than the consignee without authority to do so.³¹

§ 1426. Nondelivery.—A stipulation in a shipping contract that the carrier is not to be held liable for any loss or damage whatever, unless claim be made therefor within a specified number of days from the delivery to it, is to be construed, in an action upon the contract for the nondelivery of freight, not to limit the liability of the carrier.³²

One of Several Packages Not Delivered.—Contract limitation as to notice of loss or damage to freight within certain time after arrival does not apply in suit for loss of one of several packages which was never delivered.³³

Freight Which Has Never Arrived at Destination.—When a railroad company seeks to defeat its common-law liability as a common carrier by invok-

27. Failure of express office to promptly forward goods.—*Baltimore, etc., Exp. Co. v. Cooper*, 66 Miss. 558, 6 So. 327, 14 Am. St. Rep. 586, 40 Am. & Eng. R. Cas. 97.

28. Loss of market or decline in value.—*Atchison, etc., R. Co. v. Poole*, 73 Kan. 466, 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449, 87 Pac. 465; *Cornelius v. Atchison, etc., R. Co.*, 74 Kan. 599, 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222, 87 Pac. 751; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293.

Judgment, Pecos, etc., R. Co. v. Evans-Snider-Buel Co., 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190, 97 S. W. 466; *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

29. Loss by misdelivery.—*Alabama.*—*Under Alabama Code 1907, § 4297*, *Southern Exp. Co. v. Ruth & Son*, 5 Ala. App. 644, 59 So. 538.

Georgia.—*Merchants', etc., Transp. Co.*

v. Moore, 124 Ga. 482, 52 S. E. 802.

New York.—*Sheldon v. New York, etc., R. Co.*, 113 N. Y. S. 676, 61 Misc. Rep. 274.

Pennsylvania.—*Ridgway Grain Co. v. Pennsylvania R. Co.*, 228 Pa. 641, 77 Atl. 1007, 31 L. R. A., N. S., 1178.

Texas.—*Grayson County Nat. Bank v. Nashville, etc., R. Co.* (Tex. Civ. App.), 79 S. W. 1094.

30. Carrier guilty of conversion.—*Merchants', etc., Transp. Co. v. Moore*, 124 Ga. 482, 52 S. E. 802.

31. Freight billed to wrong party by carrier without authority—Goods lost.—*Cleveland, etc., R. Co. v. Potts & Co.*, 53 Ind. App. 564, 71 N. E. 685; *Chicago, etc., R. Co. v. Fifth Nat. Bank*, 26 Ind. App. 600, 50 N. E. 43.

32. Nondelivery.—*Porter v. Southern Exp. Co.*, 4 S. C. 135, 16 Am. Rep. 762.

33. One of several packages not delivered.—*Galveston, etc., R. Co. v. Ball*, 89 Tex. 602, 16 S. W. 441.

ing a special contract, it must show a violation of both the spirit and letter of such contract, therefore, where the freight for the loss of which damage is claimed has never arrived at its destination, written notice of the claim provided for by the shipping contract is not required.³⁴

Refusal of Express Company to Pay Draft Received for Transmission and Collection.—A stipulation, annexed to a receipt given by an express company upon receiving a draft for transmission and collection, that it should not be liable for any loss or damage unless a claim should be asserted within 90 days, is inapplicable to limit the company's liability for neglect or refusal to pay the plaintiffs the money received for them.³⁵

§ 1427. Unauthorized Diversion.—See post, "Facts Excusing Failure to File Notice," §§ 1445-1450.

§ 1428. Carrier's Conduct as Warehouseman.—A contract of shipment contained a stipulation that no claim for loss or damage to the property shipped should be valid unless made in writing within thirty days after the same should have occurred. Such condition was applicable in respect to the carrier's conduct as a warehouseman, that relation being incident to that of carrier.³⁶

§ 1429. Failure to Return Freight Refused by Consignee.—When freight, forwarded by the owner by express, is refused by the consignee, and the express company promises to return it to the shipper, but negligently fails to do so, the damages the shipper is entitled to recover against the carrier is based upon the contract for the return of the goods, and not upon the original shipping contract, and is, therefore, not affected by a provision in the latter contract requiring claims arising under it to be made in writing within a specified number of days of its date.³⁷

§ 1430. Failure to Collect for C. O. D. Parcel or Return Same.—Where a carrier neglects to collect the amount due on a C. O. D. shipment and does not return it to the shipper according to the contract of shipment, the shipper is not restricted to the time stipulated in the contract, but may make his claims within a reasonable time after the carrier's default,³⁸ especially where the carrier, after a wrongful delivery of the goods, has stated that they are in its possession and promised to return them.³⁹

§ 1431. Right to Require Carrier to Trace Shipment.—That a bill of lading provided that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if de-

34. Freight which has never arrived at destination.—*Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

35. Refusal of express company to pay draft received for transmission and collection.—*Bardwell v. American Exp. Co.*, 35 Minn. 344, 28 N. W. 925.

36. Carrier's conduct as warehouseman.—*Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, 54 N. W. 1059.

37. Failure to return freight refused by consignee.—*Green v. Pacific Exp. Co.*, 37 Mo. App. 537.

38. Failure to collect for c. o. d. parcel or return same.—*Smith v. Dinsmore* (N. Y.), 6 Daly 188.

39. Failure of vendee to pay for goods—Carrier's promise to return to vendor—Wrongful delivery to vendee.—In *Marcus v. New Haven Steamboat Co.* (N. Y. Sup.

Ct.), 20 Misc. Rep. 421, it appeared that the vendor of goods, consigned by himself to himself at a distant point, after learning that the vendee had failed to pay for them on delivery, as agreed, demanded them of the carrier on the thirtieth day after they were forwarded, and was then informed by its agent that it had the goods and would return them to the vendor within a few days. It was held that the carrier could not escape liability for a conceded misdelivery to the vendee, made without any payment or the presentation of the bill of lading, by setting up the conceded failure of the vendor to comply with a clause in the bill of lading which protected the carrier from liability for loss or damage, unless claim was made therefor within thirty days after the delivery of the property or after due time for its delivery.

layed for more than 30 days after delivery of the property, or after due time for delivery thereof, no carrier should be liable in any event, does not limit the rights of the shipper to make demand upon the initial carrier to trace the freight, under Civ. Code 1910, §§ 2771, 2772, requiring carriers, on application by a shipper, to trace freight which may have been lost, and to inform applicant in writing within 30 days of the time, place, and manner of the loss, and of the names of the persons, and their official position, if any, by whom such fact can be established, and that failure to do so renders the carrier liable for the value of the freight lost as if such loss had occurred on its own line.⁴⁰

§§ 1432-1439. What Constitutes and Sufficiency of Notice—§ 1432. Necessity for Actual Notice.—A contract stipulation, that as a condition to recovery for injury to the property shipped the shipper will give notice of claims therefor in writing to an agent of the carrier within one day after delivery at destination, so that the claim may be investigated, requires actual notice, so that notice by mail is not sufficient, unless received within the one day.⁴¹

§ 1433. Writing.—A stipulation that a shipper of freight shall give notice in writing of his claim for damages before he shall recover is valid.⁴²

Where Verbal Notice Sufficient.—Verbal notice is sufficient where, under all the circumstances, it would be unreasonable for the carrier to insist upon the stipulation for written notice.⁴³

Written Notice Expressly Waived.—Where stipulation in contract of shipment providing for written notice of claim for damages is expressly waived, verbal notice is sufficient.⁴⁴

Verbal Notice Accepted and Acted upon before Written Notice Given.—See post, "Notice Received in Time without Objections to Sufficiency," § 1454. Where verbal notice of a claim for loss of injured is acted upon by the carrier or its agent⁴⁵ and a written notice is afterwards given, the notice is sufficient.

40. Right to require carrier to trace shipment.—*Davis v. Seaboard, etc., Railway*, 136 Ga. 278, 71 S. E. 428.

41. Necessity for actual notice.—*St. Louis, etc., R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517.

42. Writing.—*Texas Cent. R. Co. v. Morris*, 1 Tex. App. Civ. Cas., § 374; *Texas, etc., R. Co. v. Jackson*, 3 Texas App. Civ. Cas., § 41; *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

43. Where verbal notice sufficient.—Appellant pleaded general denial, and specially that one of appellees, representing them all in the shipment of the cattle, entered into a written agreement with defendant, whereby he undertook to superintend the loading of the cattle, and, among other things, as a condition precedent to his right to recover anything for said cattle, to give notice in writing of his claim therefor to some agent or officer of the defendant before the stock should be removed from the place of destination, which was not done. The written notice required was not given for several days after the arrival of the train at Sherman. The cattle were put off in the night. It was dark and raining. There were no pens to put them in, and they could not be kept together in the dark-

ness. They scattered abroad into the country, and it was several days before they could be collected, and many of them were entirely lost. The court holds that under the above circumstances the appellant could not insist upon a literal compliance with the condition. It was sufficient that verbal notice of the claim was given to the agent on the night of the arrival at Sherman, and written notice as soon as it could be reasonably given after collecting the cattle. *Houston, etc., R. Co. v. Hester (Tex.)*, 2 Posey 296.

44. Stipulation for written notice expressly waived by agent.—*Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

45. Oral notice given in time—Tracer sent out by express agent.—A receipt given by an express company provided that it should not be liable for loss unless the claim should be presented in writing within 30 days. Within a few days after the delivery of the package verbal notice was given the agent at the shipping point of a partial loss, and the agent sent out a tracer. After about ninety days the agent reported that he was unable to find the property, and immediately thereafter a written demand was made on the company for the value of the property lost. It was held that

§ 1434. Verification or Affidavit.—See post, "Treating Unverified Claim as Pending for Adjustment," § 1459.

§ 1435. Complaint by Letter.—A mere complaint by letter of delay and extra charges is⁴⁶ not a compliance with the requirement of a shipping contract that a claim for loss or damage must be filed within a fixed time; but a claim in writing accompanied by a letter explaining the particulars of the loss is sufficient and such bill of particulars may be amended without substantially changing the claim.⁴⁷

§ 1436. Inquiry Requesting Property to Be Traced.—The mere inquiry by the consignee requesting the property shipped to be traced, and stating what he supposed the value of the property to be, is not a compliance with the provision of such bill of lading.⁴⁸

§ 1437. Filing Suit and Service of Citation.—Commencement of Action.—Under a provision of a contract of shipment requiring the presentation of claims for damages within a specified time, the commencement of an action within that time is a sufficient presentation of the claim.⁴⁹ The filing of suit and service of citation are sufficient to meet requirements of a shipping contract whereby the shipper agrees to give definite notice in writing of his claim to the carrier within a certain time after date of injury.⁵⁰

§ 1438. Copy of Telegraph Message to Consignor.—The notification may be by telegraph or delivery of a copy of a telegraph message from the consignee to the consignor.⁵¹

§ 1439. Officer to Whom Given.—Ordinarily, it is sufficient, to charge the company itself with notice of a given fact, to show that its agent in charge of that particular branch of the business had notice thereof⁵² or that notice was

the notice was sufficient. *Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 23 R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

46. Complaint by letter of delay and extra charges.—*Texas, etc., R. Co. v. Jackson*, 3 Texas App. Civ. Cas., § 41.

47. Claim accompanied by letter filed as bill of particulars.—Amendments.—But a claim in writing which has been presented to the railroad company accompanied by a letter explaining the full particulars of the transaction, charging it with the loss of 50 per cent of 147 boxes of oranges, and for a return of the freight paid it thereon, is sufficient to notify the railroad of a claim against it for damages caused by the negligence of the company in the transportation of the oranges, and, when such claim has been filed before a justice of the peace as a bill of particulars, the plaintiff may, upon leave obtained from the court, file an amended bill of particulars setting out such damages and negligence, and does not thereby substantially change the claim against the railroad company. So held in *St. Louis, etc., R. Co. v. Bryan Fruit Co.*, 1 Kan. App. 551, 42 Pac. 267, 2 Am. & Eng. R. Cas., N. S., 691.

48. Inquiry requesting property to be traced.—*Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30.

49. Commencement of action.—*South-*

ern Exp. Co. v. Ruth & Son, 5 Ala. App. 644, 59 So. 538.

50. Filing suit and service of citation.—*Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W. 63; *Houston, etc., R. Co. v. Davis*, 50 Tex. Civ. App. 74, 109 S. W. 422, distinguishing *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318, and *International, etc., R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189.

51. A bill of lading required the delivery in writing of a claim for damages within thirty-six hours after notice of the arrival of the freight at the place of delivery. The freight on its arrival was examined by an agent of the consignee in the presence of an agent of the delivering carrier, and it was found to be in bad condition, and the agent of the consignee refused to accept the freight and so notified the carrier, and the agent immediately wired the consignor to that effect, and gave to the agent of the delivering carrier a copy of the message. Held, that the carrier received proper notice of the consignee's claim for damages. *St. Louis, etc., R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939.

52. Officer to whom given.—*Ft. Worth, etc., R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686, affirmed in part and reversed in part, in 85 Tex. 516, 22 S. W. 578.

given to depot manager at the place of destination.⁵³ And it would seem that if the real object of the company in exacting these complicated contracts be to guard against fraudulent claims, instead of to confuse the shipper and escape liability, upon other than equitable grounds, notice to the delivering conductor is all that should be required.⁵⁴

Connecting Carriers.—Where a shipper made a contract with one carrier to take freight to a certain place, and there made a contract with a connecting carrier to take it to another place, each expressly stipulating that it only agreed to carry the goods between the points that it did carry them and that its liability should be limited to its own line, the contracts are independent, so that notice given to one of claim of damages is not notice to the other.⁵⁵ Where a contract for shipment over two connecting lines of carriers requires a notice of claim for damages to be made at the point of destination, notice of a claim against the first carrier need not be given at the connecting point,⁵⁶ or at the office of shipment;⁵⁷ but may be made upon some officer or agent of the company chargeable with the loss.

§§ 1440-1442. Effect of Failure to Give Notice—§ 1440. In General.—A provision in a bill of lading requiring notice of claims for loss or damage to be made in writing to a named agent of the carrier within a specified number of days after the delivery of the property, or after due time for delivery thereof, is enforceable by the carrier in bar of any suit brought by the shipper for the loss of goods for which claim was not presented as provided in the bill of lading containing such provision.⁵⁸ But a number of courts, among them

53. Depot manager.—The provision in a bill of lading requiring notice of any claim for damages to the delivering carrier within thirty hours of the time of arrival at destination is sufficiently complied with by notice, within the prescribed time, to the depot manager at the place of destination, to whom such complaints were customarily made. *St. Louis, etc., R. Co. v. Heyser*, 95 Ark. 412. 130 S. W. 562.

54. Missouri Pac. R. Co. v. Childers (Tex. Civ. App.), 29 S. W. 559, 560.

55. Connecting carriers.—*Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

Plaintiff submitted testimony tending to show that the agent of the terminal carrier, at his instance, prepared a written notice of his claim for damages, and forwarded it to the headquarters of that company, but that testimony fails to show that that company or its agent was the agent or representative of the defendant. And according to the rule that notice given to the agent of the terminal carrier without proof to show that he was agent to receive same for defendant, the initial one, is not a compliance with the contract, the notice was held insufficient. *International, etc., R. Co. v. Heitner*, 42 Tex. Civ. App. 617, 619, 94 S. W. 189.

56. Atchison etc., R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

57. A package of money was received by the Adams Exp. Co., at Pittsburgh, Pa., directed to a person at Jonesboro, Ind., the bill of lading or receipt stipulating that the company should forward

the package to its agent nearest or most convenient to the destination, and there deliver it to other parties to complete the transportation, such delivery to terminate the liability of the company; and the company was not to be liable for any loss, unless the claim therefor should be made in writing, at the office of shipment, within thirty days from the date of the receipt; and it was provided that the stipulations of the contract should extend to, and inure to the benefit of, every company or person to whom Adams Exp. Co. might intrust or deliver the package, and should define and limit the liability therefor of such other company or person. In a suit by the consignee against the U. S. Exp. Co., as a common carrier, for the loss of a portion of the money while transportation was being completed by the defendant, where the complaint did not allege that the claim for such loss was made in writing, within 30 days after the date of the contract, held, that it was not necessary to make the claim at the office of shipment, but it might be made upon some agent or officer of the company chargeable with the loss. *United States Exp. Co. v. Harris*, 51 Ind. 127.

58. Effect of failure to give notice.—*Southern Exp. Co. v. Glenn*, 84 Tenn. (16 Lea) 472, 1 S. W. 102; *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A., N. S., 753; *Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 525, 65 S. E. 30; *Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838; *Old Dominion Steamship Co. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

the supreme and other superior courts of Texas have been very undecided as to whether lack of notice, as required in railroad contracts for the shipment of property, should ever preclude a shipper from recovery, and have always refused to lay down a general rule on the subject.⁵⁹ And the court of North Carolina has held that the failure of a shipper to give the carrier formal written notice of loss of or injury to the freight, as required by the contract of affreightment, will not prevent him from recovering, if otherwise entitled,⁶⁰ while that of Missouri has said that the manifest object of such a provision is not to relieve the carrier from just liability, but to enable the latter, by proper investigation, to protect itself against unjust claims.⁶¹

§ 1441. Failure without Fault or Negligence of Shipper.—But where the failure to make the claim as required by such stipulation occurs without fault or negligence of the parties entitled to the money, then such failure will be excused, and will not prevent a recovery for the loss.⁶²

§ 1442. Where Extent of Damages Can Not Be Ascertained until After Expiration of Time Limit.—Where the damage to the freight, or its nature and extent can not be discovered or ascertained by the consignee, by the exercise of due care, until after the expiration of the time limited by the contract for giving notice of claims for injuries to the shipment, the stipulation will not protect the carrier if the claim is made within a reasonable time after the loss or injury is ascertained.⁶³

§ 1443. Computing Time within Which Notice Must Be Given.—What Constitutes a Reasonable Time for Delivery.—Where a shipment under a bill of lading stipulating that claims for loss must be made to the agent at a point of delivery promptly after the arrival of the goods, and if delayed more

59. *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930, 931, citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 374, 14 S. W. 666, 22 Am. St. Rep. 56; *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76, and *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

60. *Hinkle v. Southern R. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685.

Harmless breach of condition no defense.—A failure to comply with a provision of the bill of lading requiring, as a condition precedent to the carrier's liability for loss or damage, that notice of claims for injuries to the freight be given within a certain period, is no defense, if the carrier was not harmed by such failure. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

61. **Object.**—*Hinkle v. Southern R. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685.

62. **Failure without fault or negligence of shipper.**—*Glenn Co. v. Southern Exp. Co.*, 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627.

63. **Where extent of damages cannot be ascertained until after expiration of time limit.**—*United States.*—*Ormsby v. Union*

Pac. R. Co., 4 Fed. 706, 2 McCrary 48. *Alabama.*—*Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96, 33 So. 482; *Western R. Co. v. Harwell*, 97 Ala. 341, 343, 11 So. 781.

Arkansas.—*St. Louis, etc., R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

Indiana.—*Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183, 33 N. E. 236.

Kansas.—*Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362.

Mississippi.—*Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 23 R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

Missouri.—*Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Popham v. Barnard*, 77 Mo. App. 619; *Richardson v. Chicago, etc., R. Co.*, 62 Mo. App. 1.

Ohio.—*Baltimore, etc., R. Co. v. Hubbard*, 72 O. St. 302, 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71, 74 N. E. 214.

Tennessee.—*Memphis, etc., R. Co. v. Holloway*, 68 Tenn. (9 Baxt.) 188.

A stipulation in a shipping contract that a claim for loss of freight must be made at the time the goods are delivered by the carrier, will not protect a railroad, where the claim is made within a reasonable time after the loss is ascertained. *Memphis, etc., R. Co. v. Holloway*, 68 Tenn. (9 Baxt.) 188.

Texas.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

than 30 days after due time for delivery the carrier shall not be liable, was made on September 5th, and 15 days was a reasonable time to transport the goods, a notice of a claim for loss not given until October 23d was too late.⁶⁴

What Constitutes Time of Offering to Deliver.—Where a railroad freight agent by mistake denies to a consignee for several months that the goods have arrived, during which time they spoil, so that the consignee refuses to accept, the time of offering to deliver to the consignee is the time of delivery within the bill of lading requirement that claims for damage must be made within four months after delivery, or a reasonable time therefor in case of failure to deliver.⁶⁵

Time Consumed in Tracing Freight.—Where a receipt given to the shipper by an express company stipulated that the shipper must present a written claim for loss of damage to the freight shipped, within thirty days of the date of the receipt; and it appeared that the company consumed time in tracing the package and finally stated to shipper that it could not be found, whereupon he presented his claim, he was justified in not presenting his claim at an earlier date.⁶⁶

§ 1444. Duty to Present Claim within Reasonable Time Although Stipulation Unreasonable.—The fact that the contract of affreightment requires claims for loss or damage to be presented within an unreasonably short time does not relieve the shipper from the obligation of presenting his claims within a reasonable time,⁶⁷ and if he fails to do so his right to recover will be barred; and, on the other hand, such stipulation will not protect the carrier where notice is given in a reasonable time after the loss.⁶⁸ The time of giving the notice is not governed by the statute of limitations.⁶⁹

What Constitutes a Reasonable Time.—In an action for loss of a portion of a shipment in which the court holds as unreasonable and void a stipulation in the bill of lading that notice of a loss should be given in 30 days, a charge that notice of loss within 60 days, would be in reasonable time is not error.⁷⁰

64. What constitutes a reasonable time for delivery.—*Old Dominion Steamship Co. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

65. What constitutes time of offering to deliver.—*Wilkins v. Atlantic, etc., R. Co.*, 160 N. C. 54, 75 S. E. 1090.

66. Time consumed in tracing freight.—*Ghormley v. Dinsmore*, 51 N. Y. Super. Ct. 196.

A receipt given by an express company provided that it should not be liable for loss or damage unless the claim for it should be presented in writing within thirty days. Within a few days after the delivery of the package verbal notice was given the agent at the shipping point of a partial loss, and the agent sent out a "tracer." After about ninety days the agent reported that he was unable to find the property, and immediately thereafter a written demand was made on the company for the value of the property lost. It was held the notice was in time. *Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

67. Unreasonable.—A stipulation of a bill of lading that "the ship owner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," even if conceded to

be unreasonable and void as to the time within which it requires the notice to be given, is valid, and will be enforced to the extent of requiring notice to be given, and it must be given within a reasonable time, or the right to recover on a claim for damage to the freight will be barred. *The St. Hubert*, 102 Fed. 362; *The Westminster*, 102 Fed. 366; *The St. Hubert*, 46 C. C. A. 603, 107 Fed. 727; *Osterhoudt v. Southern Pac. Co.*, 47 App. Div. 146, 62 N. Y. S. 134.

68. A stipulation that the claim for loss must be made at the time the goods are delivered, will not protect the company, where the claim is made in a reasonable time after the loss is ascertained. *Memphis, etc., R. Co. v. Holloway*, 68 Tenn. (9 Baxt.) 188.

69. Where a stipulation in a bill of lading providing for notice of loss within thirty days is unreasonable and void, the time of giving notice is not governed by the three-year statute of limitations, but notice must be given in a reasonable time, since such stipulation is not a statute of limitation restricting time of suit. *Deans v. Atlantic, etc., R. Co.*, 67 S. E. 332, 152 N. C. 171.

70. What constitutes a reasonable time.—*Deans v. Atlantic, etc., R. Co.*, 152 N. C. 171, 67 S. E. 332.

Claims for Number of Cargoes Bunched without Indicating Respective Shipments.—Where the consignor of a number of cargoes, instead of giving notice from time to time of the damage to each cargo waited until nearly three months after the last shipment, and ten months after the first, and then bunched the claims, without indicating the respective shipments to which the various items of damage pertained, this was not a reasonable compliance with the terms of a shipping contract requiring claims to be presented within a time assumed to be unreasonably short.⁷¹

§§ 1445-1450. Facts Excusing Failure to Give Notice—§ 1445. Refusal of Consignee to Receive Goods.—A stipulation in a bill of lading as to notice of claim for damage done to goods while in transit, and before delivery, does not apply where the owner refuses to receive the goods at all.⁷²

§ 1446. Carrier Having Knowledge of Loss or Injury and Opportunity to Investigate.—The fact that the carrier has notice of the loss or injury does not excuse a failure to give the required notice where the condition is valid, nor a failure to give notice within a reasonable time where the stipulation for notice is itself unreasonable and void.⁷³

Opportunity to Investigate.—Where a carrier learned of the damaged condition of a shipment on its arrival at the point of destination, and was afforded opportunity to investigate the nature and extent of the damage, the failure to give notice of damage, as required by the bill of lading, did not defeat a recovery.⁷⁴ Though a contract of shipment requires written notice of claim for damages to be made within thirty days, a notice is unnecessary where the carrier's agent attended the opening of the car with the consignee, listed the damaged goods and made report thereof to the carrier, who entered upon an investigation of the damages, and did not object to the form of notice.⁷⁵

§ 1447. Carrier Having Examined Goods at Destination.—Where a carrier has examined goods at their destination and knows their condition, it is not necessary to present a written notice of "intention to claim damages," as provided in the bill of lading.⁷⁶

§ 1448. Shipment Burned in Yards with Carrier's Knowledge.—A shipper's right to recover for loss of a shipment following an unauthorized diversion thereof is not precluded by a failure to make a written claim within 30 days after arrival of the shipment, where the shipment was wholly valueless on reaching its destination, and was burned in the yards with knowledge of the agent of the last carrier.⁷⁷

§ 1449. Destruction of Shipment While in Carrier's Possession.—Where a railroad company had notice that a shipment of goods was destroyed by fire, the failure of the consignee to give notice of nondelivery, as required by the bill of lading, is no bar to an action; there being no reason for the giving

71. Claims for number of cargoes bunched without indicating respective shipments.—*Osterhoudt v. Southern Pac. Co.*, 47 App. Div. 146, 62 N. Y. S. 134.

72. Refusal of consignee to receive goods.—*Gulf, etc., R. Co. v. Golding*, 3 Texas App. Civ. Cas., § 33.

So held as stipulations for presentation of claim before removal of goods from station and for presentation of such claim within ten days after delivery, when owner refused to receive the goods because of their damaged condition. *Gulf, etc., Co. v. Golding*, 3 Texas App. Civ. Cas., § 33.

73. *The Westminster*, 102 Fed. 366; *The St. Hubert*, 46 C. C. A. 603, 107 Fed. 727.

74. Opportunity to investigate.—*Hardin Grain Co. v. Missouri Pac. R. Co.*, 120 Mo. App. 203, 96 S. W. 681.

75. *Navin v. Missouri, etc., R. Co.*, 126 Mo. App. 707, 106 S. W. 102.

76. Carrier having examined goods at destination.—*Cumbe v. St. Louis, etc., R. Co.*, 105 Ark. 406, 151 S. W. 237.

77. Shipment burned in yards with carrier's knowledge.—*Drake v. Nashville, etc., R. Co.*, 125 Tenn. 627, 148 S. W. 214.

of such notice.⁷⁸ Though a bill of lading provides that claim for damages must be reported by the consignee to the delivering line within 36 hours after the consignee has been notified of the arrival of the freight, otherwise there shall be no liability, failure to give the notice does not prevent recovery, where the agent of the delivering company immediately knew about the destruction of the property while in its possession, and notice would have done no good.⁷⁹

§ 1450. Failure to Give Notice Induced by Conduct of Carrier or Its Agent.—A restriction of the carrier's liability resulting from a failure to give notice of a claim for loss or damage as provided for by shipping contract, will not be applied where failure to give the required notice was caused by the conduct of the carrier or that of its agent or servant.⁸⁰

§§ 1451-1466. Waiver of Notice or Defects Therein—§ 1451. Right to Waive.—A carrier may waive his right under a contract to be notified before suit of the extent of the damage to the goods.⁸¹

§ 1452. Effect of Waiver.—Where a carrier waives the omission of a shipper whose goods have been damaged in transit to give notice of its claim for damages as required by the bill of lading, the shipper's action for damages can not be defeated by the omission.⁸²

§§ 1453-1465. What Constitutes a Waiver—§ 1453. Conduct Inconsistent with Intent to Enforce Stipulation.—Compliance with a provision of the shipping contract requiring notice of claims for loss of or injury to be given within a fixed time may be waived and rendered inapplicable by con-

78. Destruction of shipment while in carrier's possession.—*Deaver-Jeter Co. v. Southern Railway*, 91 S. C. 503, 74 S. E. 1071, Ann. Cas. 1914A, 230.

79. *Scott County Milling Co. v. St. Louis, etc., R. Co.*, 127 Mo. App. 80, 104 S. W. 924.

80. Failure to give notice by conduct of carrier or its agent.—*Indiana*.—*Cleveland, etc., R. Co. v. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685.

Kentucky.—*Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 10 Ky. L. Rep. 554, 9 S. W. 698.

Michigan.—*Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853.

Mississippi.—*Illinois Cent. R. Co. v. Bogard*, 78 Miss. 11, 27 So. 879, 18 Am. & Eng. R. Cas., N. S., 410. See *Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 23 R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

Missouri.—*Richardson v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. Cas., N. S., 170, 149 Mo. 311, 50 S. W. 782.

Texas.—*Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

Washington.—*Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 20 R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70, 82 Pac. 161, 111 Am. St. Rep. 883.

New York.—An express driver accepted a package from the consignor's agent, assuring him that the address which he had corrected with a pencil was all right, and that the parcel would reach its destination. The package went to the wrong

place, and the consignor was not notified until five months thereafter, and in none of its correspondence in relation to the matter did it claim that the consignor could only make a claim within sixty days from the date of shipment, as provided in the contract. Held, that the carrier was precluded by its negligence and delay from asserting the limitation as to time. *Magnus v. Platt*, 115 N. Y. S. 824, 62 Misc. Rep. 499.

Texas.—*Gulf, etc., R. Co. v. York*, 2 Texas App. Civ. Cas., § 813.

81. Right to waive.—A stipulation that a claim for loss shall be made in writing to the agent of the carrier at the point of delivery, and if such claim be delayed for more than thirty days no carrier acting under the bill of lading shall be liable, may be waived by the carrier. *Post v. Atlantic, etc., R. Co.*, 76 S. E. 45, 138 Ga. 763; *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

82. Effect of waiver.—*Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co.*, 137 Mo. App. 479, 119 S. W. 1.

Where a contract with a carrier required notice of injury to freight before suit, and it was shown that compliance with this stipulation was waived by carrier whose agent agreed to pay fixed sum in satisfaction of damage, verdict for agreed sum is not erroneous. *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

duct of the carrier inconsistent with the existence of an intention to claim the protection of the stipulation.⁸³

Promise of Local Agent to Make Delivery.—The statement of a local agent that the balance of a shipment would be delivered in a few days is a waiver of a provision in the shipping contract requiring notice of the loss to be presented within a specified number of days.⁸⁴

Goods Examined by Carrier's Agent to Ascertain Damage.—A stipulation in the bill of lading, requiring notice to the carrier of damage to goods to be given within thirty days after delivery, does not apply where the carrier's agent examines goods delivered to the consignee in bad order for the purpose of ascertaining the damage.⁸⁵

Examination of Freight and Agreement by Agent to Pay.—Where a shipping contract stipulated that the carrier must be notified in writing of the extent of damage sustained by the freight in transit, before action was brought therefor, compliance with this condition is waived by the carrier, through the action of its agent, after examining the freight, and agreeing to pay a certain amount in satisfaction of the claim.⁸⁶

Search for Lost Package and Accepting Shipper's Instructions to Sell.—A stipulation in a shipping contract requiring notice within a fixed period is waived by the carrier stating, in answer to the shipper's demand for the return of the package shipped, that the carrier was searching for it, and, when found, by its accepting the shipper's instructions to sell.⁸⁷

Disposition of Goods Directed by Carrier's Agent.—A stipulation for notice to the carrier of damages to the goods to be given within thirty days after delivery, is waived where the carrier's agent, after ascertaining the extent of the damage, directs the disposition of the goods, or promises to adjust the claim.⁸⁸

§ 1454. Notice Received in Time without Objection to Sufficiency.—Where a contract of affreightment requires that, in case of loss or damage, notice thereof shall be given the carrier within a limited time, and in a particular manner, if notice of loss is given within the time limited and no objection is made to its sufficiency, but refusal to pay the claim is upon other grounds, all defects in such notice are waived.⁸⁹

83. Conduct inconsistent with intent to enforce stipulation.—*Arkansas*.—St. Louis, etc., R. Co. v. Jacobs, 70 Ark. 401, 68 S. W. 248.

Illinois.—Chicago, etc., R. Co. v. Grimes, 71 Ill. App. 397; *Wabash R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273.

Kentucky.—Owen v. Louisville, etc., R. Co., 87 Ky. 626, 10 Ky. L. Rep. 554, 9 S. W. 698.

Michigan.—Soper v. Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853; *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750.

Mississippi.—Illinois Cent. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879, 18 Am. & Eng. R. Cas., N. S., 410.

Missouri.—Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202; *Rice v. Kansas Pac. Railway*, 63 Mo. 314.

North Carolina.—United States Watch-Case Co. v. Southern Exp. Co., 120 N. C. 351, 27 S. E. 74.

Oregon.—Bennett v. Northern Pac. Exp. Co., 12 Ore. 49, 6 Pac. 160.

Pennsylvania.—Eckert v. Pennsylvania R. Co., 211 Pa. 267, 18 R. R. 475, 41

Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781, 107 Am. St. Rep. 571.

Texas.—Galveston, etc., R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143; *Missouri Pac. R. Co. v. Scott*, 2 Texas App. Civ. Cas., § 324.

84. Promise of local agent to make delivery.—Galveston, etc., R. Co. v. Ball, 80 Tex. 602, 605, 16 S. W. 441.

85. Goods examined by carrier's agent to ascertain damage.—*Kelly v. Southern Railway*, 84 S. C. 249, 66 S. E. 198.

86. Examination of freight and agreement by agent to pay.—*International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

87. Search for lost package and accepting shipper's instructions to sell.—United States Watch-Case Co. v. Southern Exp. Co., 120 N. C. 351, 27 S. E. 74.

88. Disposition of goods directed by carrier's agent.—*Kelly v. Southern Railway*, 84 S. C. 249, 66 S. E. 198.

89. Notice received in time without objection to sufficiency.—*Merrill v. American Exp. Co.*, 62 N. H. 514.

Acceptance of Verbal Claim.—Where a carrier accepts a verbal claim for loss of goods without protest, and undertakes to deal with the claim, it thereby waives the requirement in the contract of shipment that claims shall be in writing.⁹⁰ Thus a provision in a contract of shipment requiring the shipper to give written notice of injury is waived by the proper agents of the carrier receiving verbal notice, and making all investigation desired without demanding written notice,⁹¹ as where, upon receipt of verbal notice, the carrier's general freight agent directs the claimant to make out his claim,⁹² or a claim agent requests certain papers if a "regular" claim had not been presented,⁹³ or when a tracer is sent out,⁹⁴ and a promise of the claim agent upon receipt of verbal notice to make adjustment.⁹⁵

90. Acceptance of verbal claim.—*St. Louis, etc., R. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248.

Georgia.—*Carter & Co. v. Southern R. Co.*, 3 Ga. App. 34, 59 S. E. 209.

Illinois.—*Chicago, etc., R. Co. v. Grimes*, 71 Ill. App. 397, 406.

Iowa.—*Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Mississippi.—*Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 42 So. 670, 23 R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547.

Where within proper time a shipper turned over the original invoice and express receipt to the agent of the carrier in making his claim for the loss of goods, and the express agent said afterwards that he had put in the claim and wanted to hear from the superintendent's office, and as soon as he heard the matter would be settled, this constituted a waiver of a stipulation in the contract of shipment that claim for loss of goods should be made in writing within ninety days, and that action should be commenced within a year after such loss. *Lasky v. Southern Exp. Co.*, 92 Miss. 268, 45 So. 869.

Missouri.—*Rice v. Kansas Pac. Railway*, 63 Mo. 314.

New York.—*Falkenberg v. Erie R. Co.*, 28 Misc. Rep. 165, 59 N. Y. S. 44.

Pennsylvania.—Where a carrier is notified of an undue delay within thirty days after the property is delivered, and the company takes prompt action to inquire into the facts and to protect itself against imposition, it will be deemed to have waived a provision in the bill of lading that the carrier shall not be liable if he is not promptly notified in writing after there has been due time for the delivery of the goods, and they have not been received. *Hoffman v. Delaware, etc., R. Co.*, 39 Pa. Super. Ct. 47.

91. *St. Louis, etc., R. Co. v. Jacobs*, 70 Ark. 401, 4 R. R. 314, 27 Am. & Eng. R. Cas., N. S., 314, 68 S. W. 248.

92. Oral notice after contract period.—Directed by several freight agents to make out claim.—A shipping contract provided that claims for damages must be in writing and made within a specified time. The shipper, injured by delay of shipment, orally laid his claim before the

carrier's general freight agent after such time had elapsed. And by his direction he made out a claim and left it with the claim agent. No one then objected to the failure to file the notice required by the contract. The claim agent, later, wrote, declining to pay in full, solely on the ground there was no liability, but offered to pay extra expenditures caused by the delay. It was held that the jury were warranted in finding that the notice required by the contract was waived. *Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550, 50 R. R. 409.

93. Conditional promise of claim agent and his request for documents.—It was stipulated in a bill of lading that claims for damages must be made in writing, and, if delayed for more than thirty days after delivery of the freight, the carrier should not be liable. The station agent was verbally notified within the time specified, and he notified the carrier, and, after the expiration of that time, the freight claim agent, on having his attention called to the matter, informed the claimant by mail that he could find no record of the claim, and asked for certain papers in case a "regular" claim had not been presented, and expressed the company's willingness to make a prompt adjustment if it should be found liable. It was held that such condition of the bill of lading was waived. *Falkenberg v. Erie R. Co.*, 28 Misc. Rep. 165, 59 N. Y. S. 44.

94. A receipt given by an express company provided that it would not be liable for loss unless the claim should be presented in writing within 30 days. Within a few days after the delivery of the package verbal notice was given the agent at the shipping point of a partial loss, and the agent sent out a tracer. After about 90 days the agent reported that he was unable to find the property, and immediately thereafter a written demand was made on the company for the value of the property lost. Held, that the notice was sufficient. *Southern Exp. Co. v. Stevenson*, 89 Miss. 233, 42 So. 670, 23 R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547.

95. *Falkenberg v. Erie R. Co.*, 28 Misc. Rep. 165, 59 N. Y. S. 44.

§ 1455. Custom to Accept Verbal Notice.—If it was the custom of a carrier to accept a verbal notice to its agent of a claim of a shipper for damage to goods and to treat it as a good notice, the custom would be binding on it.⁹⁶

§ 1456. Request for Further Information.—Where a contract of af-freightment stipulated that in case of loss or damage the shipper must give notice in writing of his claim, as a condition precedent to a right to recover; and the carrier received information of the injury to the freight by letter, and called for information regarding the same shortly after the shipment was made, the notice, if not objected to, is sufficient.⁹⁷

§ 1457. Mere Denial of Liability.—A waiver of notice required by bill of lading to be given of any claim for damage to freight shipped can not be predicated on a mere denial of liability when the claim is presented.⁹⁸

§ 1458. Denial of Liability on Other Grounds than Defect of Notice.—**Grounds.**—A stipulation in a shipping contract for notice of a claim for loss or injury within a specified period may be waived by the conduct of the carrier in denying liability for the loss or injury complained of on other grounds,⁹⁹ that it had discharged the duty it owed, and failure to require compliance with such provision.¹ Where a railroad company is sued for the loss of a car load of tomatoes which were alleged to have rotted from the neglect of the company properly to ice them, and the company has full knowledge of the condition of the car and its contents upon arrival, and in the course of correspondence with the owner denies its liability on the ground that it had properly performed its contract of carriage, it can not after suit brought defend on the ground that it had not received the thirty day notice of loss provided for in the bill of lading.² Where, after thirty days from the delivery of goods shipped had elapsed, the shipper made a written claim, pursuant to which the carrier investigated its liability and declined payment, on the ground that the injury was not due to its conduct, a provision on the bill of lading that, if the shipper failed to make claim within thirty days after delivery, the carrier should not be liable, was waived.³

§ 1459. Treating Unverified Claim as Pending for Adjustment.—A carrier may waive a stipulation in a shipping contract that claim for damages must be made in writing, within a fixed time, and be verified by affidavit, by receiving, without objection, an unsworn notice, and treating the claim as pending for adjustment upon its merits;⁴ by writing the shipper in regard to the

96. Custom to accept verbal notice.—Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co., 137 Mo. App. 479, 119 S. W. 1.

97. Carrier informed of injury by letter.—Request for further information.—Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642.

98. Mere denial of liability.—Gamble-Robinson Comm. Co. v. Northern Pac. R. Co., 119 Minn. 40, 137 N. W. 19.

99. Grounds.—Georgia.—See Hill v. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Iowa.—Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Missouri.—One Hundred and One Live Stock Co. v. Kansas, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782; Rice v. Kansas Pac. Railway, 63 Mo. 314.

New Hampshire.—Merrill v. American Exp. Co., 62 N. H. 514; Patrick v. Farmer's Ins. Co., 43 N. H. 621, 80 Am. Dec. 197.

1. Failure to require compliance.—A stipulation in an express receipt that the company shall not be liable for loss or damage unless the claim therefor shall be presented in writing within ninety days after date of the receipt, is waived by the company's failure to exact compliance therewith when the demand is made. Bennett v. Northern Pac. Exp. Co., 12 Ore. 49, 6 Pac. 160.

2. Conrad Schopp Fruit Co. v. Pittsburgh, etc., R. Co., 43 Pa. Super. Ct. 481.

3. Post v. Atlantic, etc., R. Co., 138 Ga. 763, 76 S. E. 45.

4. Unverified claim.—Wabash R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273.

claim without objection to the want of verification;⁵ by promising to give prompt attention as soon as certain discrepancies were explained,⁶ or by promising to look up and adjust a claim made in an unverified letter handed by the shipper to the freight agent who received the same without objection thereto for want of verification.⁷

§§ 1460-1465. Notice Received after Expiration of Time Limit—
§ 1460. In General.—A provision of a bill of lading requiring any claim for loss or damage to be made in writing within a specified number of days after delivery was waived where no objection was raised on that ground to a claim filed after that time.⁸

§ 1461. Returning Notice to Claimant for Correction.—Claim Returned to Have Freight Bill Attached.—The bill of lading provided that no claim for damages to the stock shipped should be made unless filed within five days. The claim in question was filed one day late, but was returned to plaintiff to have the freight bill attached, which was done, and then the carrier declined to settle on the ground that the claim was filed too late. It was held that such provision as to time was waived.⁹

§ 1462. Refusal to Pay on Other Grounds than Failure to Notify in Time.—Where a bill of lading contains a provision that claims for loss or damage must be made in writing within thirty days, this provision is waived where the railroad company deliberated on a claim made after the expiration of the thirty days, and placed its refusal to pay the claim on the merits.¹⁰

§ 1463. Request for Information and Promise to Adjust Claim.—A letter from the carrier's agent, after exemption from liability has attached, requesting "the affidavit of the packer of the case, also invoice showing the original cost of the articles," and stating that promptly upon the receipt of these documents the matter will receive attention, did not constitute a waiver of the carrier's exemption from liability, nor estop it from relying on its exemption as a defense.¹¹

§ 1464. Attempt to Trace or Find Shipment.—An attempt by a carrier to find a lost shipment after its exemption from liability has attached and be-

5. Correspondence—Failure to object.—A clause in the contract of affreightment that a claim for damages to the cattle shipped shall not be valid, unless in writing, sworn to, and delivered to the carrier's agent within ten days after knowledge of the injury, can not be taken advantage of by the carrier, where the agent was written to in regard to the claim, and the shipper received several letters in reply, in none of which was any question made of the claim not being sworn to. *Illinois Cent. R. Co. v. Bogard*, 78 Miss. 11, 27 So. 879, 18 Am. & Eng. R. Cas., N. S., 410.

6. Promise to give prompt attention as soon as discrepancies were explained.—Evidence that a carrier received an unverified claim for damages from a shipper of stock, with a promise to give the matter prompt attention as soon as certain discrepancies were explained, and without any other objection than as to the amount of the claim, warrants the finding of a waiver of the requirement of its bill of lading that, in order to maintain a claim for damages to stock, a veri-

fied statement thereof must be served within five days after the removal of the animals from the cars. So held in *Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853.

7. Unverified letter received without objection by freight agent—Promise to look up and adjust.—*Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202.

8. Notice received after expiration of time limit.—*Merchants', etc., Transp. Co. v. Eichberg*, 109 Md. 211, 71 Atl. 993.

Promise to settle claim on merits.—*Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

9. Claim returned to have freight bill attached.—*Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750.

10. Refusal to pay on other ground than failure to notify in time.—Judgment 98 N. Y. S. 609, 112 App. Div. 612, affirmed. *Isham v. Erie R. Co.*, 191 N. Y. 547, 85 N. E. 1111.

11. Request for information and promise to adjust claim.—*Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30.

come a vested right by reason of the failure of the shipper to present a claim therefor within the time and at the place stipulated for in the bill of lading, does not constitute a waiver of its right to claim such exemption, if the goods should not be located.¹²

§ 1465. Attempt to Lessen Shipper's Loss.—That after a carrier had lost a package of notes, and the shipper had failed to present claim therefor within the time prescribed by the rule of the company, the carrier's agent attempted to lessen the shipper's damage by collections on the lost notes, and did so materially, did not amount to a waiver of the provision by the carrier.¹³

§ 1466. Proof of Waiver.—Waiver of the Notice.—Where a contract between a carrier and shipper requires the shipper to give notice of any claim for damages within a specified time, etc., a waiver may be shown by circumstances inconsistent with the carrier's right to insist upon such condition.¹⁴

Admissibility and Competency.—In an action against a carrier for damages to freight, evidence to show waiver of plaintiff's failure to make claim for damages within thirty days after delivery of the goods, as provided in the bill of lading, was competent.¹⁵

Sufficiency of Evidence.—In order to establish a waiver on the part of the defendant it is necessary for the plaintiff to submit proof tending to show that defendant or one of its agents did something calculated to induce him to believe that it would not insist upon the stipulation of the contract requiring written notice.¹⁶

Sufficiency of Letters Referring to Second Claim.—In an action for damage to goods, as to which plaintiff filed two claims for different amounts, and claimed that a stipulation of the bill of lading requiring notice of damages within thirty days after delivery was waived, letters written plaintiff by defendant's claim agent stating that the claim would be disposed of, etc., referring to

12. Attempt to trace or find shipment.—*Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30; *Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838; *Old Dominion Steamship Co. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

The act of a carrier in sending at the request of the consignee tracers for a lost shipment after the time fixed in the bill of lading for service of notice on it of a claim for loss essential to hold the carrier liable does not amount to a waiver of its right to rely on its exemption if the goods are not located; there being nothing to indicate that the carrier did not intend to insist on its contract rights nor anything to show that the consignee was prejudiced. *Old Dominion Steamship Co. v. C. F. Flanary & Co.*, 69 S. E. 1107, 111 Va. 816.

13. Attempt to lessen shipper's loss.—*Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838.

14. Waiver of the notice.—*Missouri Pac. R. Co. v. Scott*, 2 Texas App. Civ. Cas., § 324.

15. Admissibility and competency.—*Banks v. Pennsylvania R. Co.*, 111 Minn. 48, 126 N. W. 410.

16. Gamble-Robinson Comm. Co. v. Northern Pac. R. Co., 137 N. W. 19, 119 Minn. 40.

Plaintiff's horses were damaged in

transit, but plaintiff failed to comply with the stipulation in the bill of lading requiring him to give written notice of his claim for damages within 91 days. The agent of one of the connecting carriers prepared a written notice of his claim for damages, which was forwarded to the headquarters of the company, but there was no evidence that such agent was the agent of defendant company. Plaintiff went to one of defendant's agents on other business and incidentally stated to him that all of the horses were damaged, to which the agent replied that he had received notice from the company to that effect, but this statement did not induce plaintiff to forego the presentation of written notice as required. Held, that such facts were insufficient to establish a waiver of such notice by defendant. *International, etc., Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189.

Instead of showing that the statement of defendant's agent to the effect that he had received information from the company that the plaintiff's horses were damaged, influenced him in the course thereafter pursued, he assigned other and different reasons by which he was influenced. Hence, the court held that the proof of waiver was insufficient. *International, etc., R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189.

the second claim filed, are evidence of a waiver of the stipulation as to that claim.¹⁷

§§ 1467-1469. Pleading and Proof of Breach—§ 1467. Burden.—The general rule is that compliance with a stipulation in a shipping contract to the effect that the carrier shall not be liable for loss or damage unless the claim therefor was made in writing within a stipulated time from the accruing of the cause of action, need not be alleged and proved by the plaintiff. Such a stipulation is not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but is in the nature of a limitation and can only be availed of as matter of defense upon trial.¹⁸ Hence in an action against a carrier for injury to freight, the burden of showing a breach of stipulation to give notice of claim for damages in a fixed time is on the carrier,¹⁹ which must allege in its plea or answer a state of facts showing that the shipper failed to give the required notice,²⁰ and that he had an opportunity to do so.²¹

17. Waiver—Letter referring to second carrier.—*Kelly v. Southern Railway Co.*, 84 S. C. 249, 66 S. E. 198.

18. New York.—*Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

United States.—*The Westminster*, 116 Fed. 123.

Missouri.—The bill of lading merely required, that claims for damages must be reported within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. It was held that when a carrier invokes such a limitation of its liability it must show that both the spirit and the letter of the requirement was violated. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas., N. S., 30.

New York.—*Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

In an action by a shipper against a carrier for injury to goods during transit, plaintiff, as a condition precedent to his right to recover, need not establish his compliance with a stipulation in the bill of lading that claims for loss or damage must be made in writing within thirty days after delivery; but, since his right to recover existed at common law, a limitation of the carrier's liability embraced in the bill of lading can only be availed of as matters of defense. Judgment, 100 N. Y. S. 190, 1121, affirmed. *Hoye v. Pennsylvania R. Co.*, 83 N. E. 586, 191 N. Y. 101, 17 L. R. A., N. S., 641, 14 Am. & Eng. Ann. Cas. 414.

South Carolina.—*Kelly v. Southern Railway*, 66 S. E. 198, 84 S. C. 249.

Texas.—*St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

Claim against ship—Notice before removal of goods.—*The Westminster*, 116 Fed. 123.

19. St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476; *St. Louis, etc., R. Co. v. Boshear* (Tex. Civ. App.), 108 S. W. 1032; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

The act of March 4, 1891 (art. 3379, Rev. Stat. 1895), places the burden of proof to show failure to give notice as required by the contract on the defendant. *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 579, 35 S. W. 476.

Live stock shipment.—The burden is on the defendant in an action against a carrier for injury to cattle in shipment to show that notice of the claim as required by the terms of the contract was not given. *Texas, etc., R. Co. v. Crowley* (Tex. Civ. App.), 86 S. W. 342; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 39 S. W. 564, 8 Am. & Eng. R. Cas., N. S., 429, affirming 39 S. W. 135. See *Western Union Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279, affirmed in 93 Tex. 697, no op.

So held where the shipper swore that he had put his claim in the hands of A. F. Crowley, and had instructed him to give notice of it. It was not shown that he did not give the notice. *Texas, etc., R. Co. v. Crowley* (Tex. Civ. App.), 86 S. W. 342, 343.

20. Pleading failure to give notice.—*St. Louis, etc., R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939.

A carrier sued for delay in transporting perishable freight must plead a stipulation in the bill of lading that claims for damages must be made in writing within thirty days after delivery of the property. *Gibson v. Atlantic, etc., R. Co.*, 70 S. E. 1030, 88 S. C. 360; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

21. Existence of opportunity or facilities to comply with requirement.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *Missouri Pac. R. Co. v. Childers* (Tex. Civ. App.), 29 S. W. 559.

Where a shipping contract stipulates that the shipper must give notice of any claim for damages to some general officers of the railroad, or to its nearest

Exception to Rule.—Some of the authorities hold that the shipper must prove that the notice was given as required by the contract.²²

Defense Can Not Be Raised by Demurrer.—The defense that a contract of shipment requires notice of a claim for damages within a specified time, must set it up in its answer, and, though the contract is made an exhibit can not be raised by demurrer even though the contract is made an exhibit to the complaint; for a demurrer does not reach exhibits attached to pleadings in cases at law.²³

§ 1468. Sufficiency of Plea or Answer.—In an action against a carrier for damages to freight shipped under a contract requiring notice of a loss within a specified time the defendant must specially plead a breach of the condition as an answer by way of general denial, merely waives such condition.²⁴

Verification.—Under the Texas statute, a plea setting up noncompliance with a stipulation for notice of a loss must be verified.²⁵

§ 1469. Sufficiency of Evidence.—Shifting Burden of Proof.—Where the carrier has produced sufficient testimony to justify an inference that no claim was made, it is incumbent on the plaintiff to rebut such inference.²⁶

Proof That Notice Not Given Local Agent.—In a suit for injury to goods transported by rail, based on a contract requiring the shipper to give notice of his claim, the burden of proving absence thereof is not met by defendant showing that such notice was not given to its local agent, where under the contract it might have been given to its general officers.²⁷

station agent, within one day after the delivery of the stock, and before they are removed, etc., the burden is on the carrier to show that it afforded the shipper reasonable facilities to comply with the contract, and where the cattle are delivered in a large city, in which it is doubtful whether the carrier has an officer known as the "station agent," it should also appear that the shipper knew what was meant by the term "general officers," and that they were so accessible that he could have reached them, by the exercise of reasonable diligence, within the time required. *Missouri Pac. R. Co. v. Childers* (Tex. Civ. App.), 29 S. W. 559.

22. Exception of rule.—*Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638, 55 N. E. 1026; *Atchison, etc., R. Co. v. Crittenden*, 4 Kan. App. 512, 44 Pac. 1000; *Osterhoudt v. Southern Pac. Co.*, 47 App. Div. 146, 62 N. Y. S. 134.

23. Can not be raised by demurrer.—*St. Louis, etc., R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939.

24. Where a carrier is sued for damages occasioned by the freezing of apples in transportation, due to the failure of the carrier promptly to transport them, and answers by way of general denial merely, it thereby waives a condition that if a claim for damages be not presented within thirty days after delivery there shall be no liability therefor. *Richardson v. New York, etc., R. Co.*, 106 N. Y. S. 702, 122 App. Div. 120.

In such a case the carrier's motion for a nonsuit, because of plaintiff's failure to prove a cause of action and defendant's negligence and plaintiff's freedom from

contributory negligence, deprived it of the benefit of a condition that if a claim for damages be not presented within thirty days after delivery there shall be no liability therefor. *Richardson v. New York, etc., R. Co.*, 106 N. Y. S. 702, 122 App. Div. 120.

25. Under Texas Rev. St., 1895, art. 3379, providing that it shall be presumed that notice of a claim for damages has been given in accordance with a stipulation of a contract requiring such notice, unless the want of notice shall be pleaded under oath, a plea setting up a stipulation in a contract requiring the giving of notice, and alleging plaintiff's failure to comply therewith, raises no issue, unless it is sworn to. *St. Louis, etc., R. Co. v. Honea* (Tex. Civ. App.), 84 S. W. 267. See, also, *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258, affirmed in 93 Tex. 697, no op.

Where a plea set up plaintiff's failure to comply with the provisions of a contract requiring notice of damages to be given was not sworn to as required by Rev. Stat. 1895, art. 3379, the erroneous sustaining of a demurrer to such plea, based on the ground that the stipulation of the contract was unreasonable, as a matter of law, was harmless. *St. Louis, etc., R. Co. v. Honea* (Tex. Civ. App.), 84 S. W. 267.

26. The Westminster, 116 Fed. 123.

27. Proof that notice not given local agent.—*St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834.

§ 1470. Instructions.—Failure to instruct as to stipulation in bill of lading for presentation of claim for loss is not ground for reversal where the railroad had full knowledge of the loss within a few minutes after it occurred, and denied liability on other grounds than the lack of demand.²⁸

§ 1471. Contracts for Benefit of Insurance.—See ante, "Contracts for Benefit of Insurance," §§ 1024, 1029.

§ 1472. Limiting Liability to That of Forwarder or Warehouseman.—See post, "Limitation of Liability," chapter 32.

§§ 1473-1497. Stipulations Limiting Time within Which Suit Must Be Brought—§§ 1473-1479. Power and Validity—§ 1473. In General.—A stipulation in a shipping contract that suit for loss or injury to goods shipped under such contract must be brought within a fixed time, shorter than that allowed by statute, is valid, and will be enforced when it is reasonable, and there is no constitutional or statutory provision by which such a stipulation is prohibited,²⁹ whether the contract of shipment be considered as interstate or one to be wholly performed within the state.³⁰

Public Policy.—A shorter period than the statutory period for the institution of suits, by agreement of the parties in their contract, violates no principle of public policy, provided the period fixed be not so unreasonable as to raise a

28. Instructions.—*Watkins Merchandise Co. v. Missouri, etc., R. Co.*, 82 Kan. 308, 109 Pac. 116.

29. Power and validity.—*United States*.—*Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 59 Fed. 879; *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. 280, Fed. Cas. No. 3,375; *Ginn v. Ogdensburg Transit Co.*, 29 C. C. A. 521, 85 Fed. 985; *Ridlesbarger v. Hartford Ins. Co. (U. S.)*, 7 Wall. 386, 19 L. Ed. 257.

Georgia.—*Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

Missouri.—*Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321.

New Hampshire.—*Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197.

New York.—*Ames v. New York Union Ins. Co.*, 14 N. Y. 253; *North British, etc., Ins. Co. v. Central Vermont R. Co.*, 40 N. Y. S. 1113, 9 App. Div. 4, 75 N. Y. St. Rep. 427; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362.

Ohio.—*Portage County Mut. Fire Ins. Co. v. West*, 6 O. St. 599.

Pennsylvania.—*Northwestern Ins. Co. v. Phoenix, etc., Co.*, 31 Pa. 448.

Texas.—A railroad company could contract with a shipper fixing a reasonably shorter time than that allowed by statute, within which suit may be brought in case of damages. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 318, 4 S. W. 567, 2 Am. St. Rep. 494,

30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.)*, 23 S. W. 298; *Texas, etc., R. Co. v. Hawkins (Tex. Civ. App.)*, 30 S. W. 1113; *Gulf, etc., R. Co. v. White (Tex. Civ. App.)*, 32 S. W. 322; *Merchants' Mut. Ins. Co. v. Lacroix*, 35 Tex. 249, 14 Am. Rep. 370; *Texas, etc., R. Co. v. Alexander (Tex. Civ. App.)*, 30 S. W. 1113.

Vermont.—*Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Williams v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 222.

Wisconsin.—*Boorman v. American Exp. Co.*, 21 Wis. 153.

England.—*Lewis v. Great Western R. Co. (Eng.)*, 5 Hurlst. & N. 867.

30. Interstate or domestic shipments.—The cattle were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that the provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353.

presumption of imposition or undue advantage.³¹ Aliter in Kentucky.³²

§§ 1474-1479. Under State Statutes—§ 1474. Statutes Prohibiting Limitation of Common-Law Liability.—The fact that a statute prohibits a carrier from limiting its common-law liability by contract does not render a stipulation in a contract of shipment that suit for loss or injury to goods shipped must be brought within a time less than the statutory period invalid;³³ for a contract which does not in any way, if given effect, defeat the complete vestiture of the right to recover from a common carrier for a breach of duty that at common law would give it, does not operate as a restriction on the common-law liability of the carrier, even though it may require the assertion of that right, by action, at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation.³⁴

§§ 1475-1478. Statute Prohibiting Limitation of Time of Bringing Suit—§ 1475. In General.—Where the statute of a state declares any provision of a contract of shipment which limits the time in which an action for injury to freight may be brought to be void, such limit, if less than the time fixed by statute, is void.³⁵

Constitutionality.—A statute declaring all parts of a contract void that purport to limit the time in which any suit thereon may be brought is not unconstitutional.³⁶

§ 1476. Montana.—See post, "Conflict of Laws," § 1479.

§ 1477. Oklahoma.—The statutes of Oklahoma prior to statehood did not forbid the making of a contract prescribing a limitation upon the bringing of suit to enforce a liability incurred by a carrier,³⁷ but such a clause in a contract for shipment of live stock limiting the time for action for damages is invalid under Comp. Laws 1909, § 1128.³⁸

§ 1478. Texas.—The Texas Act of March 4, 1891, forbids the making of any contract limiting the time in which suit may be brought to less than two years.³⁹ This statute has been held to invalidate a clause in a contract of car-

31. Public policy.—*United States*.—Ginn v. Ogdensburg Transit Co., 29 C. C. A. 521, 85 Fed. 985.

Arkansas.—Hafer v. St. Louis, etc., R. Co., 101 Ark. 310, 142 S. W. 176, Ann. Cas. 1913E, 866.

Georgia.—Brown v. Savannah Mut. Ins. Co., 24 Ga. 97.

Missouri.—Thompson v. Chicago, etc., R. Co., 22 Mo. App. 321.

32. A stipulation in a shipping contract that no suit for damage to the freight shall be brought, unless commenced within six months after the loss, is in effect an attempt to vary the statute of limitations, and void as against public policy. *Adams Exp. Co. v. Walker*, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412. See, also, *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 7 Ky. L. Rep. 22, 4 Am. St. Rep. 126; *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 21 Ky. L. Rep. 1251, 92 Am. St. Rep. 371; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 36 L. R. A. 711, 66 Am. St. Rep. 361.

33. Statutes prohibiting limitation of common-law liability.—*Gulf, etc., R. Co.*

v. Trawick, 68 Tex. 314, 30 Am. & Eng. R. Cas. 49, 4 S. W. 567, 49 Am. & Eng. R. Cas. 171, 2 Am. St. Rep. 494.

Not within Act III, 1874 (Rev. St. 1874, c. 27), § 1.—*Ingram v. Weir*, 166 Fed. 328.

Not within Texas Rev. Stat., art. 278.

—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171.

34. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171.

35. Statute prohibiting limitation of time bringing suit.—*Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas., N. S., 170.

36. Constitutionality.—*Karnes v. American Fire Ins. Co.*, 144 Mo. 413, 46 S. W. 166.

37. Oklahoma.—*Missouri, etc., R. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220.

38. *St. Louis & S. F. R. Co. v. James*, 36 Okla. 196, 128 Pac. 279.

39. *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Gulf, etc., R. Co. v.*

riage requiring suit to be brought within fourteen days,⁴⁰ forty days,⁴¹ or ninety days,⁴² and within six months,⁴³ after the accrual of the cause of action, but a stipulation in a contract of carriage that suit must be brought within two years is valid.⁴⁴

Not Retroactive.—The Texas statute of March 4, 1891, does not apply to cases arising before its passage.⁴⁵

Interstate Shipments.—The Texas Act of March 4, 1891, invalidating contracts which limit the time in which to sue thereon to less than 2 years, applies to claims for damages for breach of contracts by a carrier for interstate shipments.⁴⁶ Legislation of this character can not be said to in any manner affect interstate commerce. It does not impose any burden upon it. It does not regulate it, nor does it interfere with it.⁴⁷ The only effect it has is to prescribe a time in which the remedy shall be limited. The act is general in effect, and applies alike to all persons, either natural or artificial, that are capable of contracting. It does not single out commerce and undertake to regulate it or to impose restrictions upon it, but the broad purpose of the act is simply to prescribe a period of time in which contracts executed within this state shall not be affected by limitation. It prescribes a period of limitation that simply affects the remedy, and not the merits.⁴⁸

§ 1479. Conflict of Laws.—A stipulation in a contract of carriage limiting the time within which an action may be brought thereon⁴⁹ is one affecting the remedy only, and is controlled by the law of the forum, irrespective of the place of the contract.⁵⁰

Hume, 87 Tex. 211, 27 S. W. 110; Gulf, etc., R. Co. v. Stanley, 89 Tex. 42, 33 S. W. 110, 2 Am. & Eng. R. Cas., N. S., 480.

40. Fourteen days.—St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225, 2 Am. & Eng. R. Cas., N. S., 541.

41. Forty days.—St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225, 2 Am. & Eng. R. Cas., N. S., 541.

42. Ninety days.—Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

43. Southern Kan. R. Co. v. Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

44. Texas & P. Ry. Co. v. Langbehn (Tex. Civ. App.), 150 S. W. 1188.

45. Not retroactive.—Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Gulf, etc., R. Co. v. White (Tex. Civ. App.), 32 S. W. 322.

46. Interstate shipments.—Missouri, etc., R. Co. v. Withers, 40 S. W. 1073, 16 Tex. Civ. App. 506, affirmed in 93 Tex. 691, no op.; Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129, holding the act of March 4, 1891 applicable to an interstate shipment of live stock; St. Louis, etc., R. Co. v. Hambrick (Tex. Civ. App.), 97 S. W. 1072; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Missouri, etc., R. Co. v. Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118.

47. Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001.

48. Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

49. Missouri, etc., R. Co. v. Godair

Comm. Co., 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.

50. Missouri, etc., R. Co. v. Godair Comm. Co., 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.; St. Louis, etc., R. Co. v. Bryce, 49 Tex. Civ. App. 608, 110 S. W. 529; St. Louis, etc., R. Co. v. Hambrick (Tex. Civ. App.), 97 S. W. 1072. See, also, Chicago, etc., R. Co. v. Thompson, 41 Tex. Civ. App. 459, 93 S. W. 702; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Southern Kan. R. Co. v. Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

Texas Rev. St. 1895, art. 3378, makes unlawful any agreement by reason whereof the time within which to sue thereon is limited to a shorter period than two years. Held that, though a contract for the shipment of cattle was executed in Arkansas and no part of the contract was to be performed in Texas, a stipulation of the contract, providing that no suit should be sustainable thereon, unless commenced within six months after the accrual of the cause of action, was unenforceable in Texas, though valid under the law of Arkansas. St. Louis, etc., R. Co. v. Hambrick (Tex. Civ. App.), 97 S. W. 1072.

Suit for damages for breach of freight contract made subsequent to the act of March 4, 1891, prohibiting contractual limitations for less time than the statute prescribes. The contract was made in Missouri, and required the shipment into Texas, and contained stipulations limiting the time within which suit might

Suit in Federal Court.—Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from delay, which suit defendant removed to the federal Circuit Court sitting in Montana, such court could not enforce a stipulation in the transportation contract providing a sixty-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont., § 2245, though it was not prohibited by the laws of Minnesota, where the contract was made.⁵¹

§§ 1480-1483. Form and Requisites—§ 1480. Reasonableness.—A stipulation in a contract of carriage limiting the time within which an action for loss or injury to the shipment must be brought must be reasonable with respect to the time allowed and such a provision will be enforced if, under the circumstances of the shipment, it is reasonable.⁵² The courts have denied the authority of the carrier to impose upon the shipper a contract limiting the time in which to sue, if from the facts of the case it appeared that the stipulation as to the time was unreasonable.⁵³

Interstate Shipments.—Stipulations in contracts of interstate shipments limiting the time in which to sue have been permitted only when they were reasonable.⁵⁴

Burden, Pleading and Proof of Reasonableness.—The burden rests on

be brought. Defense insisted that the contract was an interstate shipment. The law of Missouri, however, was not pleaded or proven. Held, the court not judicially knowing the laws of Missouri, the law of the forum will apply, and the contract limitation has no legal effect. *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

Act of negligence occurring in state of forum.—Where acts of negligence charged against a carrier occur after the goods have reached their destination in this state, and suit is brought here, a stipulation in the contract of carriage requiring suit to be brought within six months after the accrual of the cause of action must be tested by the laws of this state, although the contract was made in another state. *Southern Kan. R. Co. v. Burgess Co.* (Tex. Civ. App.), 90 S. W. 189.

51. Suit in federal court.—*Northern Pac. R. Co. v. Kempton*, 71 C. C. A. 246, 18 R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542, 138 Fed. 992.

52. Reasonableness.—*Lasky v. Southern Exp. Co.*, 92 Miss. 268, 45 So. 869; *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220; *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Capps v. Leachman*, 90 Tex. 499, 39 S. W. 917, 59 Am. St. Rep. 830; *Missouri, etc., R. Co. v.*

Godair Comm. Co., 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 35 S. W. 164.

Such stipulations are valid and binding, if from the contract itself or facts of the particular case they are reasonable. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

Suit for injuries to live stock.—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 318, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171.

53. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 124, 26 S. W. 161; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 168, 2 S. W. 574; *Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

54. Interstate shipments.—*Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 124, 26 S. W. 161, citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 168, 2 S. W. 574; *Pacific Exp. Co. v. Darnell* (Tex.), 6 S. W. 765, and *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

the carrier to show by proper pleading⁵⁵ and proof⁵⁶ that a stipulation as to the time of suit on a shipping contract is reasonable. Hence the carrier must allege in its answer the facts showing such stipulation to be reasonable.⁵⁷ But where such provision is *prima facie* reasonable, the plaintiff must show that he could not by the exercise of reasonable diligence have brought his action within such period.⁵⁸

Question for Jury.—Whether a provision in a shipping contract or receipt limiting the time in which suit shall be brought is reasonable under the circumstances of the shipment, is a question of fact for the jury.⁵⁹

Jurisdiction of State Court of Interstate Shipment.—State courts have power to determine and adjudicate question whether time limited in carrier's contracts, within which to sue is reasonable or unreasonable, and exercise of such jurisdiction does not regulate or interfere with interstate commerce.⁶⁰

Particular Limitation Considered.—A contract of carriage with a railroad company stipulating that no action against the company shall be maintained unless the same be commenced within forty days,⁶¹ sixty days,⁶² ninety

55. Burden, pleading, and proof of reasonableness.—*Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 39 S. W. 564, 8 Am. & Eng. R. Cas., N. S., 429.

To avail itself of stipulation in a bill of lading, limiting commencement of action for breach of carrier's contract, the latter must plead facts showing reasonableness of stipulation. *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 39 S. W. 564, 8 Am. & Eng. R. Cas., N. S., 429.

56. Burden of proof of reasonableness.—In an action against a carrier for damages to a shipment, the burden is on the carrier to show that a stipulation in the contract of shipment limiting the time within which an action may be brought thereon is reasonable. *Missouri, etc., R. Co. v. Godair Comm. Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871; *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 39 S. W. 564, 8 Am. & Eng. R. Cas., N. S., 429; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574.

57. Sufficiency of answer.—*Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 8 Am. & Eng. R. Cas., N. S., 429, 39 S. W. 564; *Capps v. Leachman*, 90 Tex. 499, 39 S. W. 917, 59 Am. St. Rep. 830, affirming 39 S. W. 135. See, also, *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 241, 32 S. W. 163; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

Interstate shipment.—A common carrier relying on a stipulation in a contract for an interstate shipment limiting time for suit must allege in its answer facts showing the contract to be reason-

able. *Capps v. Leachman*, 90 Tex. 499, 39 S. W. 917, 59 Am. St. Rep. 830, affirming 39 S. W. 135.

58. Forty days after right of action accrues.—A stipulation in a contract of affreightment that, as a condition precedent to a right to recover against the carrier, suit for damages for loss of or injury to freight must be filed within forty days after the right of action accrues, is valid, and a failure to comply with such conditions will prevent a recovery, unless the plaintiff shows that he could not by the exercise of reasonable diligence have brought his action within such period. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 45 Am. & Eng. R. Cas. 353, 10 L. R. A. 419; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171, 2 Am. St. Rep. 494; *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

59. Question for jury.—*Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321; *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Texas, etc., R. Co. v. Hawkins* (Tex. Civ. App.), 30 S. W. 1113.

60. Jurisdiction of state court of interstate shipment.—*Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 125, 26 S. W. 161.

61. Forty days held a reasonable time.—*Texas.*—*McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 18 S. W.

62. *Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321.

days,⁶³ three months,⁶⁴ six months,⁶⁵ or one year,⁶⁶ next after the cause of action accrues or the damage occurs is reasonable and valid. But a stipulation in a contract of carriage of cattle that suit be brought within forty days for damage to them is unreasonable.⁶⁷

§ 1481. Assent of Shipper.—What Constitutes.—Where an express receipt recited that the carrier agreed to carry the articles on the following terms and conditions, to which the shipper agreed, and as evidence thereof accepted the bill of lading, such acceptance constituted the shipper's assent to a clause that the carrier should not be liable for loss or damage to the goods, unless suit was commenced within a year thereafter.⁶⁸

§ 1482. Consideration.—Reduced Rate.—A reduced rate is a sufficient consideration to support a stipulation limiting the time for bringing suit for loss or damage to freight to a fixed time from the date of delivery to the carrier.⁶⁹

§ 1483. Stipulations on Back of Contract.—Stipulations made on the back of shipping contracts limiting the time for bringing actions for losses can be upheld only on the ground that they are reasonable regulations, rather than contracts in the true sense.⁷⁰

§§ 1484-1496. Operation and Effect—§ 1484. As Limiting Common-Law Liability of Carrier.—A contract of shipment of live stock, by its stipulation that any action against the carrier for recovery of any claim by virtue of the

948, 15 S. W. 568; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Galveston, etc., R. Co. v. Sillegman* (Tex. Civ. App.), 23 S. W. 298.

63. A provision in a carrier's cattle contract that any suit for loss or damage to the cattle shall be brought within ninety days after the same occurred, and not afterwards, is reasonable and valid. *Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A., N. S., 412.

A stipulation in a contract for the shipment of cattle that no suit against the carrier shall be brought after ninety days from the happening of the injury to the cattle complained of is valid. *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220.

64. **Three months after damage occurs.**—A condition in a bill of lading exempting the carrier from liability for loss or damage, unless "the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs," is not forbidden by any rule of law, nor by public policy, and will be presumed to have had the full assent of both parties, and be regarded as reasonable, unless the contrary is established by evidence.

United States.—*Ginn v. Ogdensburg Transit Co.*, 29 C. C. A. 521, 85 Fed. 985; *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 59 Fed. 879.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

New York.—*North British, etc., Co. v.*

Central Vermont R. Co., 40 N. Y. S. 1113, 9 App. Div. 4, 75 N. Y. St. Rep. 427.

65. **Six months.**—A contract of carriage with a railroad company stipulating that no action against the company shall be maintained unless the same be commenced within six months next after the cause of action accrues is reasonable and valid. *St. Louis, etc., R. Co. v. Pearce*, 82 Ark. 339, 101 S. W. 763.

The stipulation, in a contract of shipment of live stock, that any action against the carrier for recovery of any claim by virtue of the contract must be brought within six months after the cause of action accrues, is not unreasonable or against public policy. *Hafer v. St. Louis, etc., R. Co.*, 101 Ark. 310, 142 S. W. 176, Ann. Cas. 1913E, 866; *Atchison, etc., R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449.

66. **One year.**—A provision of a bill of lading that the carrier should not be liable in any suit to recover for loss or damage to the property, unless suit was brought within one year, was reasonable. *Ingram v. Weir*, 166 Fed. 328.

67. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480.

68. **What constitutes.**—*Ingram v. Weir*, 166 Fed. 328.

69. **Reduced rate.**—*St. Louis, etc., R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161; *Texas, etc., R. Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 567.

70. **Stipulation on back of contract.**—*Lasky v. Southern Exp. Co.*, 92 Miss. 268, 45 So. 869.

contract must be brought within six months after the cause of action accrues, does not abridge, modify, limit, or abrogate any common-law duties or liabilities of the carrier, in violation of Acts 1907, p. 557, but simply affects the remedy for enforcement of any right.⁷¹

§§ 1485-1490. As Bar to Action Brought after Expiration of Time—
§ 1485. General Rule.—A stipulation in a contract of shipment that an action for loss or damage to the freight shipped must be brought within a reasonably shorter time than that allowed by the statute of limitation after the loss or damage occurs, operates as a bar to an action brought after the expiration of that time from the happening of the loss or damage, unless the plaintiff shows some reasonable excuse for the delay.⁷²

§ 1486. When Cause of Action Accrues.—Nondelivery of Freight.—A cause of action for nondelivery of freight accrued on the expiration of a reasonable time for delivery, though extraordinary conditions, not known to the shipper, prevented delivery within that time; and an action, not brought within two years, as provided by the contract of shipment, was barred.⁷³

Where Notice of Loss Required.—Where a contract of carriage provides that suit shall be brought upon it only within six months after a cause of action shall accrue, and the giving of notice within a fixed time shall be a condition precedent, the six months do not begin to run until notice is given.⁷⁴

§ 1487. Necessity for Knowledge of Loss.—Absence of Knowledge of Damage Not Due to Extraordinary Circumstances.—A condition in a bill of lading, appearing to be in common use, with general acquiescence, and agreed to by the shipper without protest, requiring an action for loss or damage to be

71. As limiting common-law liability of carrier.—*Hafer v. St. Louis, etc., R. Co.*, 101 Ark. 310, 142 S. W. 176, Ann. Cas. 1913E, 866.

72. General rule.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97. *Missouri*.—*Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321.

Texas.—*McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353; *Gulf, etc. R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; *S. C.*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

A stipulation that no suit shall be maintainable to recover for injuries to cattle shipped unless brought within forty days, not shown to be unreasonable nor waived, constituted an effectual bar to a suit not brought in conformity thereto. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

Instances.—*Arkansas*.—Where a cattle transportation contract provided that no suit should be maintained thereon after six months from the date the cause of action accrued, an action not begun until May 17, 1904, for injuries to the cattle in September, 1903, was barred. *St. Louis, etc., R. Co. v. Butler*, 82 Ark. 469, 102 S. W. 378.

Plaintiffs' contract of carriage with defendant railroad for the transportation of stock stipulated that no action against de-

fendant should be maintained unless commenced within six months after the cause of action accrued. Defendant's agent wrote plaintiffs within the period of limitation, requesting them to wait a few days until plaintiffs' claim for damages of shipment of stock could be investigated, but thereafter, and before the expiration of such period of limitation, notified plaintiffs that liability was denied. The evidence showed that plaintiffs' action to recover for damages was not commenced until nearly six months after the notice was given by defendant. Held, that plaintiffs could not recover. *St. Louis, etc., R. Co. v. Pearce*, 82 Ark. 339, 101 S. W. 763.

Delay in delivery of live stock shipments.—In a contract for the transportation of cattle, a common carrier may provide that suit on any claim thereunder must be brought within forty days after the damage occurred, and such a provision will bar an action for delay commenced seventy-seven days after the delivery of the cattle, the carrier having notified the plaintiff twenty-five days after the delivery that his claim would not be paid. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353.

73. Nondelivery of freight.—*Texas, etc., R. Co. v. Langbehn* (Tex. Civ. App.), 150 S. W. 1188.

74. Notice of loss required.—*Chicago, etc., R. Co. v. James*, 81 Kan. 180, 105 Pac. 40.

brought within a specified time after it occurs, can not be controlled by want of knowledge of the loss or damage, where such want of knowledge is not due to extraordinary circumstances.⁷⁵

§ 1488. Time Consumed in Correspondence.—The time consumed by correspondence in regard to the claim does not relieve the shipper of his obligation to bring suit within the specified time. Twelve days remaining, after he discovered he could not settle, is a reasonable time in which to begin suit, and having failed to do so he is barred from recovery by the term of such provision.⁷⁶

§ 1489. What Constitutes Commencement of Action.—The filing of a petition, with instructions to the clerk to issue citation thereon, is the commencement of the action, within the meaning of a contract which provides that, unless suit or action shall be commenced within a stipulated number of days after the damage occurs, no suit shall be maintained by virtue of such contract.⁷⁷ And where an amended petition which does not set up a new cause of action is filed after the expiration of the time fixed by the limitation clause, the suit will be treated as having been commenced at the time the original petition was filed.⁷⁸

§ 1490. Removal of Bar.—Where the time fixed in a contract of carriage with which an action for loss or injury to the shipment must be brought has expired without action being brought, so that action is barred, such bar to an action can be removed by nothing less than an absolute promise, in writing, to pay.⁷⁹

§ 1491. Losses or Injuries to Which Applicable.—Live Stock Shipment.—Where a live stock shipping contract provides that no claim for damages can be enforced unless suit is brought within six months after the injury, relates only to such injuries as occur while the stock is in transit,⁸⁰ or after shipment.⁸¹

Escape of Stock from Pens or Yards Prior to Shipment.—A stipulation limiting the time within which suit must be brought does not apply to an action for the loss of stock escaping from defective cattle pens or yards while awaiting shipment.⁸²

Prior Verbal Contract to Furnish Cars.—Under a stipulation in a bill of lading that no action for breach thereof should be sustainable, unless brought within a given number of days after the right of action has accrued, a delay for a longer period will not bar an action for breach of a prior verbal contract to

75. Absence of knowledge of damage not due to extraordinary circumstances.—*Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 59 Fed. 879.

76. *Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321.

77. What constitutes commencement of action.—*Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 27 S. W. 302.

78. The contract of shipment stipulated that in case of loss in order to make appellant liable therefor, suit should be instituted within forty days after such loss occurred. Within forty days after the damage occurred plaintiff's petition was filed, and the clerk was instructed to issue the citation. More than forty days after the damage occurred citation was issued, and plaintiff filed an amended petition setting up a copartnership between the defendant and its connecting

lines, which had not been alleged in the original petition. Held, the amendment did not set up a new cause of action, but only amplified the grounds upon which plaintiff was liable; and the suit is treated as having been commenced at the time the original petition was filed. *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 27 S. W. 302.

79 Removal of bar.—*Gulf, etc., R. Co. v. White* (Tex. Civ. App.), 32 S. W. 322.

80. Live stock shipment.—*St. Louis, etc., R. Co. v. Beets*, 75 Kan. 295, 89 Pac. 683, 10 L. R. A., N. S., 571.

81. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 275, 18 S. W. 948, 15 S. W. 568.

82. Escape of stock from pens prior to shipment.—*St. Louis, etc., R. Co. v. Beets*, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. 571; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 18 S. W. 948, 15 S. W. 568.

furnish cars for the shipment of stock at a certain place on a certain day.⁸³

Penal Action for Failure to Feed and Water Cattle.—A statutory penal action against a carrier for failure to sufficiently feed and water live stock in transit is not limited by a clause in the contract of shipment barring claims thereon unless sued within a stipulated number of days after damage done.⁸⁴

Loss by Delay in Delivery.—See ante, "As Bar to Action Brought after Expiration of Time," §§ 1485-1490.

§§ 1492-1496. Waiver or Estoppel to Rely upon Stipulation—§ 1492.

Authority of Agent.—A carrier's agent may not waive a limitation requiring suit for loss or injury to a shipment to be brought within a stipulated number of days unless such waiver is within the scope of his authority either actual or implied.⁸⁵ Thus the station agent at the destination of a shipment who is not shown to have any authority to adjust claim for damages, and did not represent that he had it, is without power to waive a contract requirement that suit be brought within a fixed number of days, and providing that no agent should have any authority to modify the contract, by advising the shipper not to sue, that the company always preferred to settle that class of claims.⁸⁶

Authority of Agent of Connecting Carrier.—Where a shipment contract stipulated that suit for loss or injury should be brought in a specified number of days after the injury occurred, an agent of a connecting carrier could not waive such provision in contract without express authority of initial carrier;⁸⁷ such agent, solely by virtue of that position, has no authority to waive a provision of the contract between the initial carrier and the shipper in regard to the time of bringing suit.⁸⁸

Proof of Authority.—Where a shipment contract stipulated that a suit for injury should be brought in a specified number of days, and plaintiff sued after such time claiming limitation was waived by defendant's agent, the burden was on him to show that the agent in making waiver acted within the scope of his authority,⁸⁹ that such waiver was within the scope of his authority must be shown by evidence or circumstances must be shown from which an inference

83. Breach of prior verbal contract to furnish cars.—*McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 611, 18 S. W. 716.

84. Penal action for failure to feed and water cattle.—*Gulf, etc., R. Co. v. Gray* (Tex. Civ. App.), 24 S. W. 837.

The liability for the penalty does not arise under the contract, and is not damages resulting from its breach. The trial court should submit the issue of penalty under the statute, independently of the limitation clause. That clause does not refer to, or by its terms include, the penalty. It will not be construed more favorably for the carrier than the shipper, but the reverse. Its terms do not, nor was it intended to, bar the penalty by delay in bringing suit beyond the time fixed in the limitation clause. The penalty being a separate right, independent of the contract, the later should not be construed to include it. *Gulf, etc., R. Co. v. Gray* (Tex. Civ. App.), 24 S. W. 837, 839, reversed in 87 Tex. 312.

85. Authority of agent.—*Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

86. *Missouri, etc., R. Co. v. Davis*, 24

Okla. 677, 104 Pac. 34, 24 L. R. A., N. S., 866.

87. Authority of agent of connecting carrier.—*Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

The agents of a line of railway connected with the line of defendant company, and over which the stock was shipped, are not the agents of defendant, for the purpose of waiving a provision of the shipping contract whereby the shipper was required to bring suit for his damages for loss or injury to the stock within forty days, unless express authority from the company sought to be made liable is shown. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

88. *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355.

89. Proof of authority.—*Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

If act of agent of connecting carrier is relied upon as waiver of provision of contract between initial carrier and shipper, his authority to so act for other carrier must be shown. *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 548, 24 S. W. 355.

would arise that his acts and statements were within the scope of his authority.⁹⁰ Evidence that it was the duty of the agents of the connecting railway to investigate and settle all claims is inadmissible, unless such duty results from some relation between the companies, if such a relation existed, it should have been proven, and its legal effect left to the court and jury.⁹¹

Agent Denying Authority at Time of Promise.—An allegation of waiver of stipulation requiring suit to be brought within a stipulated number of days from the time the damage occurred is not sustained by evidence to the effect that the only statements that were made to the plaintiff upon the subject were made to him by the local agent of the defendant mentioned in the pleading, and that he gave them only as his own opinion and stated at the time that he had no authority in the matter. The evidence shows that he in fact had none. In such case the defendant may seek a ruling of the court upon the insufficiency of the evidence to support the issue of estoppel, both by a charge requested and upon its motion for a new trial. The charge should have been given and if it was not the motion should be granted.⁹²

Agents Generally Entrusted with Settlement of Similar Claims.—Evidence that the agent was generally entrusted with the settlement of such claims is sufficient to authorize the jury to infer that it was within the scope of his apparent authority to do so. That fact justified the public in acting upon the promises he made as to payment; and the fact that his act was contrary to his instructions, or was without real authority, is immaterial.⁹³

§ 1493. Effect of Fraud or Misrepresentations of Carrier.—Where the failure to sue the carrier for loss or damage to freight within the time prescribed by the shipping contract has been caused by the fraud or misrepresentations of the carrier or its agent, such stipulation does not affect the shipper's right of recovery.⁹⁴

90. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

91. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

One of the persons upon whose promises plaintiff relied in not bringing his suit appears to have been an agent of defendant. The extent of his powers as such is not proven otherwise than by the testimony offered by defendant, which shows that he was never entrusted with and did not exercise authority such as that claimed for him. Whether he had ever adjusted and paid such claims, or had waived such conditions as those in question, is not indicated further than this, nor are any circumstances disclosed from which an inference that his acts and statements by which it is sought to bind the defendant were within the scope of his apparent authority. The evidence fails to show authority to waive the stipulation in question in those whose acts are relied on, and for this the judgment must be reversed. The plaintiff testified, that the two roads "were connecting lines, and that they were acting together at the time of shipment." This is too indefinite to establish a partnership or other relation between them, such as to enable the agents of one to bind the other. How they were acting together, whether simply as connecting lines or otherwise, is not shown. *Gulf,*

etc., R. Co. v. Williams, 4 Tex. Civ. App. 294, 297, 23 S. W. 626.

92. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

93. **Agents generally entrusted with settlement of similar claims.**—*Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 621, 2 S. W. 831. In the case of *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948, there was no such evidence as there is in this case, that the local agent generally settles such claims. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 268, 23 S. W. 332.

Claims for overcharges.—Where an agent of a railroad company is generally intrusted with the settlement of claims for overcharges of freight, a waiver by him of a clause in a bill of lading that suit for overcharges must be brought within forty days is binding on the company, though such waiver was contrary to his instructions. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

94. **Effect of fraud of carrier.**—*Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298; *Galveston, etc., R. Co. v. Kelley* (Tex. Civ. App.), 26 S. W. 470; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171.

§ 1494. What Constitutes Waiver.—Where a shipping contract limits the time within which an action for loss of goods must be brought, there must be prompt action on the part of the carrier in denying its liability, so that the shipper may be duly apprised of the fact that suit will be necessary.⁹⁵

Shipper Induced to Believe Claim Will Be Paid without Suit.—The rule is that if the course of conduct pursued by the carrier is such as to induce the shipper to believe that his claim for damages would be paid without suit, and for this reason suit was not brought within the time prescribed, then the action may be maintained after the expiration of the time.⁹⁶ The principle involved in the rule as to waiver in insurance policies and contracts of carriage is substantially the same.⁹⁷ Promises of settlement delaying suit are a waiver of a stipulation in a contract between shipper and carrier that suit for goods damaged in transit must be brought within a specified time,⁹⁸ as where the carrier's agent, when asked about the claim, requested the shipper to wait and stated that the carrier had written that it would pay the claim,⁹⁹ or where the carrier, by promising to pay plaintiff's claim if made for a reasonable amount, induces him to delay bringing suit.¹

Delay in Handling Claim.—Delay in handling a claim for damages to a shipment, made under a contract limiting the time in which an action must be brought, may operate as a waiver of such stipulation.²

95. What constitutes.—*Lasky v. Southern Exp. Co.*, 92 Miss. 268, 45 So. 869.

96. Shipper induced to believe claim will be paid without suit.—*Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948; *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298, 301; *Galveston, etc., R. Co. v. Kelley* (Tex. Civ. App.), 26 S. W. 470, 471.

If the defendant, by negotiations for settlement or otherwise, so acted as to justify a reasonable belief on the part of the plaintiff that his claim would be settled without suit, and the plaintiff acting on such belief did not institute his suit until after the expiration of a stipulated number of days, the defendant would be estopped from invoking the limitation. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913, 10 L. R. A. 419, 45 Am. & Eng. R. Cas. 353.

Where, by the conduct of an agent of a railroad company, a shipper is induced to believe that his claim for damages to goods will be paid without suit, and for that reason suit is not brought within the time prescribed in the contract of shipment, it may be brought thereafter. *Galveston, etc., R. Co. v. Kelley* (Tex. Civ. App.), 26 S. W. 470.

97. Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

Injuries to cattle.—*Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

98. Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298, 301.

99. Where a shipper, having a claim for damages against a carrier, which by the contract of shipment was required to be sued upon within forty days, presented his claim before the expiration of that time to the carrier's agent, who

forwarded it to the general offices, and afterwards, within the forty days, when asking the agent about the claim, was requested to wait, and told that the carrier had written that it would pay the claim, the court properly refused to charge that the fact that the agent received the claim to be forwarded to the general offices would not be a waiver or estoppel on the part of the carrier, but that the shipper must have been deprived of his right to sue by the willful acts and promises of the carrier. *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

1. Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

In *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 18 S. W. 948, 15 S. W. 568, it appeared that a shipping contract required suit to be brought within forty days from the time damages to freight occurred. Plaintiff, in replication to a plea of this limitation, the suit not having been filed within the stipulated time, alleged that "within three days after the accrual of the cause of action, and on divers days down to and including Oct. 27, 1884, the defendant by and through its agents represented to plaintiff that the defendant would adjust and pay his claim for the cattle killed and injured, and induced him to put in his claim for much less than the real damage, upon a statement made by defendant, through the local agent of defendant at Lampasas, to the effect that defendant would pay said claim without suit if plaintiff would put it in for a reasonable sum," * * * alleging refusal to pay Oct. 27 and suit filed Nov. 11, 1884. It was held that the replication was sufficient.

2. Delay in handling claim.—Shortly after the loss of his mule plaintiff filed

§ 1495. Pleading and Proof.—Allegation of Waiver or Estoppel.—Where a carrier's transportation contract required suit for loss or damage to be brought within a given number of days, and not afterwards, an allegation that defendant led plaintiff to believe that his claim would be settled without suit, and though more than the stipulated number of days expired before action brought, defendant took more than that time to investigate the claim before refusing to pay it, and verbally agreed that if payment was finally refused, it would waive compliance with the contract limitation, alleged sufficient facts to show a waiver thereof or an estoppel.³

§ 1496. Proof of Waiver.—Weight of Evidence.—In suit on a shipment contract against carrier, defended on ground that suit was not brought in time stipulated in contract, proof that bringing of suit was delayed by promises of defendant to settle, is sufficient evidence of defendant's waiver of limitation.⁴

§ 1497. Instructions.—In an action by a shipper against a railroad company for injuries to live stock shipped thereon, the refusal of the court to instruct the jury as to the effect of the failure of the shipper to institute suit within the time prescribed by the shipping contract is error.⁵

§ 1498. Stipulations as to Time of Service of Process.—A stipulation in a shipping contract requiring suit to be brought within a time less than that prescribed in the general law of limitations and the citation served, is unreasonable.⁶ A railroad company can not lawfully contract with a shipper, that

a claim with the connecting carrier, which claim was referred to defendant's auditor. Not until five months thereafter did the auditor advise the connecting carrier that defendant had declined to pay the claim. About forty days later plaintiff wrote defendant in reference to the claim, and within a week received an answer that it had been returned to the connecting carrier. Thereupon plaintiff brought suit for the value of the mule. Held that, even though defendant could make a valid stipulation in the contract of affreightment that no suit should be maintained for damages unless brought within six months after the cause of action accrued, the delay in handling plaintiff's claim operated as a waiver of such stipulation. *Howze v. New Orleans, etc., R. Co.*, 45 So. 837, 91 Miss. 695.

3. Allegation of waiver or estoppel.—*Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A., N. S., 412.

Replication setting up waiver.—Suit against a railway company for injury and loss caused by its negligence to cattle shipped by plaintiff upon its road. The freight contract contained a clause requiring suit within forty days from the time damages occurred. The plaintiff in replication to a plea of this limitation, the suit not having been filed within the stipulated time, alleged that "within three days after the accrual of the cause of action, and on divers days down to and including October 27, 1884, the defendant by and through its agents represented to plaintiff that the defendant

would adjust and pay his claim for the cattle killed and injured, and induced him to put his claim for much less than the real damage, upon a statement made by defendant through the local agent of defendant at Lampasas to the effect that defendant would pay said claim without suit if plaintiff would put it in for a reasonable sum," alleging refusal to pay October 27 and suit filed November 11, 1884. Held, that the replication was sufficient. *St. Paul Fire, etc., Ins. Co. v. McGregor*, 63 Tex. 399, 404; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

4. Weight of evidence.—*Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 265, 23 S. W. 332.

In *Missouri, etc., R. Co. v. Godair Comm. Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op., there was evidence tending to show that the carrier had by its conduct waived the stipulation in the contracts of shipment requiring suit to be brought within 90 days.

5. Instructions.—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171.

6. Stipulation as to time of service of process.—*Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480; affirming 29 S. W. 806; *Gulf, etc., R. Co. v. Elliott* (Tex. Civ. App.), 26 S. W. 636.

A stipulation in a shipping contract,

citation for damages shall be served within forty days, for the reason that service of citation is duty of public officer and not governable by private contract.⁷ The duties of public officers in issuing and in serving citations are prescribed by law; and any contract between parties which would involve any interference with the regular discharge of those duties would be against public policy and void. A stipulation requiring that suit be brought and citation served within a time less than that prescribed in the general law of limitations would be void. It is not a subject about which the parties could contract.⁸ A freight contract stipulated that suit for damages must be filed and service had within forty days after accrual of the claim. The stipulation as to service of citation being unlawful, the two acts of filing suit and service of citation are so blended that they can not be separated. The entire clause is nugatory.⁹ One period of time is by this agreement designated within which two things are to be done; no part of that time can be specified as that within which suit might be filed, and the limitation of the right to recovery avoided, without performing the other act of serving citation. It is apparent, therefore, that these acts are so blended that they can not be separated, and the entire clause is rendered nugatory by including that which it was not lawful to embrace in the agreement.¹⁰

Demurrer.—A demurrer to a plea setting up a failure to comply with a stipulation in shipping contract that injured party must serve citation on defendant within forty days, should be sustained.¹¹

§ 1499. Stipulations Abrogating Rules of Evidence.—If, under any circumstances, parties should be allowed to abrogate by contract well-settled rules of evidence, it should not be countenanced where it would place the shipper in the power of the carrier, who would hold the key to all the evidence. It is the rule, when a carrier is sued for the nondelivery of goods, that the shipper is only required to show that the carrier had received the goods, and that they had not been delivered at point of destination, and then the burden would rest upon the carrier to show that he is relieved from liability by the act of God or the public enemy, or any other exception lawfully ingrafted on the contract.¹²

Stipulations as to Burden of Proof of Negligence.—While a carrier can not contract against its own negligence, it may by contract put the burden of proof on one suing therefor.¹³ But in Texas it is held that the existence of negligence is presumed against the party having the means of disproving it, but who fails to do so, and a contract abrogating this is unreasonable, if not void, and will not be enforced.¹⁴

requiring action to be brought and service had within thirty days after breach, is unreasonable and void. *Gulf, etc., R. Co. v. Elliott* (Tex. Civ. App.), 26 S. W. 636, 637, affirmed in 93 Tex. 684, no op.; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

7. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

8. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

9. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 914.

10. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

11. **Demurrer.**—*Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 657, 24 S. W. 915.

12. **Stipulations abrogating rules of ev-**

idence.—*Southern Pac. R. Co. v. Phillipson* (Tex. Civ. App.), 39 S. W. 958; *Ryan & Co. v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

13. **Stipulation as to burden of proof of negligence.**—*Merchants', etc., Transp. Co. v. Eichberg*, 109 Md. 211, 71 Atl. 993.

Under a bill of lading providing that negligence should not be presumed against the carrier and charging a less rate than under the common-law liability, the burden was on the shipper to show, not only injury to the goods, but negligence causing such injury. *Merchants', etc., Transp. Co. v. Eichberg*, 71 Atl. 993, 109 Md. 211.

14. *Galveston, etc., R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440; *Southern Pac. Co. v. Phillipson* (Tex. Civ. App.), 39 S. W. 958.

A stipulation in an interstate contract

§ 1500. Stipulations Requiring Adjustment of Claims.—A stipulation requiring a shipper of freight to adjust a claim for damages before delivery, in the presence of an officer of the railroad, does not apply where the shipper refuses to receive the freight because it had become worthless, because there was no delivery of the freight, the owner having rightfully refused to receive it because it was so injured as to be worthless.¹⁵

of carriage against the presumption of negligence which would arise from proof of certain facts, and prescribing the character of proof necessary to fix liability for loss of the goods on the carrier, is unreasonable, as an abrogation

of the rules of evidence, and will not be enforced. *Southern Pac. Co. v. Phillips* (Tex. Civ. App.), 39 S. W. 958.

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CHAPTER XV.

CHARGES AND LIENS.

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§ 1501. Definition.—The word “freight,” when not used in a sense to imply the burden or loading of the ship, or the cargo, which she has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another.¹

§§ 1502-1519. Rate or Amount of Freight—§ 1502. Reasonableness of Charge.—At common law because of the public character of the business in which they are engaged a common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire.² This is the doctrine of the Federal courts,³ and the courts of the states of Georgia,⁴

1. **Freight defined.**—*Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

2. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

Mr. Hutchinson, in his work on Carriers, 2d Ed., § 447, in discussing the amount of compensation to be allowed the common carrier for the transportation of goods in cases where the rate has not been fixed by statute, by established usage, nor by agreement of the parties, says that, “The carrier will be entitled to demand and receive a reasonable compensation.” And that, “Further than that his charges shall be reasonable, the common law seems to have put no restriction upon the carrier in respect to his demand for compensation.” *Abilene Cotton Oil Co. v. Texas, etc., R. Co.*, 38 Tex. Civ. App. 366, 85 S. W. 1025, affirmed in 101 Tex. 627, no op.

3. **Charges must be reasonable.**—*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Missouri Pac. R. Co. v. United States*, 189 U. S. 274, 47 L. Ed. 811, 23 S. Ct. 507; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

Where the consignee of a ship gave notice to the consignee of the goods, re-

quiring payment of the freight of the goods as they should be landed from the ship on the wharf, and the consignee of the goods offered to pay the freight of such of the merchandise as had been landed, the latter did all that he was bound to do under the notice, although not bound to do so by the commercial law, and the refusal of the consignee of the ship to receive such pro rata freight was unjustifiable. *Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

Where the entire freight was demanded when only a part of the goods was ready to be delivered, and the entire freight was refused when the goods were all landed, except upon the condition that the consignee of the goods would pay cartage and storage, this was contrary to the general law upon the subject. *Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

The ship is not bound to land an entire shipment in a day; and when landed on different days, if the shipper disregards the notice that such will be the case, and shall not be present to receive the goods, and has made no arrangement for the

4. *Stewart v. Comer*, 100 Ga. 754, 28 S. E. 461, 62 Am. St. Rep. 353.

Florida,⁵ Illinois,⁶ Iowa,⁷ Kentucky,⁸ Massachusetts,⁹ New York,¹⁰ Ohio,¹¹ Tennessee,¹² Texas¹³ and all others. The question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enters many elements for consideration,¹⁴ and must be delivered by the circumstances of each case.¹⁵

Unreasonable to Fix Greater Sum for Less than Maximum for Greater Distance.—Where a railroad company is authorized to demand and receive a stated compensation for transportation of property not exceeding a stated sum per mile, when the same is transported a distance of a stated number of miles or more, and in case the same is transported for a less distance, such reasonable rates as may be from time to time fixed by the company, it is unreasonable, as a matter of law, that the company should fix a greater sum, for a less distance than thirty miles, than the maximum allowed for full thirty miles.¹⁶

Right of Legislature to Fix Rates.—The reservation of power in the legislature to regulate charges does not relieve the carrier from its common-law duty.¹⁷ As common carriers must carry all freight offered to them, and can only make a reasonable charge for so doing, it follows that a statute prescribing a maximum is only an expression of what was the law without the statute. Un-

freight, then they may be stored in the shipowner's name, to preserve his lien upon them for freight, for safe-keeping, at the consignee's expense and risk. *Brittan v. Barnaby* (U. S.), 21 How. 527, 6 L. Ed. 177.

5. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. St. Rep. 731.

6. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 278, 41 Am. St. Rep. 278.

7. *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512.

8. 1 Duval 146.

9. "In the case of the Citizens' Bank *v. Nantucket Steamboat Co.*, Fed Cas. No. 2,730, 2 Story 16, Mr. Justice Story, speaking of the hire or recompense of common carriers, remarks that 'it may be in the nature of a quantum meruit.' The same view is announced in 5 Wend. 340, and id. 350." *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

10. *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457; *New England Exp. Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31.

11. Where a statute limits the rate which may be demanded when the distance is more than eight miles, and imposes no limit when the distance is not more than that. The railroad company is allowed to exercise its own discretion in fixing the rates, subject only to the implied condition that it must not prescribe a rate which the law would pronounce unreasonable. *Railroad Co. v. Skillman*, 39 O. St. 444.

12. "The carrier is worthy of his hire—that is, to receive reasonable compensation for his service and risk—while the shipper is entitled, in the first place to reasonable rates for the service rendered him, and, in the next place, to have the

same rates, no more, no less, than other shippers." *Post v. Railroad*, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481. See post, "Discrimination in Rates and Overcharge," Chapter 16.

13. Where goods are properly tendered to a common carrier for shipment, the common law requires it to receive them, and if no special contract is made for compensation, it has the right to charge its reasonable and customary rates for like services. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020.

14. *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194; *Root v. Long Island R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. 712.

15. **A question of fact.**—*Campbell v. Marietta, etc., R. Co.*, 23 O. St. 168; *Peters, etc., Co. v. Marietta, etc., R. Co.*, 42 O. St. 275, 51 Am. Rep. 814; *Railroad Co. v. Skillman*, 39 O. St. 444.

16. **Unreasonable to fix greater sum for less than maximum for greater distance.**—*Campbell v. Marietta, etc., R. Co.*, 23 O. St. 168; *Peters, etc., Co. v. Marietta, etc., R. Co.*, 42 O. St. 275, 51 Am. Rep. 814; *Railroad Co. v. Skillman*, 39 O. St. 444.

17. **Right of legislature to fix rates.**—"In the case of *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded 10 per cent of the capital actually expended, did not relieve the company from its common-law duty as a common carrier." *Root v. Long Island R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

doubtedly the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges.¹⁸

Court to Judge of Reasonableness.—The court is to judge of reasonableness of the freight charges.¹⁹

§§ 1503-1504. Right of Carrier to Fix Rate—§ 1503. Charter Regulations.—Right to Regulate Charge.—The right of a common carrier to regulate his charges of freight is controlled by the charter of the company,²⁰ which usually fixes a maximum rate and leaves the tariff of charges, within that limit, to the company subject to the rule that the charge must be reasonable, and to the regulating power of the courts and legislature.²¹ In the early history of railroads a few companies obtained from the legislatures irrevocable charters without any restrictions upon the right to fix the rates for transportation. Very soon, however, the evils likely to result from such legislation were discovered and railroad companies were limited in the exercise of this power.²²

Instance.—A statute enacting that "all the rights, powers, privileges and franchises granted to any other company * * * in said counties are * * * conferred on a designated railroad company in respect to its branch road and its leased lines," does not allow it to charge for freight at the rates of other local companies with which it does not connect.²³ Respecting freight, the continuous line formed under the act is entitled to the powers and privileges of its connection, only in respect to such connections.²⁴ Such charter provision applies to the whole line of the company, both to the consignee by rail and by water.²⁵

18. *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278. See ante, "Charges," §§ 35-95.

19. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

If the legislature has failed to fix a reasonable rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate. *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 12 S. Ct. 468; *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

20. **Right to regulate charge.**—*Camden, etc., R. Co. v. Briggs*, 21 N. J. L. 406, affirmed in 22 N. J. L. 623.

When authorized to perform the duty of common carriers, railway companies are obliged to transport all merchandise and passengers on the terms fixed in the grant through which they obtain their franchise. *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379.

21. By its charter a railroad company was given the exclusive privilege to carry freight and passengers over its respective road, and the charter also contained this provision, "provided that the charge for transportation or conveyance shall not exceed thirty-five cents per one hundred pounds on heavy articles, and

ten cents per cubic feet on articles of measurement, for every hundred miles, and five cents a mile for every passenger." It was held, that the intention of the legislature was to confer upon each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within that limit, to the company, subject to the rule of the common law that the charges should be reasonable, and to the regulating power of the courts and the legislature. *Ragan v. Aiken*, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684.

22. *Campbell v. Marietta, etc., R. Co.*, 23 O. St. 168. And see *Peters, etc., Co. v. Marietta, etc., R. Co.*, 42 O. St. 275, 51 Am. Rep. 814.

23. **Instances.**—*McGregor v. Erie R. Co.*, 35 N. J. L. 115.

24. *McGregor v. Erie R. Co.*, 35 N. J. L. 115; *S. C.*, 35 N. J. L. 89.

25. The restriction in the 16th section of the charter of the C. & A. R. R. Co., limiting their charge for the transportation of property to the rate of eight cents per ton per mile, extends and applies to the whole line of communication which they were authorized and incorporated to perfect; that is, from New York to Philadelphia. It was not intended to be applied to the railroad only, and to leave the company to charge at discretion on their conveyance by water. *Camden, etc., R. Co. v. Briggs*, 21 N. J. L. 406.

Company Using Tracks of Another.—Where a lessee road operated the lessor's line subject to the latter's charter with respect to freight, and another part of the line was built by a third company to which the precise relation of the lessees company did not appear; the lessee must be deemed to operate the line of the third company under the charter of the lessor company.²⁶

§ 1504. Duty to Consult Shippers and Consignees.—There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying. It can not exceed a lawful rate, and it is presumed, in the interests of its stockholders and the public, to conduct properly its own business.²⁷

§§ 1505-1506. Standards for Fixing Charge—§ 1505. Measure or Weight.—A railroad company may lawfully rate shipments either by measurement or weight, but can not charge according to both standards on the same lot of freight.²⁸

§ 1506. Value or Risk Assumed.—It is reasonable and lawful for the rate to be proportioned with reference to the value and to the amount for which the carrier should be held responsible in the event of loss.²⁹

§§ 1507-1515. Special Contracts as to Amount of Charge—§ 1507. Capacity.—A carrier has capacity to enter into special contracts as to the amount of its compensation;³⁰ such contracts are not against public policy³¹ so long as they are not discrimination.³²

§§ 1508-1509. Requisites—§ 1508. Meeting of Minds.—To constitute a valid contract between a shipper and a common carrier for a freight rate the minds of the parties must assent to the same thing, in the same sense; or there is no contract;³³ as, for instance, where the carrier's agent quoted the wrong rate by a mistake as to the character of the shipment,³⁴ as to the quantity

26. Company using track of another.—The Erie Railway Company must be considered as running on the Long Dock Railroad under the Paterson & Hudson River charter and rates; hence it can not charge as a common carrier. *McGregor v. Erie R. Co.*, 35 N. J. L. 89.

27. Duty to consult shippers and consignees.—*Pennsylvania R. Co. v. Midvale Steel Co.*, 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

28. Measure or weight.—*Central R. Co. v. Hearne*, 32 Tex. 546, 547.

29. Value or risk assumed.—*United States*.—*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151.

California.—"Rates for transportation are based upon the value of the property, and it is only natural that the amount of care which is to be exercised by the carrier in the protection of the property will be largely determined by its value." *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811.

Georgia.—"The carrier is entitled to some compensation on the basis of the difference in care and expense attending the shipment, and also for the greater or less liability in case of loss or damage." *Georgia, etc., R. Co. v. Johnson, etc., Co.*, 121 Ga. 231, 48 S. E. 807.

New Hampshire.—A common carrier may fix a rate of charges proportionate of the risk it assumes. *Duntley v. Boston, etc., Railroad*, 68 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327, 9 L. R. A. 449.

Texas.—The value of the thing to be carried may be taken in consideration by the carrier in fixing compensation for the carriage. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815.

30. Capacity.—*Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277, 282.

31. A contract whereby a salt company agrees to ship 66 per cent of its output over a certain railroad, which in return agrees to ship at as low a rate as may be offered by any other road, is not void as against public policy. *Texas, etc., R. Co. v. Texas Short Line R. Co.*, 80 S. W. 567, 35 Tex. Civ. App. 387.

32. See post, "Discrimination in Rates," §§ 1601-1632.

33. The Hartford, etc., R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177.

34. Mistake as to character of shipment.—A shipper of fruit can not recover the difference between the price at which defendant railroad company's agent agreed to ship a carload and the regular price, which plaintiff was subsequently compelled by the connecting line to pay,

to be transported,³⁵ or as to the place of destination.³⁶

§ 1509. Consideration.—A carrier's contract to transport freight at certain rates is not void, as being an agreement to do what it was legally required to do, and hence without consideration.³⁷ The mutual obligations of a shipper to ship, and of a carrier to carry, furnish sufficient consideration for a contract to carry at a specified rate, but if the shipper fails to accept the carrier's offer, and is not bound to furnish the goods for carriage, the carrier's offer or promise to carry for a particular rate becomes a mere nudum pactum, the breach of which will not support an action.³⁸

Performance of Voyage.—In certain cases the performance of the voyage with the goods shipped is the consideration for the freight.³⁹

§§ 1510-1511. Validity—§ 1510. Value as Basis of Charge.—A contract fixing the value of property as a basis for freight rates is not unreasonable, which establishes a certain rate for property of a certain value, and increases the rate 10 per cent for every raise of 100 per cent in value of the property, to be transported.⁴⁰

when it appears that, though the shipper informed the agent of the character of the fruit shipped, the latter misunderstood him, and quoted the rate under a mistake as to the character of the shipment. *Gulf, etc., R. Co. v. Dawson* (Tex. Civ. App.), 24 S. W. 566.

35. Mistake as to quantity to be shipped.—The defendants applied to the agent of a railroad corporation, to transport fifty thousand laths from M. to H. and enquired the expense of transportation. The latter, having asked how many bundles that quantity would make, a companion of the defendants, to whom they referred the enquiry, replied, five hundred, but said agent understood him to say one hundred, and thereupon gave the defendant the price of transporting one hundred bundles, as the price of transporting five hundred bundles, which price the defendants agreed to pay. Held, that the misunderstanding of the agent, in regard to the quantity of laths, prevented that meeting of the minds of the parties, which was essential to a contract between them. *The Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177.

Such corporation having discovered such misunderstanding, and, while they were conscious that the defendants had no knowledge of it, forwarded said laths. Held, in an action brought to recover the price of transportation, at the usual rates, that this circumstance did not preclude the plaintiffs from claiming, on the trial, that such a mistake occurred, but was merely evidence, to be submitted to the jury, of the plaintiffs' assent to the price, as understood by the defendants. *The Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177.

Where, on such trial, the defendants claimed that the transmission of the

laths by the plaintiffs constituted, in law, an assent by them to the terms of the contract, as understood by the defendants, and that the plaintiffs were therefore precluded from showing that there was any such mistake, and the court instructed the jury in conformity with such request, it was held that such instruction was erroneous. *The Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177.

36. Mistake as to destination.—If a person, desirous of shipping articles from one point to another over a railway, inquires at its office, of its freight cashier, what the charges will be, and the latter, in turn, inquires of the way-bill clerk, whose duty it is to know what such charges are, and the latter, misunderstanding the place to which shipment is to be made, gives an incorrect answer, according to which the charges are computed and paid in advance, the railroad company is not bound by the answer thus made, and may, after shipping the goods to the place designated, and there delivering or offering to deliver them, recover such additional sum as may be required to reasonably compensate it for the services rendered. *Rowland v. New York, etc., R. Co.*, 61 Conn. 103, 29 Am. St. Rep. 175, 179, 23 Atl. 755, citing *The Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177.

37. Consideration.—*Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

38. Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144.

39. Performance of voyage.—*Love v. Ross, etc., Co.*, 8 Va. (4 Call) 590.

40. Value as basis of charge.—*Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811. See ante, "Value or Risk Assumed," § 1506.

§ 1511. Conformity to Published Tariffs.—A carrier in dealing with shippers is required to conform its charges for transportation to the rates fixed in its published tariff and can not lawfully depart therefrom.⁴¹ Where a railway agent, by mistake, inserted in a bill of lading for an interstate shipment a rate less than the published rate, the railroad company is not bound thereby; and it is immaterial in such case that the shipper and the agent were both ignorant of the published rate.⁴²

Persons to Whom Published Rates Applicable.—A railroad's published rate applies as well to other carriers as to producers and owners.⁴³

Rate Agreed upon Less than Approved Rate—Charge Less than Rate Approved by Interstate Commerce Commission.—The consignee is, on tender of the freight stipulated in the bill of lading, though it is less than the rate approved by the interstate commerce commission, entitled to possession of goods transported by connecting carriers jointly, in the absence of proof of publication of the latter rate as provided by § 6 of the interstate commerce act of 1887 (24 Stat. 379, ch. 104), as amended in 1889 (25 Stat. 855, ch. 382).⁴⁴

Charging Less than Maximum Rate Fixed by Railroad Commission.—A contract by a carrier to carry goods at less than the maximum rates fixed by the railroad commissioners is valid where there is no discrimination.⁴⁵ It was not the intention of the state railroad commission act to abolish the right of railroad companies to make contracts for freight. A lawful contract may be made for less rates than those prescribed by the commission.⁴⁶

Lowering Rate in Manner Required by Interstate Commerce Act.—Lowering a freight rate in the manner required by the interstate commerce act, after a contract has been made in violation of that act, does not render the contract valid and binding on the carrier, and, if under no legal obligation to lower the rate, the carrier may restore the rate so lowered.⁴⁷

§§ 1512-1513. Construction, Operation and Effect—§ 1512. As to Rate.—Rate Payable.—Stipulation in contract of shipment to pay "at the rate of tariff," does not make the shipper liable to pay more than the rate agreed on, no tariff having been legally established.⁴⁸

Agreement to Carry for Immediate Inadequate Compensation.—If a carrier agrees to carry for an inadequate compensation it is bound by the contract as well in respect to its compensation, as in respect to any other element of the contract, and it can not plead ignorance unless the shipper is in some way

41. **Conformity to published tariffs.**—Missouri, etc., R. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553, 557, 21 S. W. 290.

42. St. Louis, etc., R. Co. v. Miller (Ark.), 145 S. W. 889, 39 L. R. A., N. S., 634, 639; St. Louis, etc., R. Co. v. Wolf, 100 Ark. 22, 139 S. W. 536. See Kansas, etc., R. Co. v. Tonn, 102 Ark. 20, 143 S. W. 577.

43. **Persons to whom published rates applicable.**—Texas, etc., R. Co. v. Texas Short Line R. Co., 80 S. W. 567, 35 Tex. Civ. App. 387.

44. **Charge less than rate approved by interstate commerce commission.**—Atlanta, etc., R. Co. v. Horne, 106 Tenn. 73, 59 S. W. 134.

45. **Charging less than maximum rate fixed by railroad commission.**—Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.), 71 S. W. 314; Thompson v. San

Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

The railroad commission act, even when rates have been fixed, does not enjoin a railroad from charging a less rate than the commission has named, provided it makes no discrimination; hence, even in cases where the commission has fixed rates for a railway company, it can not be said that it is powerless to make contracts for transportation. Thompson v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 148, 32 S. W. 427.

46. Thompson v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 148, 32 S. W. 427.

47. **Lowering rate in manner required by interstate commerce act.**—Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144.

48. **Rate payable.**—Gulf, etc., R. Co. v. Leatherwood, 69 S. W. 119, 29 Tex. Civ. App. 507.

in fault. A contract of carriage necessarily includes all risks, and the compensation agreed upon is regarded as sufficient for all liabilities.⁴⁹

Contract for Through Rate.—A carrier contracting with shipper for a through rate of freight is liable to him for any charge over and above that rate.⁵⁰

§ 1513. As to Valuation and Weight.—Valuation of Property.—In determining whether or not an agreement fixing the valuation of property as a basis for freight rates is reasonable, the question whether or not it reasonably approximates the real value of the property is immaterial and can not be taken into consideration.⁵¹

Conclusiveness of Weights Stated in Bill of Lading.—Where, under a written contract, a carrier was to accept and ship freight according to the shipper's scale of weights, with a proviso that the carrier could from time to time inspect the books of the shipper to verify the weights, and that the shipper would pay all undercharges found due, the carrier was not precluded from going behind bills of lading and freight bills signed by it and showing that the weights furnished by the defendant were incorrect, and recover shortage, though the carrier's agent knew of the shortage at the time the shipments were made.⁵²

§ 1514. Duration.—An agreement in writing by a common carrier to transport lumber for another, from one place to another, for a certain period at a fixed price, is a continuing offer for that period, and failure to transport the lumber afterwards offered by the shippers was a breach of the contract.⁵³

§ 1515. Breach.—See post, "Misrepresentation of Rate," § 1519.

§ 1516. Undervaluation.—Where a shipper obtains a less freight rate by fraudulently undervaluing his shipment, the carrier is entitled to recover compensation for any increase of risk within the limit of the value given, caused by the fact that it carried such valuable freight.⁵⁴

49. Agreement to carry for immediate compensation.—*Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277, 282.

50. Contract for through rate.—*Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142, 143.

51. Valuation of property.—*Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811.

Detention of goods for increased rates over contract for price of carriage.—Where a common carrier receives a package for transportation, for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit or artifice on the part of the shipper, it can not on discovering that the package was of greater value than supposed, refuse to deliver it to the consignee without additional compensation; and if the consignee pay such charge he may maintain an action to recover it back. *Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277.

52. Conclusiveness of weights stated in bill of lading.—*Belton Oil Co. v. Gulf, etc., R. Co.*, 92 S. W. 411, 41 Tex. Civ. App. 374.

"The purpose of the stipulation referred to was to reserve the right for a reasonable time to correct errors in weights, and that such right was not destroyed by making out bills according to the weights furnished by the defendant and receiving payment therefor from the defendant. The stipulation that the plaintiff would accept the scale of weights of the defendant on all consignments in carload lots, and that inspections might be made by its auditor, or other duly accredited representative, and that same might be made from time to time, negatived the idea that it was intended that the inspection should be made at the very time the several shipments were tendered, and not after they had been made and freight charges paid according to the weights furnished by the defendant." *Belton Oil Co. v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 374, 92 S. W. 411.

53. Harvey v. Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673, 674, citing *Bornstein v. Lans*, 104 Mass. 214.

54. Defendant delivered to the plaintiff express company at St. Paul, Minn., to be carried to Washington, D. C., a sealed package containing twenty registered United States government bonds of the value of \$234,000, informed it that the

§ 1517. Misclassification.—Fraudulent Misclassification.—If the consignor falsely represents to the common carrier that the goods which he desires to ship are of a certain kind, and the carrier, without notice or knowledge that they are of a different kind, accepts the goods and fixes and accepts the freight and delivers to the consignor a bill of lading on the basis that the goods are of the character stated by the consignor when in fact the goods are of an entirely different character, upon which the carrier would be lawfully entitled to charge a higher rate of freight, the carrier may, upon discovering this fact before the goods are delivered to the consignee at the place of destination, charge the excess of the freight against the goods and hold the shipment until the additional charges are paid.⁵⁵

Articles of Freight Received as Baggage.—A carrier which accepts for transportation as baggage, articles known by it to be freight, assumes the liability of a freight carrier, and may collect the regular transportation charge where the statute prohibits all discrimination in rates.⁵⁶

§ 1518. Illegal Rate Charged.—Amount Named in Bill of Lading Illegal.—Where the freight rate charged in a bill of lading is illegal, the carrier may recover reasonable remuneration for its transportation services.⁵⁷

Difference between Proper Rates and Unlawful Discrimination.—If a common carrier makes an unlawful discrimination in favor of a shipper by contracting to carry his goods at a lower rate than they should bear and accepts the goods and carries them at that rate, it can not, after the goods have reached their destination, charge against them an additional amount of freight sufficient to bring the total charge up to the proper rate. To do so would permit the carrier to make a rate lower than it properly should make, to secure the business, and thereafter take advantage of its own wrong to increase the charge and secure the usual compensation.⁵⁸

§ 1519. Misrepresentation of Rate.—If the agent of a railroad company misrepresents its freight rates, whereby a person is induced to make a contract for the sale of goods at a certain price and is compelled to pay a higher freight rate than that represented, thus sustaining a loss, the railroad company is liable in damages for such loss.⁵⁹

value was \$1,000, concealed from it that they were of greater value, and paid for carrying them the same 75 cents, which was the usual price for so carrying such a package of the value of only \$1,000. In an action to recover additional compensation, it was held that the carrier is entitled to recover compensation for any increase of risk within the \$1,000 limit, caused by the fact that it handled and carried so valuable a package. *United States Exp. Co. v. Koerner*, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600.

55. Fraudulent misclassification.—*Illinois Cent. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108; *Smith v. Findley*, 34 Kan. 316, 8 Pac. 871; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290.

Instances.—Where a carrier enters into a special contract with a shipper to transport household goods at a greatly reduced rate, and the shipper, without the knowledge or consent of the carrier, puts into the car other goods which bear a higher freight, the carrier is entitled to

additional compensation for the latter. *Smith v. Findley*, 34 Kan. 316, 8 Pac. 871.

So held in case of classification of narrow gauge cars for use on steam railroad instead of on logging tramway. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290, see 85 Tex. 405.

56. St. Louis, etc., R. Co. v. Miller (Ark.), 145 S. W. 889, 39 L. R. A., N. S., 634.

57. Amount named in bill of lading illegal.—*Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290.

58. Difference between proper rates and unlawful discrimination.—*Illinois Cent. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108.

59. Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 86 Fed. 846; *Missouri Pac. R. Co. v. Crowell Lumber, etc., Co.*, 51 Neb. 293, 70 N. W. 964; *Texas, etc., R. Co. v. Mugg*, 98 Tex. 352, 83 S. W. 800, 107 Am. St. Rep. 633.

Quotation of less than published tariff.—A railway company is liable for dam-

§§ 1520-1541. Right to and Payment of Freight—§ 1520. Right to Demand Prepayment.—Where there is no special agreement to the contrary, a carrier is entitled to demand the price of carriage before he receives the goods, and if not paid, he may refuse to receive them.⁶⁰

§ 1521. Effect of Failure to Demand Prepayment.—If a carrier take charge of goods for transportation, the nonpayment of the price of carriage in advance will not discharge, affect, or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed.⁶¹

§ 1522. Time of Payment.—The contract being silent as to the time of payment of the freight, it is payable at the time of the delivery of the property to the consignee.⁶²

§ 1523. Place of Payment.—The contract being silent as to the place of payment of the freight, it is payable at the place of delivery.⁶³

§ 1524. Tender of Payment.—Before delivery, or effort to deliver the goods at the place of destination, the carrier is not entitled to any tender of freight charges.⁶⁴ A consignee of goods is not bound to make tender to a carrier, which having no legal claim on them for anything besides the freight, refuses to deliver them unless a further sum is first paid, where the consignee is ready to pay the freight.⁶⁵ Where the carrier refuses to do what it had agreed to do, the consignee need not formerly offer to do what he has engaged to do; readiness to do it is all that he need allege.⁶⁶

§ 1525. Demand.—A carrier's claim for his freight is not barred by delay in making demand after delivery within the period of limitation. The shipper's obligation to pay the freight when due did not impose upon the company the

ages caused by its agent quoting to a shipper a freight rate less than the regular published tariff, for an interstate shipment, whereby he was led to make contracts to sell the article transported at a price based on the rate named, though the carrier could not contract to transport at such rate nor the shipper enforce such contract. *Texas, etc., R. Co. v. Mugg*, 98 Tex. 352, 83 S. W. 800, 107 Am. St. Rep. 633.

60. Right to demand prepayment of freight.—*Niagara v. Cordes* (U. S.), 21 How. 7, 16 L. Ed. 41.

Massachusetts.—*Robinson v. Baker* (Mass.), 5 Cush. 137, 51 Am. Dec. 54.

Michigan.—*Fitch v. Newberry* (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

New York.—*Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277.

Rhode Island.—*Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46.

Texas.—*Texas, etc., R. Co. v. Hays*, 2 Texas App. Civ. Cas., § 390.

61. Effect of failure to demand prepayment.—*Niagara v. Cordes* (U. S.), 21 How. 7, 16 L. Ed. 41; *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385.

62. Time of payment.—*Pittsburg, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732. See post, "Accrual of Right to Payment," §§ 1526-1532.

63. Place of payment.—*Pittsburg, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

64. Tender of payment.—*Sonia Cotton Oil Co. v. Red River*, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Necessity for tender—When cars demanded.—Tender of payment of freight charges, when goods are offered for shipment and cars demanded, is not a condition precedent to recovery from a carrier for refusal to furnish cars and for increased freight demanded after such offer, if the carrier requires payment only before delivery to the consignee. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320.

65. Adams v. Clark (Mass.), 9 Cush. 215, 57 Am. Dec. 41.

Necessity for tender of stipulated sum by consignee.—Where the carrier demands a larger sum than that which is stipulated by contract and refuses to receive any sum less than the whole amount he thus claims, and the consignee offers to pay the sum stipulated in the contract, no formal tender of that sum is required from the consignee: the law in such a case will not ask him to do a vain thing. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

66. Peebles v. Boston, etc., R. Co., 112 Mass. 498, 509.

duty to make demand at that time. As to the consignee it was still due. After delivery no due date was fixed, so that the due date was not changed. The railway might demand it as soon after delivery as it pleased or, generally speaking, at any time thereafter within the period of limitation. Of course there might be facts attending a delay in enforcing the right which might defeat it. But the few days after final default, as in this case, is certainly insufficient.⁶⁷

§§ 1526-1532. Accrual of Right to Payment—§§ 1526-1527. Deliver Goods—§ 1526. In General.—A common carrier, although entitled to demand payment of its charges in advance, by accepting goods for carriages without requiring prepayment, waives this right; and does not then become entitled to demand its freight charges until its duty has been performed, either by delivery or an offer to deliver at the place of destination;⁶⁸ unless the delivery is prevented by default of the shipper or his agents.⁶⁹ If it becomes impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying the freight.⁷⁰

§ 1527. Part Performance.—The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the carrier can not, in general, claim freight.⁷¹ If the owner of the goods, either by his waiver

67. Demand.—*McFarland v. Parr & Co.*, 34 Tex. Civ. App. 292, 79 S. W. 76.

68. United States.—*Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

Indiana.—*Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385; *Holliday v. Coe*, 3 Ind. 26; *Rogers v. West*, 9 Ind. 400.

Ohio.—*Whitney v. Rogers*, 2 Disn. 421, 13 O. Dec. 258. And see *Steamboat Baltimore v. Levi*, 2 Han. 30, 12 O. Dec. Reprint 314.

Tennessee.—*East Tennessee, etc., R. Co. v. Hunt*, 83 Tenn. (15 Lea) 261.

Virginia.—*Brown v. Ralston*, 25 Va. (4 Rand.) 504.

The duties of the carrier and consignee are correlative.—The one to deliver and the other to pay the freight; both are mutual acts. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

General rule not affected by notice on back of bill of lading.—A stamp upon the back of the bill of lading, stating, amongst other things, "that the entire freight was payable prior to delivery, if required," which was put there by the ship's owner, but where there was no evidence that it was recognized by the shipper as part of his contract, can not vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. Such a stamp is not equivalent to a memorandum upon a policy of insurance, which is always on the face or the margin of the policy. *Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

69. *Brown v. Ralston*, 25 Va. (4 Rand.) 504.

Contract for freight and demurrage distinct and independent.—A stipulation

for payment of demurrage does not affect a contract for freight, and if the consignee failed to unload and discharge the vessel within the lay days allowed, there being no impossibility of his doing so, and afterwards, while the vessel was detained on demurrage, the vessel and cargo be lost without the default of the master or mariners, the shipowner is entitled to recover the freight, as well as the demurrage. *Brown v. Ralston*, 36 Va. (9 Leigh) 532.

70. *Brown v. Ralston*, 25 Va. (4 Rand.) 504.

71. Part performance.—*Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Adams & Co. v. Haught*, 14 Tex. 243. See post, "Partial or Pro Rata Freight," §§ 1535-1537.

"It is indeed laid down in *Angell on Carriers*, § 232, that a common carrier 'is not entitled to freight until the contract for a complete delivery is performed,' and this is continued in the last Boston edition, the 5th A. D. 1877. This, if not taken in connection with §§ 124, 356, might mislead. Even a general ship, i. e., one which advertises for a particular voyage only and to take for that voyage the goods of any one who sends, could not be obliged to carry without prepayment if demanded. But when without prepayment they take goods on freight, the general law of obligations would require the performance of the contract on their part, at least so far as they could perform it, before they could claim compensation. When they offer to carry goods for all between certain termini on a certain route at more or less regular periods, they then become common carriers; and the right of common carriers, whether by ship, railroad, or

or default, is the cause of their not being transported to the place of destination, full freight may be recovered.⁷²

§ 1528. Opportunity to Examine Goods.—The freight upon a shipment of goods is payable, according to general rules, when the merchandise is in readiness to be delivered to the person having a right to receive it, and when the consignee has had the opportunity to examine the goods, to see if the obligations of the bill of lading have been fulfilled by the ship owner or carrier.⁷³ If the shipment is large, or can not be landed in a day, the master has a right to ask for security or arrangement for the pro rata freight. But he can not demand the payment of the freight on the entire shipment before the consignee has an opportunity to examine the goods.⁷⁴

§ 1529. Where Consignee Can Not Be Found.—The freight money becomes due when upon the arrival of the goods at the place of consignment the carrier can find no consignee there.⁷⁵

§ 1530. Failure to Deliver Not Due to Fault of Either Party.—If it is impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying freight.⁷⁶

§ 1531. Erroneous Recital in Bill of Lading as to Amount of Shipment.—A bill of lading is complied with by delivering two thousand, two hundred and seventeen bushels of corn, if no more is shipped, where it recites the shipment of, and an agreement to deliver two thousand and two hundred and eighty-two bushels, more or less, and the master is entitled to freight on the number of bushels actually delivered.⁷⁷

§ 1532. Conversion of Part of Goods by Carrier.—A common carrier which converts part of goods to its own use on the way, may, in an action against the owner, recover the whole of the freight stipulated to be paid, if the

other conveyance, to demand payment in advance, is well settled. The apparent contradiction may be explained in part by the fact that payment in advance was not in old times denominated freight, nor was the word used for land carriages as it now is. Freight was the reward or compensation for safe conveyance and delivery by ship, and was not earned until that was performed. It had certain incidents attached to it which did not attach to payments made in advance. *Abbott on Shipping*, 405, 406 (5th Am. Ed. by Perkins, 491, 494); *MacLachlan on Shipping*, 364, 421, 433; *Maule & Pollock on Shipping*, 238; 1 *Parsons on Shipping*, 210, 246, 248, n. 2." *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46.

72. *Adams & Co. v. Haight*, 14 Tex. 243.

73. Opportunity to examine goods.—*Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

A common carrier, or other bailee for the transportation of property, must permit the consignee, if he requests it, to examine the cargo at the place of delivery, before he can demand his freight. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

74. Where shipment is large and discharge of cargo takes several days.—

Brittan v. Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177.

When the shipmaster has a larger shipment under one bill of lading than can be landed in the business hours of one day, he must take care not to land it in such quantities as to be unable to ascertain the pro rata freight. Unless he takes this care, the goods landed will be under his care and responsibility without additional expense to the consignee of them until they shall be ready for delivery. *Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

75. Where consignee can not be found.—*House v. Soder*, 6 Tex. 629.

Freighter contracting during a rebellion to carry goods from one point in Texas to another, and there deliver them to agent of consignor, may recover freight money, if upon arrival at destination he is unable to find consignee and in consequence goods are confiscated by federal authorities. *House v. Soder*, 36 Tex. 629; *Gerhard v. Neese*, 36 Tex. 635.

76. Failure to deliver not due to fault of either party.—*Brown v. Ralston*, 25 Va. (4 Rand.), 504.

77. Erroneous recital in bill of lading as to amount of shipment.—*Kelley v. Bowker* (Mass.), 11 Gray 428, 71 Am. Dec. 725.

defendant does not claim any deduction for the goods not delivered.⁷⁸

§ 1533. Right of Carrier to Earn Freight for Entire Distance.—When a carrier receives property and contracts to deliver it at a distant place, the shipper can not compel the carrier to part with the property during the transit, unless he tenders him the whole freight. What the carrier has a right to earn can not be taken from him till the fruit of his labors, if permitted to be performed, is secured.⁷⁹

§ 1534. Dead Freight.—A shipper having agreed to deliver the cargo on board with no unreasonable delay, the captain of the vessel applied for it on Sunday, and, no person being ready to deliver it, would not wait until Monday, but went to sea without it. The ship owner was not entitled to dead freight on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained, in consequence of the captain's not taking the full quantity on board.⁸⁰

§§ 1535-1537. Partial or Pro Rata Freight—§ 1535. In General.—The cases in which a partial payment may be claimed are exceptions founded upon principles of equity and justice as applicable to particular circumstances.⁸¹

§ 1536. Part of Cargo Delivered.—Pro rata freight is earned when part of the cargo is delivered or sent, by the ship owner, to its destination.⁸² A carrier, who has contracted to transport goods and deliver them to the consignee, but who on the arrival of the goods at their destination, stores a portion instead of delivering them, is not entitled to freight, nor even to pro rata freight on the portion stored, although the consignee may have taken the goods, indemnifying the warehouseman against any claim for freight.⁸³

§ 1537. Cargo Accepted at Intermediate Point.—Pro rata freight is earned where the cargo is voluntarily accepted by its owners at an intermediate point,⁸⁴ justifying the inference that further carriage was dispensed with.⁸⁵

78. Conversion of part of goods by carrier.—*Hill v. Leadbetter*, 42 Me. 572, 66 Am. Dec. 305.

79. Right of carrier to earn freight for entire distance.—*Whitney v. Rogers*, 2 Disn. 421, 13 O. Dec. 258.

80. Dead freight.—*Dunbar v. Buck*, 20 Va. (6 Munf.) 34.

81. Partial or pro rata freight.—*Adams & Co. v. Haight*, 14 Tex. 243.

Enemy chased by merchantman having letter of marque.—*Hooe v. Mason*, 1 Va. (1 Wash.) 207, see also, *Galt v. Archer*, 48 Va. (7 Gratt.) 307.

82. Part of cargo delivered.—*Minnesota Min. Co. v. Chapman*, 2 O. Dec. Reprint 207.

83. Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

84. Cargo accepted at intermediate point.—Common carrier of goods is entitled to pro rata freight, where the owner of them is willing to receive them at a place short of that to which the carrier stipulated to carry them. *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Minnesota Min. Co. v. Chapman*, 2 O. Dec. Reprint 207.

There can be no such thing as freight "pro rata itineris," unless the bailee voluntarily gives up the cargo, and the bailor

consents to receive it before the place of destination is reached. *Whitney v. Rogers*, 2 Disn. 421, 13 O. Dec. 258.

Freight is due pro rata itineris when the vessel by inevitable necessity is forced into a port short of her destination and is unable to prosecute her voyage further, and the cargo is there voluntarily accepted by the owner. The consent of the owner to accept the cargo at such intermediate port must either by word or act be expressly given, or fairly deducible, and when so given, the original contract is dissolved, and the claim to such pro rata freight rests upon the basis of a new contract, which the law implies. *Crawford v. Williams*, 33 Tenn. (1 Sneed) 205, 60 Am. Dec. 146.

When a vessel is so disabled during its voyage that it can not proceed on the same, and the cargo is in peril of loss, the law implies an agency from necessity, on the part of the master, to act for the interest of all concerned; and it is his duty in such case to transship the cargo, and he has a right to charge it with such freight as it was proper to give. *Crawford v. Williams*, 33 Tenn. (1 Sneed) 205, 60 Am. Dec. 146.

85. Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

Goods Sequestered at Junction Point by Owner.—Where the owner of a shipment sequesters and takes possession of the property at the junction point of the initial and connecting carriers, he is liable for freight from the shipping point to the point of sequestration at full legal rates.⁸⁶

Cargo Recovered in Action of Replevin.—Where the shipper recovers the freight in an action of replevin, there is no such voluntary acceptance of it as to render him liable for pro rata freight.⁸⁷

§ 1538. Intent to Evade Blockade or Revenue Laws.—The fact that shipper intended to evade blockade and revenue laws after the freight reached the point of destination is no defense to an action on a contract for the carriage of freight from one point to another in Texas during the Civil War.⁸⁸

§ 1539. Stranding.—If, in order to avoid capture by the enemy, the master before he reaches the port of destination, strands the vessel, which is thereby lost, but the cargo saved, the cargo shall not contribute to repair the loss of the ship, but the owner of the ship is entitled to freight and salvage.⁸⁹

§ 1540. Vessel Condemned by Foreign Tribunal—Fraud of Owner.—Freight, though by the terms of the charter party, payable monthly, if required, is not to be recovered, where the voyage is never completed, but the vessel is condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act.⁹⁰

§ 1541. Bond to Secure Freight.—A bond to secure freight may be ex-

86. Goods sequestered at junction point by owner.—*Southern Pac. R. Co. v. Haas* (Tex.), 17 S. W. 600; S. C. (Tex. Civ. App.), 21 S. W. 1021.

Defendant railroad charged \$1.70 per hundred on freight from San Francisco to El Paso, and \$2 on freight to the city of Mexico; its line connecting at El Paso, which was about halfway, with the Mexican Central. On through freights its division with the Mexican Central gave it only ninety-six cents for carrying to El Paso. Plaintiff shipped goods from San Francisco to the city of Mexico, his receipt therefor providing that, if shippers, consignees, or their agents should remove their goods from the warehouse at El Paso, the shipment would be treated as an El Paso proper shipment, and full El Paso proper rates collected. Held, that plaintiff could not demand and receive the goods at El Paso without paying full local rates to that point. *Southern Pac. R. Co. v. Haas* (Tex.), 17 S. W. 600.

Held, herein, that even if there was any discrimination in the rates against El Paso in favor of the city of Mexico and points along the Mexican Central, it would not be subjected to consideration under a state law, the shipment being from a point without the state, and the shipper could not receive goods at El Paso without paying full local rates to that point. *Southern Pac. R. Co. v. Haas* (Tex.), 17 S. W. 600.

87. When copper was shipped on board a vessel at Detroit to be carried to Dun-

kirk, and the vessel was accidentally burned to the water's edge, at the intermediate port of Sandusky, and sunk with the copper on board, and was afterwards raised, with the copper, by the owners of the vessel, who refuse to deliver the copper to the shipper, upon the ground that he was entitled to a lien for pro rata freight, and to contribution, in the nature of general average, for the expense of raising the hulk and copper with it, and the shipper obtained possession of the copper by replevin, it was held that this was not such a voluntary acceptance of it as to render him liable for pro rata freight. *Minnesota Min. Co. v. Chapman*, 2 O. Dec. Reprint 207.

88. Intent to evade blockade or revenue laws.—*House v. Soder*, 36 Tex. 629; *Gerhard v. Neese*, 36 Tex. 335.

In 1863, so far as the supreme court is apprised, there was no law or public policy of the United States, and no proclamation of the president of the United States, prohibiting the hauling of cotton from one portion of Texas to another, nor interdicting one citizen of the state from contracting to do such hauling for another and it is immaterial that the destination of the cotton was the port of Brownsville, on the Rio Grande. *House v. Soder*, 36 Tex. 629.

89. Stranding.—*Eppes v. Tucker*, 8 Va. (4 Call) 346.

90. Vessel condemned by foreign tribunal—Fraud of owner.—*Hadfield v. Jame-son*, 16 Va. (2 Munf.) 53.

ecuted to secure the prompt forwarding and delivery of shipments of freight.⁹¹

§§ 1542-1546. Rights of Connecting Carrier—§ 1542. Power of Initial to Bind Succeeding Carrier.—In the absence of an agreement or partnership, a carrier can not bind other carriers, forming a connecting line with its own, as to rates of freight; and each road can charge its own rates; but if a carrier made a contract to carry for a guaranteed rate, or guarantee that the whole freight shall not exceed a specified rate or sum, it may be sued upon it.⁹²

Receipt of Freight by Connecting Carrier.—If connecting carriers receive freight from the first carrier under a bill of lading issued by it, they do not impliedly assent to its rates, if the articles shipped are of a different character from those billed, and usually charged at a higher rate, but they may recover the higher rate for transportation.⁹³

§ 1543. When Freight Due or Demandable.—If there is an association of carrier between two points, by which the carrier at one end was authorized to contract for and bind all others on the route, then the rule might apply that if pay for the whole route was not taken in advance, no freight could be due until it arrived safely at the end of the voyage.⁹⁴

Demand for Prepayment.—The initial and intermediate carriers are bound to see that the ultimate carrier does not make a demand for prepayment of freight and refuse to carry the goods for nonpayment of the freight, where the contract of shipment, which is accepted by the intermediate carrier, provides for through transportation without prepayment of charges.⁹⁵

§ 1544. Right to Divide Through Freight.—The right of railroad corporations to divide through freights on authorized lines are contracts concerning their own authorized business, and not objectionable unless unconscionable.⁹⁶

§ 1545. Combination as to Rates.—A declaration of policy made by each of several carriers at a meeting, which is simply an expression of a right which the carriers had without such declaration, and which is not made for an illegal purpose, and does not operate prejudicially to shippers, although it declares that rates are not to be reduced, does not constitute an unlawful combination, where the rates referred to are reasonable rates, which have resulted from free competition.⁹⁷

An injunction against observing a declaration of policy by carriers, will not be granted on the ground that it may be made the basis of illegal acts and practices thereafter, when they are not its direct and necessary effect.⁹⁸

When New "Line" is Formed.—Two carriers may use the same "road" but each has a separate "line." One railroad company may lease trackage rights to another; but the joint use of the same track does not create the same "line," so as to compel either company to graduate its tariff by that of the other. There must be "common arrangement" between connecting companies, such as the

91. **Bond to secure freight.**—McFarland v. Parr & Co., 34 Tex. Civ. App. 292, 79 S. W. 76.

92. **Power of initial to bind succeeding carrier.**—Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228; Knight v. Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46; Sumner v. Southern R. Ass'n, 66 Tenn. (7 Baxt.) 345, 32 Am. Rep. 565; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56.

93. **Receipt of freight by connecting carrier.**—Sumner v. Southern R. Ass'n, 66 Tenn. (7 Baxt.) 345, 32 Am. Rep. 565.

94. **When freight due or demandable.**—Knight v. Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46.

95. **Demand for prepayment.**—Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451.

96. **Right to divide through freight.**—Morris, etc., R. Co. v. Sussex R. Co., 20 N. J. Eq. 542. See Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

97. **A declaration of policy.**—Post v. Railroad, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

98. **An injunction.**—Post v. Railroad, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

making of a joint tariff, before a "new line" can be formed; and the "line" so formed under the joint tariff of the connecting companies is one which is separate and independent from that of either of the connecting companies.⁹⁹

§ 1546. Advances for Charges and Expenses.—It is the long and well-established custom and usage of trade, throughout the United States, for freighters of goods to advance for the forwarding agents the existing charges upon them, which the consignees and owners are liable to refund, especially if the general forwarding agents, with whom the contract is made, are also the special agents of the owner for the shipment of goods; and no private arrangements of the consignee with the forwarding agent will effect the right of the common carrier to recover.¹

Liability for Freight Collected for Initial Carrier.—Where steamboat received freight from railroad company and delivered it to the consignees, and collected the freight charges due itself and also that due the railroad company, under a contract to deliver the freight entered into between the railroad company and the officers of the boat, the boat was liable for the amounts so collected.²

Lien for Advances to Pay Back Charges.—See post, "Advances for Back Charges," § 1566.

§§ 1547-1548. Persons Liable for Charges—§ 1547. Consignor.—The general rule is that in all cases where goods are shipped by the consignor under a contract, or for his benefit, he is originally liable for freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, etc., "he or they paying freight," will not, of itself, relieve him from that liability,³ such provision being for the benefit of the carrier, which may waive it and resort to the consignor, unless the latter is exonerated by some special stipulation,⁴ although it has delivered the shipment to the con-

99. When new "line" is formed.—Interstate Commerce Comm. v. Cincinnati, etc., R. Co., 56 Fed. 925, 54 Am. & Eng. R. Cas. 365.

1. Advances for charges and expenses.—White v. Vann, 25 Tenn. (6 Humph.) 70, 44 Am. Dec. 294.

2. Liability for freight collected for initial carrier.—Chicago, etc., R. Co. v. Steamboat W. G. Woodsides, 10 Iowa 465, 77 Am. Dec. 125; The Argyle v. Worthington, 17 O. 460.

3. Maine.—Holt v. Westcott, 43 Me. 445, 69 Am. Dec. 74.

Massachusetts.—Union Freight R. Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; Blanchard v. Page (Mass.), 8 Gray 281; Wooster v. Tarr (Mass.), 8 Allen 270, 85 Am. Dec. 707; Finn v. Clark (Mass.), 10 Allen 479; S. C. (Mass.), 12 Allen 522; Finn v. Western R. Corp., 102 Mass. 283; S. C., 112 Mass. 524, 17 Am. Rep. 128.

North Carolina.—Spencer v. White, 23 N. C. 236.

New Jersey.—Grant v. Wood, 21 N. J. L. 292, 47 Am. Dec. 162.

Where the consignor of goods contracts with a carrier for their transportation, he is prima facie liable to pay the charges thereof, and the fact that the charges are unpaid by him, and are to be collected from the consignee, does not

discharge the consignor from his liability. Central R. Co. v. McCartney, 68 N. J. L. 165, 52 Atl. 575.

New York.—Barker v. Havens (N. Y.), 17 Johns. 234, 8 Am. Dec. 393.

The carrier is not bound to look to the consignee nor to the consignor's factor. Hayward v. Middleton (S. C.), 3 McCord 121, 15 Am. Dec. 615.

"It is said to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and a shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Wooster v. Tarr (Mass.), 8 Allen 270, 85 Am. Dec. 707; Union Freight R. Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398.

4. Holt v. Westcott, 43 Me. 445, 69 Am. Dec. 74; Barker v. Havens (N. Y.), 17 Johns. 234, 8 Am. Dec. 393.

"Such is the settled law in England, though at one time Lord Kenyon at nisi prius ruled differently. The case was, however, carried to the king's bench, and the ruling of Lord Kenyon overruled by the full bench, and subsequently, in the case of Shepard v. De Barnales, 13 East 565, the question was again before the king's bench, and the English authorities fully reviewed by Lord Ellenborough, and the decision was that the provision, 'he or

signee;⁵ but in all cases the carrier ought to endeavor to get the freight of the consignee.⁶

Effect of Carrier's Lien.—The lien which the ship owner has on the goods conveyed is only an additional security for the freight. This lien is not incompatible with the personal responsibility of the shipper, and does not extinguish

they paying the freight,' usually inserted in bills of lading, was for the benefit of the master of owners, which provision they might waive, if they saw fit, and fall back upon the consignor for payment." *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74.

Instances.—Goods were shipped with directions to be delivered to the consignee, he "paying freight for the same, with primage and average accustomed," according to the bill of lading, signed by the master who delivered the goods to the consignee without receiving the freight, though he afterwards demanded it, and payment was refused. It was held that the carrier might maintain an action for the freight against the consignor, as in this case he had the property in the goods. *Barker v. Havens* (N. Y.), 17 Johns. 234, 8 Am. Dec. 393.

"In the case of *Barker v. Havens* (N. Y.), 17 Johns. 234, 8 Am. Dec. 393, an action was maintained by the shipowner against the shipper and consignor for the freight of cotton, on the ground of the contract created by the bill of lading, and the stipulation therein for the payment of freight. The court, in their opinion, lay some stress on the fact that the shipper was the owner of the goods, and the contract was for the carriage of his own goods. But it seems to be thus stated, not because he would not be liable on this contract if the property was not in himself; but to enforce the duty of the master when the goods are deliverable only on payment of freight, so as to exempt the consignor from liability on his contract, when the consignee or any other person is owner." *Blanchard v. Page* (Mass.), 8 Gray 281.

"*Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162, was an action by the owners against the consignor of a quantity of lumber for a balance due for freight, the consignee having paid in part only. There was no charter party; but a bill of lading with the usual clause as to payment of freight by the consignee. The claim was resisted by the consignee, who was the owner of the lumber, on the ground that the consignee alone was liable after the delivery of the lumber. The court, however, after a careful examination of the authorities, held the defendant to be liable, and that the fact that the consignee had also made himself liable by a reception of the lumber, did not relieve the consignor from his original liability; that the right of the master to retain the goods until freight is paid is an additional security for his benefit." *Holt*

v. Westcott, 43 Me. 445, 69 Am. Dec. 74.

"In *Spencer v. White*, 23 N. C. 236, the defendant shipped on board a vessel belonging to the plaintiff then lying at Elizabeth City a cargo of corn, for which the captain signed bills of lading, that the cargo was to be delivered to John Williams, at Charleston, in South Carolina, or in his assigns, 'he or they paying freight for the same.' The consignee received the cargo and paid the freight, except the sum of one hundred dollars, and for that balance the action was brought. The hundred dollars was withheld on account of the damaged state of the corn. At the trial the defendants contended that it was the duty of the plaintiff to have collected the freight of the consignee, and also that the corn was damaged by the negligence of the plaintiff. The evidence showed, however, that the damage was occasioned by the dangers of the sea, and the court held the plaintiff was entitled to recover, and was not obliged to look to the consignee." *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74.

5. "It was once held that if the master parted with the goods to the consignee without securing his freight he was deprived of all recourse to the consignor; but it is now decided otherwise. If the master can not recover the freight from the consignee to whom he has delivered the goods without receiving the freight, he still has his remedy over on the charter party against the shipper, and the condition precedent to the delivery inserted in the bill of lading was intended only for the master's benefit. 3 Kent's Com., 4th Ed., 222." *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74.

"It is often provided in charter parties that the goods shall be delivered agreeable to bills of lading, to be signed by the master; and the master, upon receiving the goods, signs bills of lading, agreeing to deliver them on the payment of freight, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And as it sometimes happened that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant character was answerable for the freight; and it has been determined that he is answerable. *Abbott on Shipping*, 141." *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74.

6. *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74; *Barker v. Havens* (N. Y.), 17 Johns. 234, 8 Am. Dec. 393.

it. The consideration for the freight is the carriage of the articles shipped on board, and the state or condition of the articles at the end of the voyage has nothing to do with the contract. It requires a special agreement to limit the remedy of the carrier for his lien to the goods conveyed.⁷

Ownership of Goods.—The shipper named in the bill of lading is liable to the carrier for freight, though he does not own the goods and the carrier has waived his lien upon them.⁸

Ownership Not Stated in Bill of Lading.—It is immaterial to the liability for freight of the owner of goods sent by general ship whether or not the ownership appears on the bill of lading.⁹

Goods Not Owned by nor Shipped for Benefit of Consignor.—Where the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, the carrier is not entitled to call on the consignor for freight.¹⁰

Shipment by Vendor to Vendee.—When the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee who is the purchaser is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk and on his account, he also may be held to be liable, as the real principal in the contract.¹¹ But whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties.¹²

7. *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74; *Griswold v. New York Ins. Co.*, 3 Johns. 321, 3 Am. Dec. 490.

The fact that the goods are liable for freight as well as the consignee when he receives them does not lease the shipper. When it is said, therefore, that these means of payment are offered to the carrier no more is meant than that it may under the circumstances resort to them. But if they fail, then the original obligation of the consignor attaches, and from him compensation may be received. *Hayward v. Middleton* (S. C.), 3 McCord 121, 15 Am. Dec. 615.

8. **Ownership of goods.**—*Wooster v. Tarr* (Mass.), 8 Allen 270, 85 Am. Dec. 707; *Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162.

"Parsons, in his recent work on mercantile law, p. 352, thus states the rule: 'If the bill of lading requires delivery to the consignee or his assignees, "he or they paying freight," which is usual, and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner can not, in the absence of an express contract, fall back on the consignor, and make him liable, unless he can show that the consignor actually owned the goods; in which case the bill of lading in this respect is nothing more than an order by a principal upon an agent to pay money due from the principal.' " *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74.

9. **Ownership not stated in bill of lading.**—*Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162.

10. *McEwen v. Jeffersonville, etc.*, R. Co., 33 Ind. 375; *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74; *Barker v. Havens* (N. Y.), 17 Johns. 234, 8 Am. Dec. 393.

11. **Shipment by vendor to vendee.**—*Union Freight R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; *Blanchard v. Page* (Mass.), 8 Gray 281; *Wooster v. Tarr* (Mass.), 8 Allen 270, 85 Am. Dec. 707; *Finn v. Clark* (Mass.), 10 Allen 479; S. C., 12 Allen 522; *Finn v. Western R. Corp.*, 102 Mass. 283; S. C., 112 Mass. 524, 17 Am. Rep. 128; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314.

Blanchard v. Page (Mass.), 8 Gray 281, "was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that, although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage unless he was prohibited by his principal, and it was said that he would be liable for the freight." *Union Freight R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398.

12. *Union Freight R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St.

Where Consignee Can Not Be Found or Refuses Goods.—If the consignee be absent, or after due effort can not be found, or if he refuse to receive them, the carrier then holds the goods for the benefit and subject to the order of the consignor, and may look to him for payment of charges.¹³

§ 1548. Consignee.—The existence of the relation of carrier and consignee will not establish a liability on the part of the latter to pay the freight charges, in the absence of an agreement, express or implied.¹⁴ Where a common carrier, on delivery of goods, waives its lien for freight charges, and allows the consignee to remove the goods, and the consignee, with knowledge that the freight charges are, to a certain extent, unpaid, and that the carrier is giving up his lien thereon, accepts the goods, and removes them, it is evidence from which to imply an agreement to pay the known amount of the freight charges.¹⁵

Stipulation in Bill of Lading.—If a consignee receives goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he, by such receipt, makes himself debtor for the freight, and may be sued for it.¹⁶ The lawfulness of stipulations of this character in favor of common carriers, to protect them against unknown responsibilities, and to adjust the freight according to the value and the responsibilities assumed, has been repeatedly upheld.¹⁷

Factor Obtaining Goods on Undertaking to Pay Freight.—Where a consignee, though a factor only, has full notice of all the facts, and obtains the goods under the bill of lading, and on the obvious undertaking to pay the freight, and pays on the carriers' requirement at the time of delivery all the freight that the carriers suppose to be due, the consignee is properly held for any balance of freight, as well as demurrage, that may be actually owing according to the terms of the bill of lading upon the actual value of which he had knowledge, but which was concealed from the carriers.¹⁸

Effect of Carriers Accepting Draft on Owner.—Where a bill of lading of goods sent by general ship states that the consignees are to pay the freight, and the goods are delivered to them without payment, and the carrier takes in payment a bill of exchange drawn by the consignees on the owner, which is not paid, the owner is not discharged from liability, either by the delivery or taking the bill of exchange.¹⁹

Less than Interstate Tariff Collected by Mistake.—Where a railway company by reason of a mistake collects less from the consignor than the rate fixed by United States laws on a shipment of goods and the goods have been delivered to the consignee, an action will lie against the consignee for the balance due, notwithstanding there was an agreement between the consignee and the consignor that the consignor was to pay the freight charges.²⁰

Rep. 398; *Blanchard v. Page* (Mass.), 8 Gray 281; *Wooster v. Tarr* (Mass.), 9 Allen 270, 85 Am. Dec. 707; *Finn v. Clark* (Mass.), 10 Allen 479; S. C., 12 Allen 522; *Finn v. Western R. Corp.*, 102 Mass. 283; S. C., 112 Mass. 524, 17 Am. Rep. 128; *Boston, etc., R. Co. v. Whitcher* (Mass.), 1 Allen 497.

13. **Consignee can not be found or refuses goods.**—*Rankin v. Memphis, etc., Packet Co.*, 56 Tenn. (9 Heisk.) 564.

14. **Consignee.**—*Central R. Co. v. McCartney*, 68 N. J. L. 165, 52 Atl. 575.

15. *Central R. Co. v. McCartney*, 68 N. J. L. 165, 52 Atl. 575.

16. **Stipulation in bill of lading.**—*Hayward v. Middleton* (S. C.), 3 McCord 121, 15 Am. Dec. 615.

17. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151; *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; *The Denmark*, 27 Fed. 141; *The Bermuda*, 29 Fed. 399, 23 Blatch. 554; *North German Lloyd v. Heule*, 44 Fed. 100, 10 L. R. A. 814.

18. *North German Lloyd v. Heule*, 44 Fed. 100, 10 L. R. A. 814; *Philadelphia, etc., R. Co. v. Barnard*, Fed. Cas. No. 11,086, 3 Ben. 39; *Neilson v. Jesup*, 30 Fed. 138; *Gates v. Ryan*, 37 Fed. 154.

19. **Effect of carrier accepting draft on owner.**—*Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162.

20. **Less than interstate tariff collected by mistake.**—*Louisville, etc., R. Co. v. Magnus Co.*, 13 O. C. C., N. S., 305.

Consignee Vendor of Consignor.—See ante, "Consignor," § 1547.

Extra Expense Incurred by Carrier.—Any necessary expense incurred by a carrier in the preservation of goods from extraordinary peril not properly belonging to the carrier can be recovered by it from the consignee. In other words, if something was required to protect this property that was beyond the usual care required of a carrier the consignee would be required to reimburse the carrier for any expense in that behalf.²¹

§ 1549. **Compensation for Stoppage in Transit for Inspection, etc.**—A carrier is entitled to compensation in addition to the actual cost involved in taking loaded cars in transit to the shipper's warehouses at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded cars, whether or not the carrier is under any obligation to extend such a privilege to shippers.²²

§ 1550. **Demurrage.**—See ante, "Lien for Demurrage," § 983.

§ 1551. **Storage Charges.**—It is a well-settled proposition of law that a warehouseman has a lien for his charges. It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee and places the goods in its warehouse, its liability thereafter is that of a warehouseman,²³ and the carrier is entitled to additional compensation for its services as a warehouseman.²⁴ A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier can not be held liable for storage fixed by the rules of the carrier, of which he had no notice, unless the rates of storage are shown to be reasonable.²⁵ A rule of a railroad company that a party to whom freight is consigned must receive the same within forty-eight hours after notice is a reasonable one, and a charge for storage after that time is legal.²⁶

Detention Wrongful.—Detention of goods by a carrier being wrongful, it has no valid claim for storage.²⁷

§ 1552. **Reshipment and Reconsignment Charges.**—A carrier when required to reship a consignment of freight, may exact a reasonable charge therefor.²⁸

21. **Extra expense incurred by carrier.**—Long v. Louisville, etc., Packet Co., 7 N. P., N. S., 14, 18 O. D. N. P. 699.

22. **Compensation for stoppage in transit for inspection, etc.**—Southern R. Co. v. St. Louis Hay, etc., Co., 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678, reversing 153 Fed. 728, 82 C. C. A. 614.

If stopping freight while in transit, for inspection and reloading, is of benefit to the shipper and involves service by and expense to the carrier the latter is not limited to the actual cost of that privilege, and it is justified in receiving some compensation in addition thereto. Southern R. Co. v. St. Louis Hay, etc., Co., 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678.

23. Collins v. Alabama, etc., R. Co., 104 Ala. 390, 16 So. 140; Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. Rep. 32.

24. Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. Rep. 32; Gulf City Constr. Co. v. Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

25. Baumbach v. Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

26. Southern R. Co. v. Lockwood Mfg.

Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. Rep. 32; Gulf City Constr. Co. v. Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

27. **Detention wrongful.**—Southern Pac. Co. v. Redding, 43 S. W. 1061, 17 Tex. Civ. App. 440, affirmed in 93 Tex. 650, no op.

28. **Additional charges in case of re-shipment.**—Under a contract to carry certain car loads to C. for ten cents, but the charge to be thirteen cents if the freight was carried beyond plaintiff's depot at C., a payment of the extra three cents, exacted by the plaintiff, on being ordered to reship the goods, is not involuntary and under duress, because the depot of the road on which the reshipment was made was but a little distance from plaintiff's depot and connected with it by tracks. The plaintiff was not obliged to allow the other road to use its tracks to haul away the cars, nor was it obliged to haul them to the other depot itself without extra payment. Louisville, etc., R. Co. v. Kahn, 5 W. L. Bull. 25, 8 O. Dec. Reprint 7.

"If the plaintiff demanded three per cent extra for something it was under

Reconsignment Charges.—The imposition of a reconsignment charge by railroad companies having switch tracks within a city, whereby a certain charge is made for the delivery of each car from the track upon which it is originally placed to that designated by the consignee, is a matter of private concern between the railroad companies and the consignees, and not one of public interest, and quo warranto will not lie to prevent the companies from making such charge.²⁹ Quo warranto will not lie to prevent the violation of a custom of railroads having switch tracks in a city to deliver consignments of goods from one track to another without making extra charge therefor.³⁰

§§ 1553-1595. Lien for Charges—§§ 1553-1555. Right to Lien—

§ 1553. In General.—A carrier of goods, whether by land or water,³¹ has a lien on the goods or property for freight and other proper charges incurred in their conveyance, and he may hold the goods until such charges are properly paid or tendered,³² unless there is a stipulation for the payment of the freight

obligation to perform, there was no consideration; but if it was for something he was under no obligation to perform, there was a consideration. The plaintiff having fulfilled its contract to bring the lard to its own depot, and deliver it there, can not be compelled to deliver at a further point. Though the distance between its own depot and that of the Little Miami road was small, and it might deliver the freight as easily at the Little Miami road as at its own depot, that was not the contract it made, and it was under no obligation to do so." *Louisville, etc., R. Co. v. Kahn*, 5 W. L. Bull. 25, 8 O. Dec. Reprint 7.

29. Reconsignment charges.—*State v. Atchison, etc., R. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

Rev. St. 7 Mo. of 1899, §§ 1112-1115, requiring delivery by the initial carrier of freight upon any track it owns, leases, or uses, or can use, does not prevent such initial carrier from assessing a reconsignment charge for delivering a shipment upon another track than that upon which it was originally placed. *State v. Atchison, etc., R. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

30. *State v. Atchison, etc., R. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

31. Carrier by land or water.—"Carriers by water have a lien as well as carriers by land. A shipowner has a lien for freight upon the goods carried, whether the vessels be chartered or be general ships carrying goods for all persons for hire. The master is not bound to deliver possession of any part of his cargo until the freight and other charges due in respect to such part are paid. This lien may be regarded as a maritime lien, because it is cognizable in the admiralty, and under the usages of commerce arises independently of the agreement of the parties. The shipowner may retain the goods until the freight is paid, or he may enforce it by a proceeding in rem in the admiralty court; but, although

the lien is maritime and cognizable in the admiralty, it stands upon the same ground with the common-law lien of the carrier on land, is subject to the same principles, except as regards enforcement, and may, therefore, be considered in connection with liens of carriers by land." *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57, quoting from *Jones on Liens*, §§ 262-263, 270, 271.

32. Lien for freight and charges.—*United States*.—*Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231; *Texas, etc., R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 44 L. Ed. 921, 20 S. Ct. 824; *New Jersey Steam Nav. Co. v. Merchants Bank (U. S.)*, 6 How. 344, 12 L. Ed. 465; *Beasley v. Baltimore, etc., R. Co.*, 27 App. D. C. 595, 6 L. R. A., N. S., 1048.

California.—*Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286.

Colorado.—*Denver, etc., R. Co. v. Hill*, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376.

Illinois.—*Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

Kansas.—*Missouri Pac. R. Co. v. Peru Van Zandt Imp. Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058.

Kentucky.—*Caye v. Pool*, 108 Ky. 124, 55 S. W. 887, 21 Ky. L. Rep. 1600, 94 Am. St. Rep. 348; *Boggs v. Martin*, 13 E. Mon. 243.

Louisiana.—*Sonia Cotton Oil Co. v. Red River*, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Maine.—*Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Wilson v. Grand Trunk Railway*, 56 Me. 60, 96 Am. Dec. 435.

Massachusetts.—*New Haven, etc., Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360; *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247.

Ohio.—*Goodman v. Stewart (O.)*,

at some other place, and at some other time, than the point of delivery.³³

Stipulation for Lien.—The term in a bill of lading to deliver, "he paying freight," is an express stipulation to the effect that the carrier may detain them for its proper charges.³⁴

§ 1554. **Connecting Carriers.**—Where several independent carriers receive goods in succession, each is entitled to payment in advance or to a lien therefor, including back charges paid; but not after notice not to receive such goods.³⁵

Bill of Lading Providing for Reshipment.—A connecting carrier which receives goods for transportation from an initial or intermediate carrier, under a bill of lading which provides for a reshipment, has a lien on the goods for its freight. Such connecting carrier is not the mere agent of the first.³⁶ When an owner of goods delivers them to a carrier to be transported over its route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, in the absence of special instructions from the consignor to the succeeding carrier, he makes and constitutes the person to whom it delivers them its forwarding agents, for whose acts in the execution of that agency he is himself responsible. And, therefore, if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and can not in any sense be considered as wrongdoers, although they are carried to a place to which he did not intend that they should be sent. And in such case the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers.³⁷ It is

Wright 216; Jordan, etc., Co. v. James, 5 O. 88; Bowman v. Hilton, 11 O. 303.

Tennessee.—Rankin v. Memphis, etc., Packet Co., 56 Tenn. (9 Heisk.) 564.

Texas.—Missouri, etc., R. Co. v. Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092; Texas, etc., R. Co. v. Klepper, 29 Tex. Civ. App. 590, 69 S. W. 426; Gulf, etc., R. Co. v. Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Gulf, etc., R. Co. v. North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080; Ryan & Co. v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Vermont.—Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

Wisconsin.—Warehouse, etc., Supply Co. v. Galvin, 96 Wis. 523, 65 Am. St. Rep. 57.

Right to retain possession.—A carrier is ordinarily entitled to retain possession of goods it has transported until the freight charges thereon are paid. *Sonia Cotton Oil Co. v. Red River*, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; *Missouri Pac. R. Co. v. Peru Van Zandt Imp. Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058.

The delivery of goods at the place of destination to the consignee, and the payment of the freight, are concurrent acts to be performed at the same time; so that the carrier is entitled to possession until the freight is tendered. *Ran-*

kin v. Memphis, etc., Packet Co., 56 Tenn. (9 Heisk.) 564.

33. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

34. **Stipulation for lien.**—*Goodman v. Stewart (O.)*, Wright 216.

35. *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

36. *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551.

37. *United States.*—*Beasley v. Baltimore, etc., R. Co.*, 27 App. D. C. 595, 6 L. R. A., N. S., 1048.

Massachusetts.—*Briggs v. Boston, etc., R. Co. (Mass.)*, 6 Allen 246, 83 Am. Dec. 626; *Stevens v. Boston, etc., R. Corp. (Mass.)*, 8 Gray 266; *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247; *Richardson v. Rich*, 104 Mass. 156, 6 Am. Rep. 210; *Briggs v. Boston, etc., R. Co. (Mass.)*, 6 Allen 246, 83 Am. Dec. 626.

New York.—*Travis v. Thompson (N. Y.)*, 37 Barb. 236.

Wisconsin.—*Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

Where the initial carrier by virtue of the contract of carriage comes into the possession of the goods, and has lawful possession with the consent of the owner. It is invested with an apparent authority over the goods, probably sufficiently to authorize it to employ another carrier to

this that broadly distinguishes such a case from all those where the goods are delivered to the carrier, without the owner's consent, by a wrongdoer. In the one case the owner never consents to the delivery of the goods to the carrier; in the other he not only consents to it, but actually contracts that it shall be done.³⁸

Shipping Directions Disregarded by Initial Carrier.—The courts generally hold that a carrier, receiving goods to be transported over its own line to a point beyond, has the apparent authority to select any of the ordinary routes leading thereto, and that the second carrier, receiving the goods in good faith in the ordinary and usual course of business between connecting lines, without notice of any special directions on the part of the consignor, will have a lien for his reasonable charges for transporting such goods over its own line, and also for such reasonable charges as it may have advanced to the first carrier.³⁹ The court of Michigan holds that a carrier receiving goods to be transported beyond its line, in delivering them to a subsequent carrier acts as a special agent of the consignor with limited powers, and that if it disregarded its instructions and exceeded its authority, the subsequent carrier could not maintain a lien upon the goods for its transportation charges.⁴⁰ In later decisions in other states the doctrine of the Michigan court, however, has not been followed.⁴¹

Goods Received under Agreement to Disregard Shipping Directions.—A carrier has no lien either for its own charges or for the amount advanced to pay those of a connecting carrier upon goods which were directed to be sent over a rival road, but which it received from the connecting carrier under an agreement between the two to disregard all shipping directions and to send all goods for points reached by the carrier claiming the lien over its road; and the fact that it had no actual knowledge of the directions to ship the particular goods upon which it claims the lien over the rival road is immaterial.⁴²

Contract of Carriage Obtained by Misrepresentation of Initial Carrier.—Owner of a vessel who has received goods to be carried for the latter part of a voyage, from a prior carrier which had a possession apparently fair, under a bill of lading authorizing a reshipment, is entitled to its freight, although the prior carrier obtained possession of the goods, and secured the contract for the entire voyage, by reasons of false representations made to the shipper.⁴³

Goods Missent.—If the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and can not in any sense be considered as wrong-

forward the goods to the place of destination, and to vest the latter with a lien thereon, for the price of transportation, if such was the custom and course of business. So far as the connecting carrier's services are concerned, they have a right to charge the ordinary rate of transportation for such services, and to assert a lien therefor. As to the freight earned by themselves, it may be they were independent freighters, and entitled to enforce their lien against the goods, even though the whole had been prepaid at the shipping point. *Travis v. Thompson* (N. Y.), 37 Barb. 236; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

38. *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

39. *United States*.—*Patten v. Union Pac. R. Co.*, 29 Fed. 590, disapproving *Fitch v. Newberry* (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

Colorado.—*Hill v. Denver, etc.*, R. Co., 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376; *Price v. Denver, etc.*, R. Co., 12 Colo. 402, 21 Pac. 188.

Massachusetts.—*Crossan v. New York, etc.*, R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408; *Briggs v. Boston, etc.*, R. Co., 6 Allen 246, 83 Am. Dec. 626, distinguishing *Robinson v. Baker* (Mass.), 5 Cush. 137, 51 Am. Dec. 54; *Whitney v. Beckford*, 105 Mass. 267.

Rhode Island.—*Vaughan v. Providence, etc.*, R. Co., 13 R. I. 578.

40. *Fitch v. Newberry* (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

41. *Hill v. Denver, etc.*, R. Co., 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376.

42. *Hill v. Denver, etc.*, R. Co., 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376.

43. *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551.

doers, although they are carried to a place to which he did not intend that they should be sent. And in such case, the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers.⁴⁴ The carrier receiving goods takes the risk of the agency of the one who delivers them, but not that of his observing the exact letter of his private instructions.⁴⁵

Initial Carrier Mistaking Rate.—Where the carriers act independently and do not form a continuous line, interested together in the transportation over the whole route, the fact that the initial carrier made a contract with the shipper for a through rate and by mistake allowed less for the carriage over one of the connecting lines than by the tariff of the latter it should have done, does not deprive such connecting carrier of its lien for the additional freight,⁴⁶ even

44. Goods missent.—*Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

"The principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong place. *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626, distinguishing *Robinson v. Baker* (Mass.), 5 Cush. 137, 51 Am. Dec. 54; *Whitney v. Beckford*, 105 Mass. 267; *Patten v. Union Pac. R. Co.*, 29 Fed. 590, disapproving *Fitch v. Newberry* (Mich.), 1 Doug. 1, 40 Am. Dec. 33; *Vaughan v. Providence, etc., R. Co.*, 13 R. I. 578. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper." *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

45. In the case of *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626, the contract was with the Racine and Mississippi Railroad Company, to forward and deliver flour in Williamstown, Massachusetts. By mistake of its agents, it was billed to Wilmington, instead of Williamstown. The defendant carried it to Wilmington, and paid the back charges according to the usual course of the business. The court held that the shipper was responsible for the mistake of his own forwarding agent, and that the defendant had a lien, not only for its own freight, but for all the back charges. And, in commenting on the case, *Robinson v. Baker* (Mass.), 5 Cush. 137, 51 Am. Dec. 54, says that the same result would have occurred there, except for the fact that the party who misdirected the goods was not the forwarding agent of the owner at all, but had contracted to deliver them in Albany to a specific consignee. *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

46. Initial carrier mistaking rate.—*Crossan v. New York, etc., R. Co.*, 149

Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408. See contra, *Marsh v. Union Pac. R. Co.*, 3 McCrary 236, 9 Fed. 873, 6 Am. & Eng. R. Cas. 359.

A carrier by railroad made a written contract with a shipper for the transportation of horses over its own and a connecting line, of which it was not the agent, and in making up the total freight, which the shipper prepaid, allowed less for the carriage over the connecting line than by the tariff of the latter it should have done; and the connecting carriers, upon the arrival of the horses at their destination, refused to deliver them unless the additional freight was paid to it by the shipper. Held, in an action for conversion, that the connecting carrier acquired a lien on the horses for the additional freight, although when it accepted them for carriage it might have had notice from the waybill that there had been an attempt to prepay the freight, and although the contract was shown to it before it refused to deliver the horses. *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

"The defendant was justified in giving preponderance to the requirement of continuous and speedy carriage, and in assuming that the authority of the Pennsylvania Railroad to offer the horses was not conditional upon the prepayment of freight by the plaintiff turning out to be full payment of all that the defendant could demand. See *Wolf v. Hough*, 22 Kan. 659; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Vaughan v. Providence, etc., R. Co.*, 13 R. I. 578; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56." *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

In such an action it was held that the shipper was not entitled to go to the jury on allegations of unreasonable delay in the transportation, and of detention of the horses upon the cars, there being no evidence of such delay after their arrival, and the consequences of their subsequent

though the initial carrier guarantied the rate on its own behalf and in behalf of the other companies.⁴⁷

Goods Damaged in Hands of Preceding Carrier.—A common carrier, receiving goods in the ordinary course of business, and in the proper line of transit, has a lien for the freight and charge paid, although the goods may have suffered damage before they reached him while in the hands of some preceding carrier.⁴⁸

§ 1555. Transfer Companies.—A person engaged in the "transfer" business or in transporting chattels within the city limits for all persons who choose to employ and remunerate him therefor is a common carrier and has a lien for his charges for hauling and for freight charges advanced, which is not lost by the assignment by the consignee for the benefit of his creditors.⁴⁹

§§ 1556-1573. Operation and Effect—§ 1556. In General.—The lien of a common carrier for its charges is a personal privilege which is not transferable and no question upon it can arise except between the principal and factor.⁵⁰

§§ 1557-1562. Property Covered—§ 1557. Property of the Government.—A common carrier can not acquire a freight lien on property of the government for services in transporting the same. Such power might subject the operations of the government to the wishes and caprice of common carriers.⁵¹

§ 1558. Property Carried without Authority.—A common carrier, which obtains possession of goods wrongfully or without the consent of the owner, express or implied, has no lien for its service, and no right to retain the property;⁵² and it will make no difference that the carrier acted in good faith and

detention being alleged only as a matter of aggravation of a wrongful refusal to deliver them; and that, the refusal to deliver the horses being rightful, negligence, if any, in the care of them while detained, could not be relied upon as a substantive cause of action. *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

47. Initial carrier's guarantying erroneous rate.—The P. F. & C. railway company received from the plaintiff at Pittsburg goods to be transported to Hudson, Wis., guarantying on its behalf and in behalf of the other companies and carriers constituting the entire route that the through freight should not exceed a certain sum, but expressly restricting its liability as carriers to its own route. The connecting companies, acting independently of each other, and having no knowledge of the guaranty, charged their regular rates, each paying to the previous carrier, according to the established custom, all back charges. The goods were transported to Hudson and delivered to the defendant as warehouseman, by whom the back charges for transportation were paid—the sum exceeding that specified in the guaranty. The plaintiff tendered to defendant the amount due according to the guaranty and demanded the possession of the goods which was

refused. In an action to recover possession, held, that the guaranty was not a through "contract,"—that each succeeding carrier after the first had a right to charge its usual rates and to pay the usual back charges, and that the defendant had a lien upon the goods for the full amount of the back charges paid by him. *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

48. Goods damaged in hands of preceding carrier.—*Bowman v. Hilton*, 11 O. 303.

49. Transfer companies.—*Caye v. Pool*, 108 Ky. 124, 55 S. W. 887, 21 Ky. L. Rep. 1600, 94 Am. St. Rep. 348.

50. Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271.

51. Dufolt v. Gorman, 1 Minn. 301, Gil. 234, 66 Am. Dec. 543.

52. Property carried without authority.—*Georgia.*—"A carrier acquires no right, by virtue of its employment as such, to hold the goods delivered to it by a wrongdoer to whom they do not belong, until the charges are paid, against the claim of the true owner; and therefore it has no lien upon them, but must, on demand, surrender them to the owner." *Savannah, etc., R. Co. v. Talbot*, 123 Ga. 378, 51 S. E. 401.

Massachusetts.—*Whitney v. Beckford*, 105 Mass. 267; *Clark v. Lowell, etc., R. Co. (Mass.)*, 9 Gray 231; *Gilson v.*

was not in fault,⁵³ as, for instance, where goods are carried for the convenience of a bailee,⁵⁴ or for a conditional vendee who has not complied with the terms of the sale.⁵⁵ The principle of caveat emptor applies, as a carrier is not bound to receive goods from a wrongdoer and can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage, is first paid.⁵⁶ To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt, sought to be enforced by the lien.⁵⁷ Where the owner has clothed a third person with apparent authority to ship the property, the carrier has a lien thereon for its freight and other proper charges.⁵⁸

Where Owner Accepts Benefit of Carriage.—The carrier, is, at least, entitled to what the transportation on its own road is reasonably worth when the owner of the goods took the benefit of its labor by receiving the goods at their point of destination.⁵⁹

Gwinn, 107 Mass. 126, 9 Am. Rep. 13; Robinson v. Baker (Mass.), 5 Cush. 137, 51 Am. Dec. 54; Stevens v. Boston, etc., R. Corp. (Mass.), 8 Gray. 266.

Michigan.—Fitch v. Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33; Pingree v. Detroit, etc., R. Co., 66 Mich. 143, 11 Am. St. Rep. 479, 33 N. W. 298.

New York.—Travis v. Thompson (N. Y.), 37 Barb. 236; Van Buskirk v. Purinton, 2 N. Y. Super. Ct. 601; Collman v. Collins, 2 N. Y. Super. Ct. 609.

Pennsylvania.—King v. Richards (Pa.), 6 Whart. 418, 37 Am. Dec. 420.

Tennessee.—Sumner v. Southern R. Ass'n, 66 Tenn. (7 Baxt.) 345, 32 Am. Rep. 565.

Texas.—Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080; Ryan & Co. v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899.

The rule seems to be that there is no lien in favor of the carrier where the goods have been received from a wrongful holder or from one not authorized to ship them. Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899.

Where goods were wrongfully delivered by a carrier to a steamship company instead of the owner, and were carried to another place, the company, having notice of the ownership, had no lien on the goods for freight, and on selling them was liable for conversion; for, though it was the duty of such company to receive goods tendered it for shipment by connecting carriers, it was not exempt from liability for goods shipped by one without authority. Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899.

53. Robinson v. Baker (Mass.), 5 Cush. 137, 51 Am. Dec. 54; Sumner v. Southern R. Ass'n, 66 Tenn. (7 Baxt.) 345, 32 Am. Rep. 565; Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899.

54. Carrying for convenience of bailee.—One who carries property for the convenience, and at the request of the bailee thereof, as for instance a lessee of a sew-

ing machine has no lien thereon for services as against the owner. Gilson v. Gwinn, 107 Mass. 126, 9 Am. Rep. 13.

55. Conditional sale not complied with.—Where property sold on a condition which has not been complied with was shipped by the buyer, the carrier had no right to detain the goods against the conditional vendor for the amount of its freight charges. Van Buskirk v. Purinton, 2 N. Y. Super. Ct. 601; Collman v. Collins, 2 N. Y. Super. Ct. 609, see, also, Fitch v. Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

56. Robinson v. Baker (Mass.), 5 Cush. 137, 51 Am. Dec. 54; Fitch v. Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or work to be done upon it, the owner can follow and reclaim it in the possession of any person however innocent. * * * A connecting carrier is not exempt from the operation of this principal. Robinson v. Baker (Mass.), 5 Cush. 137, 51 Am. Dec. 54; Fitch v. Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

57. Fitch v. Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

58. Owner clothing third person with apparent authority to ship goods.—Where an owner clothed a third person with apparent authority to act for him in securing the transportation of property, the carrier, transporting the property pursuant to a contract with the third person, may look to the owner for his reasonable charge, and hold a lien on the property for the same. Hahl v. Laux, 93 S. W. 1080, 42 Tex. Civ. App. 182; Ryan & Co. v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899.

59. Sumner v. Southern R. Ass'n, 66 Tenn. (7 Baxt.) 345, 32 Am. Rep. 565.

Recovery by Owner.—If a common carrier obtains the possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value.⁶⁰

§ 1559. Missent Goods.—Where goods are missent by an agent of the owner acting within the scope of his authority, the carrier has a lien for his freight.⁶¹

§ 1560. Property Included by Mistake in Bill of Lading.—No lien exists on goods of one for freight and charges on goods of another, shipped by the same bill of lading to the same consignee, in absence of evidence that the former consented that his goods should be held for charges due on the goods of the latter; and without his consent, no such burden could ever be thrown on him.⁶²

§ 1561. Agent Violating Instructions in Shipping Goods.—Carrier, who, in good faith, enters into a contract for the transportation of goods in the hands of an agent, can not be made to suffer because in entering into such a contract the agent disobeyed his secret instructions.⁶³

§ 1562. Shipment Obtained by Misrepresentation of Carrier.—See ante, "Connecting Carriers," § 1554.

§§ 1563-1568. Extent of Lien—§ 1563. Amount Shown by Bill of Lading.—The lien of a carrier for freight is only to the extent of the contract price as shown by the bill of lading. If it claims a lien for a larger sum it does it at its peril. The shipper is not bound to submit to any different charge. He is under no legal obligation to pay the unlawful charge and take his chances of the repayment of the amount of the overcharge.⁶⁴

Agreed Rate Less than Scheduled Charges under Interstate Commerce Act.—One who has obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, less than the published schedule rates, filed with and approved by the interstate commerce commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law.⁶⁵

60. *Massachusetts*.—*Robinson v. Baker* (Mass.), 5 Cush. 137, 51 Am. Dec. 54.

Michigan.—*Fitch v. Newberry* (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

New York.—*Van Buskirk v. Purinton*, 2 N. Y. Super. Ct. 601; *Collman v. Collins*, 2 N. Y. Super. Ct. 609.

Texas.—*Liefert v. Galveston, etc., R. Co.* (Tex. Civ. App.), 57 S. W. 899.

61. **Missent goods.**—*Whitney v. Beckford*, 105 Mass. 267. See ante, "Connecting Carriers," § 1554.

62. *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367.

63. *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551.

Connecting carrier receiving goods

from prior carrier.—See ante, "Connecting Carriers," § 1554.

64. *Beasley v. Baltimore, etc., R. Co.*, 27 App. D. C. 595, 6 L. R. A., N. S., 1048.

The carrier can not assert his lien for any other amount than that stated in the bill of lading. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

65. *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910; *Southern R. Co. v. Harrison*, 119 Ala. 539, 72 Am. St. Rep. 936, 24 So. 552, abandoning ruling in *Mobile, etc., R. Co. v. Dis-mukes*, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113, because of the decision in *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910, as to the force of the Interstate Commerce Act.

Mistake as to Rate.—Where a common carrier, by mistake, names a lower freight rate than it should, it may exact the full rate at the destination.⁶⁶

§§ 1564-1568. Charges Secured—§ 1564. Charges Not Connected with Carriage.—The right of a common carrier to a lien extends to charges connected with the expenses of transportation strictly.⁶⁷ Hence a common carrier, having received goods for transportation and given a bill of lading, can not detain them for a debt due to it but not connected with the carriage.⁶⁸ The carrier's lien does not extend to any claim for damages for the breach of collateral contracts of covenants by the shipper, even when incorporated in the bill of lading,⁶⁹ as a claim for breach of covenant to furnish a full cargo;⁷⁰ nor to damages for detention beyond the time fixed by the contract for receiving or loading or unloading the goods;⁷¹ nor to compensation for delay in the nature of demurrage;⁷² nor to any claim for unliquidated damages.⁷³ The lien does not extend to the payment of pilotage,⁷⁴ port charges,⁷⁵ or expenses of warehousing the goods;⁷⁶ cartage for delivery of the goods to the consignee,⁷⁷ the charge for the carriage of other goods,⁷⁸ or to the passage money of the consignor's father who came in the vessel that brought the goods.⁷⁹

§§ 1565-1568. Charges for Continuous Transit on Successive Lines—§ 1565. In General.—The lien of a carrier is not confined to charges for its own transportation,⁸⁰ but extends to all the proper freight and storage charges

66. **Mistake as to rate.**—Compare *Mobile, etc., R. Co. v. Dismukes*, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113; *Rowland v. New York, etc., R. Co.*, 61 Conn. 103, 29 Am. St. Rep. 175, 23 Atl. 755; *Savannah, etc., R. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

67. **Charges not connected with carriage.**—*Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

The carrier's right to hold goods against the consignee extends no farther than until he has paid for his carriage. *Jordan, etc., Co. v. James*, 5 O. 88.

68. *Louisiana.*—*Pharr v. Collins*, 35 La. Ann. 939, 48 Am. Rep. 251.

Ohio.—As the contract of affreightment is the only basis of the lien, it is never extended to embrace any other claim than that stipulated to be paid for the carriage of the goods; all else must be matter of special agreement. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

Pennsylvania.—*Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

69. *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

70. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

71. *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

A common carrier has no lien upon goods for damages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival. *Chicago, etc., R. Co. v. Jenkins*, 103 Ill. 588; *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa.

379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

72. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182; *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327. See ante, "Demurrage," § 1550.

73. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

74. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

75. *Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182; *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

76. *Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 110 Am. St. Rep. 550, 3 L. R. A., N. S., 327.

77. **Lien for cartage.**—Where a common carrier by water, after landing goods at the wharf in the city to which they are consigned, voluntarily assumes the delivery of them to the consignee at his place of business, no lien for cartage arises. *Richardson v. Rich*, 104 Mass. 156, 6 Am. Rep. 210.

78. **Charges for transportation of other goods.**—A common carrier has a lien on goods in his possession only for the transportation of these particular goods, and not for the transportation of other goods also, which do not remain in his possession. *Hartshorne v. Johnson*, 7 N. J. L. 108.

79. *Adams v. Clark (Mass.)*, 9 Cush. 215, 57 Am. Dec. 41.

80. **Lien not confined to carrier's own charges for transportation.**—*Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

"The lien attaches not alone for the

upon the goods throughout the whole of a continuous transit over successive lines.⁸¹

§ 1566. Advances for Back Charges.—Since on a line of railroads unconnected by any agreement the owner would be obliged to have some one at the end of each road to pay the freight for him or otherwise his goods detained under the lien, it has become the usage, founded on general convenience and necessity, for the next road to pay the back freight, and it is considered as the agent of the owner for that purpose, and the owner is supposed to know this usage.⁸² The usage is well settled and has become a part of the commercial law. Each carrier which pays the back freight becomes the agent of its predecessors to collect it. It is in a manner substituted or subrogated in the place of the previous ones;⁸³ and in some cases may recover for back freight it has paid when it can not recover for its own.⁸⁴ Or it may be said that the shipper makes the succeeding carriers his agents for forwarding in the customary manner. But the rule holds not only in cases where an agency can be implied, but in cases where it can not. And it is perhaps better to say that the right to forward and the claims for repayment of all reasonable back charges grow out of the necessity of the case. Between widely separate parts of this extended country, the shipper is presumed to know that his goods must be carried by successive lines, and to submit himself to the ordinary course of business, unless he gives special directions to the contrary.⁸⁵ The duty of the carrier is to do what a prudent man would do in the case. If the goods are in apparent good order the carrier is not obliged to examine further, and has a right to pay the back freight.⁸⁶

particular item of charge for carriage due upon the goods, but for such other legal charges as the carrier, in the course of his duty, may have been compelled to expend upon their care, custody and preservation. As when a railway, in the transportation of live stock, as cattle, horses and swine, has been at expense of labor and money in feeding and preserving them, such expense is a legitimate charge in addition to their transportation. For the carrier is under special obligation to guard and protect such property, hence the propriety of a lien for such extraordinary expense and care. If a carrier, in the ordinary course of the business, pay back charges upon goods due to another carrier in the course of transportation, as they come to him, he may recover for such back charges and freight so paid; and the owner may seek his remedy for any damages done them against the party in whose hands it was done, or under his original contract of shipment." Overton on Liens, § 135, p. 166. *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

81. Freight and storage charges over connecting line.—*Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

In making payment to a connecting carrier of its freight charges, the carrier is not a mere volunteer, such as is referred to in *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. Ed. 537, 8

S. Ct. 625; *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

A carrier has a lien not only for its freight, but also for freight to prior carriers. *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626. See ante, "Property Carried without Authority," § 1558.

82. Connecticut.—*Elmore v. Naugatuck R. Co.*, 23 Conn. 457, 63 Am. Dec. 143.

Illinois.—*Bissel v. Price*, 16 Ill. 408.

Ohio.—*Bowman v. Hilton*, 11 O. 303.

New York.—*Lee v. Salter, Lator's Supp.* (Hill & Denio) 163.

Rhode Island.—*Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46.

Wisconsin.—*Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 65.

83. *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46.

84. *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Bissel v. Price*, 16 Ill. 408.

85. *Mallory v. Burrett* (N. Y.), 1 E. D. Smith 234; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 65.

86. *Monteith v. Kirkpatrick*, 3 Blatchf. 279, Fed. Cas. No. 9721; *Bissel v. Price*, 16 Ill. 408, and in *Bowman v. Hilton*, 11 O. 303; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46.

Instances.—Flour was shipped from Oswego to New York, via Albany. At Albany it was transferred to another line

§ 1567. **Feeding and Caring for Stock.**—The lien of a carrier extends to charges for feeding and caring for live stock in transit.⁸⁷

§ 1568. **Duties Paid by Prior Carrier.**—A carrier has a lien for customs duties paid by a previous carrier in order to get possession of the goods.⁸⁸

§ 1569. **Goods Missent.**—Where the goods are missent as a result of the mistake of the shipper or his agent, the carrier's lien secures the charges covering the entire route over which the shipment was transported.⁸⁹

§§ 1570-1572. **Priorities**—§ 1570. **Assignment for Benefit of Creditors.**—See post, "Delivery to Assignee for Creditors," § 1577.

§ 1571. **Stoppage in Transitu.**—The vendor's right of stoppage in transitu is paramount to all liens against the purchaser,⁹⁰ even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee;⁹¹ or to an express stipulation in the bill of lading to the effect that the

of carriers, who received it in apparently good order, and paid the back freight. On arriving at New York it was found to be damaged by wetting, and that the damage occurred before reaching Albany. The libelants claimed their freight and back charges. It was held that by established usage they were entitled to the back charges, and that the right to recover them stood on the same ground as the right to recover their own freight. *Monteith v. Kirkpatrick*, 3 Blatchf. 279, Fed. Cas. No. 9721.

87. **Cost of feeding and caring for live stock.**—*Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

88. **Duties paid by previous carrier.**—*Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

The custom laws of the United States are potent to fully protect the carrier in the payment of the legal duties charged upon goods in its possession. *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

Congress—having in mind the duty of carriers in reference to transportation and delivery, their customary lien for charges, and their right to retain possession during transit—in directing the custom house officers to take goods out of a carrier's possession, inspect and hold until the duties are paid, intended that upon payment the government lien should pass to the carrier with a view of enabling it to discharge its duty of carriage and delivery to the consignee. *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

Lien of last carrier for duties paid not affected by wrong of initial carrier.—Goods were shipped from abroad in bond to St. Louis, via the Canadian Pacific, which, for its own convenience wrongfully changed their bonded destination to the port of St. Paul, and during the examination and inspection at St. Paul some of the goods were broken, and some lost, whereas if they had been shipped in bond to St. Louis, they might have been

opened and examined in the presence of the plaintiff and injury and loss prevented. It was held that even if the Canadian Pacific by its wrongful act was liable for the injuries resulting to the plaintiff, as the contract of shipment stipulated that each of the parties employed in the carriage should be liable only for loss or damage accruing upon its own road, and that such carriers should not be jointly liable, nor either for any loss or damage accruing upon the road of the others whatever claim the plaintiff may have had for such injury and loss was only against the Canadian Pacific, and could not operate to prevent the connecting company from receiving its freight and charges paid by it. *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231.

89. Where lumber intended for plaintiff at Baird, Texas, was shipped to "Beard," Texas, through mistake of plaintiff's agent at the initial point in signing a shipping bill ordering it consigned to plaintiff at such latter point, and from there it was sent to plaintiff at Baird, which was on defendant company's line, defendant was entitled to hold the lumber for payment of the increased freight charges covering the entire route over which the lumber was so transported, and was not liable in damages for refusal to deliver to plaintiff upon his tender of what would have been the proper amount of freight charges but for such mistake. *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426.

90. **Stoppage in transitu.**—*Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Blackman v. Peirce*, 23 Cal. 508.

91. *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247. See, also, *Sears v. Wills (Mass.)*, 4 Allen 212; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Jackson v. Nichol*, 5 Bing., N. Cas. 508; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

goods may be detained for all arrearages of freight and charges due the consignees.⁹² As between the carrier and the consignee who is the owner, there is no reason why this lien may not be extended by a contract to cover a general balance due by the consignee for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he honestly owed, before allowing him to remove the goods from the possession of his creditor, whether that creditor was a natural or an artificial person.⁹³

Charges between Consignment and Stoppage.—Exercise of the right of stoppage in transitu by the vendor of goods is not a rescission of the contract of sale, but a resumption of possession which enables him to insist upon the vendor's lien which he had waived by the delivery to the carrier. In such case the carrier may, as against the consignor, retain the goods by virtue of his lien for carriage, until his charges and expenses between the consignment and stoppage are paid.⁹⁴ The common-law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried, and is as valid against the consignor as against the consignee.⁹⁵

§ 1572. Bona Fide Purchasers.—If a consignee of goods shipped by rail obtains possession of them through the negligence of the railroad company, without paying the freight charges, and sells them to a bona fide purchaser for value, the company can not enforce its lien for freight against the goods in the hands of such purchaser.⁹⁶

92. Stipulation in bill of lading for lien.—A stipulation in a bill of lading, which the vendor and shipper of goods take from the carrier, that "the several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods," if binding at all, is entirely subordinate to the consignor's right of stoppage in transitu, and is ineffectual to give the carrier a lien such as stipulated for, which will take precedence of such right. *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760.

Goods were shipped under a bill of lading containing a clause as follows: "Said merchandise may be detained for all arrearages of freight and charges due thereon, and also on any other goods by the same consignee or owner; and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid." In such case the consignor having exercised his right of stoppage in transitu, and not being a debtor for previous carriage, the carrier's lien did not extend beyond the charges applicable to the goods stopped, and on payment or tender of such charges the consignor was entitled to a delivery of the goods to him. *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

93. *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

"As between the carrier and the seller, there was no balance of accounts for carriage of former consignments; for the delivery of the goods to the consignee without payment of the freight was a voluntary surrender of the lien upon them, and the security which the lien afforded. The carrier by such delivery gave credit to the consignee, and undertook to look to his solvency and integrity. The former bills were therefore paid so far as the consignor was concerned, and the carrier had no legal or moral ground for calling upon him to pay any balance due upon them." *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

94. Charges between consignment and stoppage.—*Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885; *Hays v. Mouille*, 14 Pa. 48.

95. *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247.

96. Bona fide purchasers.—*Norfolk, etc., R. Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

Where a carrier by whom goods sold are shipped to be delivered to the vendee upon the payment of the purchase money negligently delivers the goods before such payment, neither the carrier nor the vendee can recover the goods from a bona fide purchaser from the vendee. *Norfolk, etc., R. Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

§ 1573. **Rights of Owner of Goods against Wrongdoer.**—The lien of a common carrier does not deprive the owner of the goods of his right to immediate possession as against a wrongdoer or tortfeasor.⁹⁷ The same consequences attach to the lien of a common carrier as to that of a factor.⁹⁸

§§ 1574-1582. **Waiver or Discharge**—§ 1574. **Express Waiver.**—It is, of course, competent for the parties to make an agreement waiving the carrier's lien; but a waiver of the lien is not to be readily presumed, and the party insisting upon the waiver must show clearly that the provisions of the special contract are so inconsistent with the existence of the lien as to indicate clearly a waiver of the latter.⁹⁹ Hence a written contract for the transportation of goods by a common carrier will not be deemed to waive a lien upon them for the charges therefor, unless it contains provisions inconsistent with the assertion of such lien, or unless an intention to make such waiver is indicated expressly or by clear implication.¹ Such a waiver is not shown by recitals in such a contract that all prior agreements concerning the facilities for such shipment, or concerning the transportation of such goods, or such shipments, are merged in the written contract, and that the written contract contains all the terms, agreements, and provisions relating in any manner to the transportation of such goods.²

§ 1575. **Delivery of Goods by Carrier.**—It is well settled that the carrier has a lien upon the goods transported, for its charges, while it retains dominion and control of the same. The rule undoubtedly is, as between the lienor and the general owner, that a lien can exist only while the lienor retains possession of the property. If he deliver possession, the lien is gone; hence, if a carrier parts with the possession out of the hands of itself and agent, it loses its lien upon the goods, and can not afterwards reclaim them;³ and the lien is

97. Rights of owner of goods against wrongdoer.—*Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

98. *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

In *Holly v. Huggefard* (Mass.), 8 Pick. 73, 19 Am. Dec. 303, it is said: "The lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of or not, as he pleases. It continues only while the factor himself has the possession; and therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien." No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common-law liens, and such a lien has very properly been defined to be the right of detaining the property on which it operates until the claims which are the basis of the lien are satisfied. *Hammonds v. Barclay*, 2 East 235; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379. The object of these liens being the same, their effect must be the same. *Ubi eadem ratio ibi*

idem jus. *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

99. Express waiver.—*Atchison, etc., R. Co. v. Hinsdell*, 76 Kan. 74, 90 Pac. 800, 12 L. R. A., N. S., 94, 96.

1. *Atchison, etc., R. Co. v. Hinsdell*, 76 Kan. 74, 90 Pac. 800, 12 L. R. A., N. S., 94.

2. *Atchison, etc., R. Co. v. Hinsdell*, 76 Kan. 74, 90 Pac. 800, 12 L. R. A., N. S., 94.

3. California.—*Wingard v. Banning*, 39 Cal. 543.

Illinois.—*Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238; *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367.

Iowa.—*Reineman & Co. v. Covington, etc., R. Co.*, 51 Iowa 338.

Kentucky.—*Caye v. Pool*, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 94 Am. St. Rep. 348; *Boggs v. Martin*, 13 B. Mon. 239.

New York.—*Bigelow v. Heaton* (N. Y.), 4 Denio 496; *McFarland v. Wheeler* (N. Y.), 26 Wend. 467.

Tennessee.—The carrier who parts with the possession of goods without enforcing his demand for freight, loses his lien. *Terril v. Rogers*, 4 Tenn. (3 Hayw.) 203; *Keep Mfg. Co. v. Moore*, 79 Tenn. (11 Lea) 285.

Texas.—*Hahl v. Laux*, 42 Tex. Civ. App. 182, 93 S. W. 1080.

not revived if the carrier or his agent afterwards accidentally obtains possession of them.⁴

Delivery to Consignee as Agent of Carrier.—Where a carrier delivers goods to a consignee, who agrees to hold them until the freight charges are paid, the carrier's lien for freight charges is terminated,⁵ but if the consignee be regarded as the agent of the carrier, the agency thus created is for collection only, and, after the charges are received by the consignee, the carrier can not assert its lien against a third person acquiring an interest in the goods without notice of the claim of lien;⁶ further the lien for the charges was terminated on their payment to consignee though by reason of its insolvency the amount was never paid over to the carrier.⁷

§ 1576. Goods Taken from Carrier's Possession by Operation of Law.—The lien, is not lost where goods are taken from the possession by the carrier's invitation or by operation of law.⁸

§ 1577. Delivery to Assignee for Creditors.—The lien of a common carrier for its charges upon property carried is not defeated by an assignment made for the benefit of creditors by the owner of the property shipped.⁹ Delivery by such a carrier to an assignee for the benefit of creditors of property subject to such carrier's lien for freight and transportation charges is for the benefit of all creditors, including such carrier, according to their respective interests, and does not defeat the carrier's right to be paid out of the proceeds of the property delivered.¹⁰ Hence, a fund arising from the collection by an assignee for creditors of money on a contract, in the performance of which property subject to a carrier's lien has been used, is chargeable with such lien.¹¹

§ 1578. Goods Wrongfully Taken from Carrier.—Where a carrier did not deliver the goods transported, but the owner took them from the carrier without the consent of the latter, the carrier's lien was not lost.¹²

4. *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367, so holding where the carrier delivered the goods to the consignee upon his note therefor.

5. **Consignee promising to retain goods till charges paid.**—Where freight charges are due from the consignor to a carrier, the carrier's lien for the charges is terminated by its delivery of the goods to the consignee as the agent of the consignor, though the consignee promised to retain the goods until the charges were paid. *Ikelheimer v. Consolidated Tobacco Co.* (N. J.), 59 Atl. 363, affirmed in *Lembeck v. Jarvis, etc., Cold Storage Co.*, 69 N. J. Eq. 781, 63 Atl. 257.

6. *Lembeck v. Jarvis, etc., Cold Storage Co.*, 68 N. J. Eq. 492, 59 Atl. 360.

A carrier delivered goods to a consignee without receiving payment of freight, and plaintiff acquired rights therein as a pledgee without notice of a lien for freight, and on delivery to plaintiff he deposited the amount of the freight under an agreement that the right thereto be settled afterwards. Plaintiff sold the goods, and brought a suit to recover the deposit, based on the question of priority of liens. Held, that defendant could not, in such action, raise the question of its right to the surplus remaining in the hands of plaintiff after said sale by him.

Lembeck v. Jarvis, etc., Cold Storage Co., 68 N. J. Eq. 492, 59 Atl. 360.

7. Where freight charges were due from a consignor to a carrier and the carrier delivered the goods to the consignee on its promise to retain them until the freight charges were paid, if the consignee be regarded as the agent of the carrier the lien for the charges was terminated on their payment to the consignee, though by reason of its insolvency the amount was never received by the carrier. *Ikelheimer v. Consolidated Tobacco Co.* (N. J.), 59 Atl. 363, affirmed. *Lembeck v. Jarvis, etc., Cold Storage Co.*, 69 N. J. Eq. 781, 63 Atl. 257.

8. **Goods taken from carrier's possession by operation of law.**—*Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

9. **Delivery to assignee for creditors.**—*Caye v. Pool*, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 94 Am. St. Rep. 348.

10. *Caye v. Pool*, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 94 Am. St. Rep. 348.

11. *Caye v. Pool*, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 94 Am. St. Rep. 348.

12. **Goods wrongfully taken from carrier.**—*Hahl v. Laux*, 93 S. W. 1040, 42 Tex. Civ. App. 182.

§ 1579. Delivery of Part of Shipment.—A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do;¹³ even as against the consignor's right of stoppage in transitu;¹⁴ and this is ordinarily a question of fact for the jury.¹⁵

§ 1580. Refusal to Deliver on Other Grounds.—A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made.¹⁶

§ 1581. Injury to Goods by Fault of Carrier.—The carrier's lien may be defeated by an injury to the goods carried, happening by the carrier's fault, to an amount larger than the charge for freight. Its right to freight, and to detain the goods for its payment, results from its performance of the contract to carry the goods. If it fails to carry the goods and have them ready for delivery, it can not claim its freight; when a carrier's lien is gone, subsequent retention of possession of freight against the wish of the owner is wrongful, and the owner may thereafter sue for the possession thereof in replevin or for the value as upon conversion.¹⁷

§ 1582. Damage to Consignee by Delay.—A carrier's lien on goods transported is only coextensive with his right to claim and recover freight. Therefore, where carriers have, by delay in transporting and delivering goods, injured the consignee to an amount equal to their charge for freight, their lien

13. Delivery of part of shipment.—*Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286; *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247; *Lane v. Old Colony, etc., R. Co. (Mass.)*, 14 Gray 143; *New Haven, etc., Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360.

"The whole lien attaches to each and every part of the goods subject to it. If not discharged or waived, it remains attached to whatever part of the property may remain within the possession of the carrier. *Ware River R. Co. v. Vibbard*, 114 Mass. 447; *Lane v. Old Colony, etc., R. Co. (Mass.)*, 14 Gray 143. A delivery of part of the property does not necessarily discharge the lien, either in the whole or pro tanto." *New Haven, etc., Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360.

14. *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 41 Am. Rep. 247.

15. *New Haven, etc., Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360.

16. Refusal to deliver on other grounds.—*Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. Rep. 315; *Vinton v. Baldwin*, 95 Ind. 433; *Mathis v. Thomas*, 101 Ind. 119; *Platter v. Elkhart*, 103 Ind. 360, 2 N. E. 544; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

17. Injury to goods by fault of carrier.—*Missouri Pac. R. Co. v. Peru Van Zandt Imp. Co.*, 73 Kan. 295, 85 Pac. 408,

87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058.

"Section 515 of the second edition of *Cobbeys on Replevin* reads: 'The right of a carrier to retain property until its charges for carriage are discharged rests upon the performance of the contract of carriage upon its part. If it has negligently delayed the delivery of the property at its destination, or otherwise subjected itself to liability for damages to the consignee in respect to the property carried, that would disentitle it to the extent of such liability to demand and recover freight; and if the damage should exceed the amount of the freight to which it would otherwise be entitled, of course it would not be entitled to demand and recover anything for the carriage of the property. And in such cases the owner or consignee may maintain a replevin without a tender, and the claim for freight by the defendant, and the claim for damage by the plaintiff, at least to the extent of the freight charge, may be adjudicated in the replevin suit.' The case of *Bancroft v. Peters*, 4 Mich. 619, is to the same effect. In the case of *Marsh v. Union Pac. R. Co.*, 3 McCrary 236, 9 Fed. 873, 6 Am. & Eng. R. Cas. 359, Judge Hallett, of the United States district court of Colorado, held that trover would lie for the value of freight held by a carrier under a lien which did not exist." *Missouri Pac. R. Co. v. Peru Van Zandt Imp. Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058.

ceases, and the consignee may maintain replevin for the goods without paying or tendering the freight.¹⁸

§§ 1583-1584. Preservation of Lien—§ 1583. Storing Goods in Warehouse.—A carrier, upon the default of the consignee to receive goods shipped to him after reasonable time and opportunity to so do, may store the goods in a safe warehouse in its own name, and thus preserve its lien for freight charges without subjecting itself to further liability as a warehouseman, and the warehouseman with whom the goods are stored will then hold them for the benefit of both the carrier and the consignor.¹⁹

§ 1584. Delivery to Consignee as Agent of Carrier.—See ante, "Delivery of Goods by Carrier," § 1575.

§ 1585. Subrogation or Substitution.—And a party who seeks to be substituted to the carrier's lien for freight can occupy no better position.²⁰

§§ 1586-1594. Enforcement—§§ 1586-1593. Sale—§ 1586. At Common Law.—At common law, in the absence of a controlling necessity,²¹

18. Damage to consignee by delay.—*Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350.

When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceeds the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion, inhibiting the consignee to maintain replevin for the goods. *Missouri Pac. R. Co. v. Peru Van Zandt Imp. Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058.

"Of the case of *Cutting v. Grand Trunk R. Co.* (Mass.), 13 Allen 381, and of *Boston, etc., R. Co. v. Brown* (Mass.), 15 Gray 223, all that can be said is, that in one the right to maintain replevin, in a case much like the one before us, was not questioned; and in the other it appeared that replevin had been maintained, either with or without controversy, where freight was claimed and refused when the suit was brought." *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350.

"The case of *Humphreys v. Reed* (Pa.), 6 Whart. 435, embodies a principle which, in its legitimate results and applications, would seem to warrant the replevin in a case like the present. In that case the carrier delivered the goods to a wharfinger, with directions not to deliver them to the consignee till the freight should have been paid. The consignee called on the wharfinger for the goods, and was told by him what his instructions were. Thereupon, he insisted to the wharfinger that the goods had been damaged in the transportation, through the fault of the carrier, to an

amount exceeding the price of the freight, and that he had a right to have his goods without paying the freight, and the wharfinger delivered them to him. Thereupon, the carrier sued the wharfinger in trover for the goods, relying on his lien for the freight. The defense set up was, the damage to the goods, and it was held, that, such damage being shown, he had no right to claim the payment of freight of the consignee, and of course no right to hold the goods himself, or authorize another to hold them for him as against the consignee, and he was defeated in the action." *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350.

19. Storing goods in warehouse.—*United States.*—The *Eddy*, 5 Wall. 481, 18 L. Ed. 486; *Brittan v. Barnaby* (U. S.), 21 How. 527, 16 L. Ed. 177.

Illinois.—*Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238.

Iowa.—*Alden & Co. v. Carver*, 13 Iowa 253, 81 Am. Dec. 430.

New York.—*Western Transp. Co. v. Barber*, 56 N. Y. 544.

Goods stored in name of consignee.—In *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238, the court said: "The terminal carrier, upon the default of the consignee to receive the grain, might have stored it in the warehouse of a responsible third person, in the name and for the benefit of the consignee alone. It is unnecessary to discuss, here, what would have been the effect of such storing, with notice to the warehouseman of the lien of the railroad company for its freight charges, or whether its lien could have thus been preserved" for the carrier for the purpose of preserving its lien.

20. Subrogation or substitution.—*Keep Mfg. Co. v. Moore*, 79 Tenn. (11 Lea) 285.

21. At common law.—In the absence of a controlling necessity to sell, the car-

a carrier had no right to sell goods to enforce its lien thereon for the freight and charges earned by it in their transportation,²² and for freight earned by preceding carriers of the goods and paid by it.²³ A carrier's lien for the freight earned in transporting a shipment gives it only a right to detain it until paid; not to sell it to obtain the remuneration to which it was entitled. An owner may sell or dispose of his property as he pleases, but he who has a lien only on goods has no right to so do; he can only detain them until payment of the sum for which they are chargeable. And the rule which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, can not lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all other persons having the like claim upon property in their possession. It is in distinct recognition of this principle that the state legislatures have provided that when the owner or consignee of fresh meat, and of certain other enumerated articles, liable soon to perish for want of care, shall not pay for the transportation, and take them away, common carriers which have a lien thereon for the freight may sell the same without any delay, and hold the proceeds, subject to their own lawful charges, for the use of the owner. And such also is the effect of provisions in relation to trunks, parcels, and passengers' effects left unclaimed at passenger stations of railroad companies for a specified period after arrival and deposit therein. This enumeration of particular cases, in which the right to sell and dispose of certain goods and chattels transported is conferred upon common carriers, operates according to a familiar rule of law as a denial or exclusion of their rights in all other instances.²⁴

Perishable Goods.—In case of perishable goods by intendment of law, the carrier becomes the agent or bailee of the consignor; and, upon unquestionable proof of necessity, may sell the goods; but, it must appear that they were perishable, and that the sale of absolute necessity to the owner.²⁵ The carrier's authority to sell under such circumstances is not in virtue of his lien, but in virtue of his trust relation and in the interest of the owner.²⁶ The carrier may retain from the proceeds of sale his charges; but, otherwise, his trust relation continues, and he is bound to all the fidelity of other agents.²⁷

§ 1587. Under Statute.—See ante, "At Common Law," § 1586. Oats are not perishable freight, within the meaning of a statute providing for a sale of such freight on five days' notice.²⁸

§ 1588. Manner of Sale.—Under a statute directing the manner in which sales of freight shall be made by express companies, to pay charges thereon, if the consignee refused to accept the property on due notice, and thereupon the consignor directed the company to sell it, in the absence of specific directions as to the manner in which the sale should be made, such directions to sell would only authorize a sale in the manner prescribed by statute; but, where the consignee consented to or ratified the sale as made, he will not thereafter be heard to object to it.²⁹

rier can only enforce his lien by due process of law. His lien and his right to enforce it are but the correlatives of the owner's right to the proper preservation of the goods. *Rankin v. Memphis, etc., Packet Co.*, 56 Tenn. (9 Heisk.) 564.

^{22.} *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626.

^{23.} *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 262.

^{24.} *Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626; *Doane v. Russell* (Mass.), 3 Gray 382.

^{25.} **Perishable goods.**—*Rankin v. Memphis, etc., Packet Co.*, 56 Tenn. (9 Heisk.) 564.

^{26.} *Rankin v. Memphis, etc., Packet Co.*, 56 Tenn. (9 Heisk.) 564.

^{27.} *Rankin v. Memphis, etc., Packet Co.*, 56 Tenn. (9 Heisk.) 564.

^{28.} **Under statute.**—*Gulf, etc., R. Co. v. North Texas Grain Co.*, 74 S. W. 567, 32 Tex. Civ. App. 93.

^{29.} **Manner of sale.**—*Hodges v. Peacock*, 2 Tex. App. Civ. Cas., § 824.

Where the freight charges which defendant had the right to collect exceeded the value of the lumber, it was not, it

§ 1589. Notice.—A railroad selling freight for charges thereon, without giving notice prescribed by the statute, is liable as for a conversion thereof.³⁰

§ 1590. Advertisement and Description of Goods.—In selling freight for charges a carrier is bound to use reasonable diligence to ascertain the character of the packages from the external indications, and to communicate his knowledge to bidders. If, knowing the contents of the barrels, or having good reason for believing what they were, the agent selling withholds such knowledge, or well-founded belief; and sells valuable freight to a favorite, having superior knowledge, and at a nominal price, this is a fraud which subjects the perpetrators of it to an action for the damages, at the suit of the party injured. The law will not sanction or excuse such faithlessness in an agent.³¹

§ 1591. Retention of Freight.—A carrier is entitled to retain freight charges out of goods refused by the consignee and sold under his directions.³²

§ 1592. Right to Overplus.—Where goods are sold by a carrier under a statute to enforce its lien, the consignee is entitled to the overplus arising from the proceeds of the sale.³³

seems, liable to plaintiff for such value because it had sold the lumber for less than the amount of such charges at private sale, instead of a public sale as directed by the statute. *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426.

30. Notice.—*Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

A buyer refused to receive certain grain shipped by rail. The railroad requested the parties interested to direct the disposition of the grain, which they refused to do, and it was subsequently sold at a loss to pay freight and storage charges, under Rev. St. 1895, art. 327, which authorized the railroad to sell the grain to pay the charges thereon accrued on giving notice of the sale as prescribed by article 328. Held, that the sale without notice was illegal, rendering the railroad liable to the owner of the grain as for a conversion thereof. *Gulf, etc., R. Co. v. North Texas Grain Co.*, 74 S. W. 567, 32 Tex. Civ. App. 93.

31. Advertisement and description of goods.—*Nathan v. Shivers*, 71 Ala. 117, 46 Am. Rep. 303; *Wright v. Spencer* (Ala.), 1 Stew. 576, 18 Am. Dec. 76; *Sarjeant v. Blunt* (N. Y.), 16 Johns. 74.

Reasonable diligence implies that the agent should have examined all external indicia and marks, the odor of the barrels, if they emitted an odor, and all other sources of information, reasonably within his reach. If from these sources, or from any information he may have received, he knew, or could have known the contents with proximate accuracy, then he should have informed the public of all he knew, or could have learned with reasonable diligence. He stands in the relation of agent, both to the railroad corporation and to the owner of the barrels, and he owes to each of them

good faith. He has no authority to open the barrels to ascertain their contents. Whether he acted with reasonable diligence in ascertaining the contents—whether he knew, could have learned, or had just grounds for believing what were the contents, and whether he acted in good faith in giving the notice and making the sale, were questions for the jury, under appropriate instructions embodying the principles above declared. *Nathan v. Shivers*, 71 Ala. 117, 46 Am. Rep. 303.

Instances.—The description given in the advertisement was "two barrels wet." The testimony was, that this was the description given of the barrels in the bill of lading which accompanied them. It was held that this description was intended to indicate the contents, as distinguished from dry barrels. These were wet barrels, in the classification of freight. It was error to hold: First, that as matter of law, the advertisement was insufficient; second, that the carrier's agent authorized to examine the contents of the barrels. *Nathan v. Shivers*, 71 Ala. 117, 46 Am. Rep. 303.

32. Retention of freight.—*Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

33. Right to overplus.—A consignee of certain corn, on being notified of arrival, refused to accept the same, unless the carrier would agree to allow him damages for an alleged shortage. After negotiations the carrier agreed to allow for the shortage, but insisted on collecting demurrage during the negotiations, which the consignee refused to pay, whereupon the carrier sold the corn, and after paying all charges due it had an overplus in its hands arising from the proceeds of the sale. Held, that the consignee, in an action against the carrier for alleged conversion, was entitled to

§ 1593. Damages for Wrongful Sale.—Market Value.—Carrier who wrongfully sells goods to enforce his lien thereon for freight is guilty of conversion, and is liable to an action therefor, in which the measure of damages is the market value of the goods, deducting the amount of the lien.³⁴

Possession of Goods Regained by Owner.—If a carrier of goods sell them for the payment of his charges, and the owner regains possession through a friend who buys them in, the owner, in an action of trover therefor, can recover only what ever damages he sustained in regaining the possession.³⁵

§ 1594. Suit.—Jurisdiction—Admiralty Jurisdiction.—In this country it is firmly established in admiralty law that the vessel and the cargo have reciprocal rights against each other, and reciprocal liens to enforce the rights of each against the other. Upon this principle it has been held in effect, that, where a shipper fails to furnish or to deliver to the vessel the full amount of goods which he had contracted to furnish or deliver, the lien of the vessel upon the goods so furnished or delivered would be enforced in admiralty, whether the action be treated as one to recover freight or to recover damages for the nonperformance of a contract.³⁶ This principle includes demurrage.³⁷

State Court.—A shipowner, as a common carrier, has a particular and specific lien at common law for his freight upon the goods carried, which he may enforce in a state court.³⁸ The court has jurisdiction to determine the amount of such lien for carriage at common law, and whether the amount of freight tendered by the plaintiff was sufficient to discharge the same.³⁹

Conflict of Jurisdiction.—If a shipowner has a lien upon the cargo of the vessel, enforceable in the admiralty courts, it is incompetent for the state court to prevent the vessel from enforcing such lien in admiralty, or to deprive the owners of the vessel of possession of the goods so long as such lien continued.⁴⁰

§ 1595. Remedy for Wrongful Assertion of Lien.—Jurisdiction.—Replevin by the owner, and consignee of goods shipped, by water, to recover possession thereof from the owner of the ship who claims a lien thereon growing out of the contract of carriage, is an action to enforce a common-law remedy, and not a proceeding in admiralty, and may be prosecuted in the state courts.⁴¹

Replevin.—When a carrier's lien ceases or is discharged, the consignee may maintain replevin for the goods. The question of the carrier's right to freight, and of his liability for damage, can as well be tried in this action as in any other mode of suit or procedure. The defendant is subject to no peril of losing any

judgment for such overplus, though the carrier was entitled to the charges and demurrage claimed. *Spurlock v. Missouri, etc., R. Co.* (Tex. Civ. App.), 90 S. W. 1124.

34. Market value.—*Briggs v. Boston, etc., R. Co.* (Mass.), 6 Allen 246, 83 Am. Dec. 626.

35. Possession of goods regained by owner.—*Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387.

36. Admiralty jurisdiction.—In re 948 Pieces of Lumber, 7 Ben. 389; *Fox v. Holt*, Fed. Cas. No. 5012, 36 Conn. 558, 4 Ben. 278; *The Eliza*, 1 Low. 83, Fed. Cas. No. 4347; *Clarke v. Crabtree*, Fed. Cas. No. 2847, 2 Curt. 87; *The B. J. Willard*, 8 Week. Not. Cas. 47; *Giles v. Cynthia*, Fed. Cas. No. 5424, 1 Pet. Adm. 203; *Watts v. Camors*, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91; *The Gazelle*, 128 U. S. 474, 32 L. Ed. 496, 9 S. Ct. 139; *Warehouse, etc., Supply Co. v. Galvin*, 96

Wis. 523, 65 Am. St. Rep. 57.

37. Warehouse, etc., Supply Co. v. Galvin, 96 Wis. 523, 65 Am. St. Rep. 57. See ante, "Demurrage," § 1550.

38. State court.—*Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

39. Warehouse, etc., Supply Co. v. Galvin, 96 Wis. 523, 65 Am. St. Rep. 57.

40. Conflict of jurisdiction.—*Stewart v. Potomac Ferry Co.*, 12 Fed. 296, 5 Hughes 372; *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

Replevin in state court.—If a shipowner has a lien upon goods enforceable in the admiralty courts, the owner thereof can not recover them by replevin in the state courts. *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

41. Jurisdiction.—*Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

security he may have had by virtue of his lien on the property, for he has not yielded his lien, and the replevin bond has become substituted for the property itself. The property has thus been put to the uses designed, and the defendant is secured for all the rights he had in respect to the freight, as fully as if he had retained custody of the property itself.⁴²

Tort Action for Conversion.—Where the carrier demands a larger sum than that which is stipulated by contract, and refuses to deliver the property, at the place of its destination, until such additional sum is paid he may be used in tort for the conversion.⁴³

Persons Who May Recover.—If a common carrier places its refusal to deliver the goods solely on the ground that the additional freight was not paid, it will not afterwards be permitted to better its hold and contend that plaintiff was not entitled to the goods because the bill of lading was not assigned. It would be estopped so to do.⁴⁴

Allegation of Readiness to Perform.—Where the carrier having no legal claim for the goods for any thing besides the freight, refuses to deliver them unless a further sum, which it has no right to charge, be first paid, the consignee need not allege a tender of the freight; readiness to do what he had engaged to do is all that he need allege.⁴⁵

Evidence of Conversion.—The refusal of a carrier, having no legal claim on the goods for any thing besides the freight to deliver them unless a further sum, which it has no right to charge, be first paid, is evidence in an action of trover for the goods of a conversion.⁴⁶

§§ 1596-1600. Actions for Charges—§ 1596. Right of Action.—Where there is an express contract between the carrier and the shipper for the carriage of a certain designated quantity of freight, the carrier may recover for a failure to deliver him such quantity for carriage,⁴⁷ but in the absence of a definite and specific contract, he can only recover for goods actually carried.⁴⁸ If the carrier agrees to receive something else than money, in payment of freight, he is entitled to recover only the value of such commodity at the time it should have been paid.⁴⁹

42. **Replevin.**—*Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350. See ante, "Damage to Consignee by Delay," § 1582.

43. **Tort action for conversion.**—*Isham v. Greenham*, 1 Handy 357, 12 O. Dec. 182.

44. **Persons who may recover.**—*Ohio*, etc., *R. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Illinois Cent. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108.

In trover against a carrier for goods sold to pay additional freight charges, the carrier is estopped to claim that the action can not be maintained because the plaintiff is neither the consignor, the consignee, nor the assignee of the bill of lading, if the refusal to deliver the goods to him was placed solely on the ground that additional freight was not paid, the carrier's agent being advised that the goods belonged to the plaintiff. *Illinois Cent. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108.

45. **Allegation of readiness to perform.**—*Peebles v. Boston*, etc., *R. Co.*, 112 Mass. 498.

46. **Evidence of conversion.**—*Richardson v. Rich*, 104 Mass. 156, 6 Am. Rep.

210; *Adams v. Clark* (Mass.), 9 Cush. 215, 57 Am. Dec. 41.

47. **Recovery for failure to deliver freight for carriage according to contract.**—*Robinson v. Noble* (U. S.), 8 Pet. 181, 8 L. Ed. 910.

48. **Where no express contract as to quantity of freight to be delivered.**—*Robinson v. Noble* (U. S.), 8 Pet. 181, 8 L. Ed. 910.

Thus where a person agrees to ship a certain lot of goods, supposed to amount to so much, and he in fact ships the whole lot, the carrier can not recover merely because the lot was not as large as supposed. *Robinson v. Noble* (U. S.), 8 Pet. 181, 8 L. Ed. 910.

49. **Effect where carrier agrees to accept payment in other than money.**—*Robinson v. Noble* (U. S.), 8 Pet. 181, 8 L. Ed. 910.

Where the agreement for carriage provided that the carrier should be paid in paper of a designated corporation or its equivalent, the carrier, in an action for recovery of freight, is only entitled to recover the amount of the specific value of such paper at the time it should have been paid. *Robinson v. Noble* (U. S.), 8 Pet. 181, 8 L. Ed. 910.

§ 1597. Jurisdiction.—Amount in Controversy.—In a suit by a carrier to recover freight charges, where the petition also seeks to recover the possession of the property for the transportation of which the charges are due, and which was wrongfully taken from it, the value of the property to which the right of possession is asserted, and not the amount of the freight charges, determines the jurisdiction of the trial court.⁵⁰

§ 1598. Form of Action.—Assumpsit.—An action at law may be maintained by a carrier to recover his charges for transportation. The usual form of action at common law is assumpsit,⁵¹ but where the action is for failure of the shipper to furnish the goods according to contract, then the action should be for breach of the contract and the subsequent damages.⁵²

§ 1599. Set-Off and Recoupment.—Some fifty years ago it was held in England that if the consignee of goods receive any benefit by their carriage he can not defend himself from the payment of freight on the ground that the goods have been damaged by the master, in carrying them, to an amount exceeding the freight. The remedy of the consignee is by cross-action.⁵³ But that doctrine has been discarded in this country, and a contrary doctrine established.⁵⁴ The inclination of judicial opinion in this country is to allow the injury done by the negligence of the carrier to be set off as an answer, pro tanto, to his claim for compensation.⁵⁵

50. Amount in controversy.—Texas, etc., *R. Co. v. Rucker*, 38 Tex. Civ. App. 591, 88 S. W. 815.

51. Assumpsit.—Thus, in *Galt v. Archer*, 48 Va. (7 Gratt.) 307, a common carrier contracted to deliver a crop of wheat at an agreed price per bushel. A large portion of the crop was delivered in good order; but from the unavoidable effects of a storm, a small part was delivered in a damaged condition, and another small portion was lost. It was held, in an action by the carrier for the freight, that he was entitled to recover under the common indebitatus count, the agreed price for the whole quantity so delivered or lost.

52. Failure of shipper to furnish according to contract.—The defendants contracted with the plaintiff that the latter should proceed to the town of M., with his wagons and teams, and should thence transport, at a stipulated rate per hundred pounds, to the town of S., certain goods and merchandise, for which they furnished him an order to their forwarding merchants. The plaintiff proceeded to M. with his wagons and teams, but the shipping merchant furnished him no goods for the defendants, and informed him that the defendants had no goods there, but offered him other goods for transportation at current rates to intermediate points between M. and S. Plaintiff refused to receive other freight than the goods he had contracted with defendants to haul, and after returning empty brought this suit against defendants, claiming judgment for the amount of freight money his wagons could have earned at the stipulated rate, if the goods had been furnished. Held, that the suit

was not properly brought; the plaintiff's remedy was not the present suit for the enforcement of the contract, but an action for breach of the contract and for the damages consequent thereto by reason of the failure to furnish the freight. *Heilbronner v. Hancock*, 33 Tex. 714.

53. Set-off and recoupment.—*Hill v. Leadbetter*, 42 Me. 572, 66 Am. Dec. 305; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350.

54. *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350. See also, *Moer v. Corinth, Dis. Ct. (Mass.)*, 19 Law Rep. 198.

55. Illinois.—In an action for freight the defendant may set off a loss of a portion of the goods agreed to be transported by the carelessness and negligence of the carrier. *Kaskaskia Bridge Co. v. Shannon (Ill.)*, 1 Gilman 15.

Maine.—*Hill v. Leadbetter*, 42 Me. 572, 66 Am. Dec. 305.

New York.—Where a portion of the property has not been delivered, the consignee in New York has been allowed to recoup the damages so sustained in an action against him for freight. *Henadale v. Weed*, 5 Denio 172.

Texas.—The goods were wet and greatly injured when delivered to the consignee but appeared to have been wet when received by the carrier. The carrier had given a clear bill of lading on receipt of the goods and was therefore prima facie responsible for the damages. The damage was estimated by the parties to be \$300 but subsequent examination showed it to be much more. It was held that this damage then ascertained and acknowledged would have been a

Damage Sustained by Act of God.—A consignee can not set off against a carrier's charge the amount of damages sustained by the goods from an act of God.⁵⁶

Connecting Carrier.—Damages to goods on any part of line of transportation, which is composed of the line of several carriers, who, by their common agent, agree to transport the goods over the whole line at a specified freightage, which is to be divided among the several carriers in stipulated proportions, may be set off in an action by one carrier for the whole freightage.⁵⁷

§ 1600. Amount of Recovery or Damages.—Damages Where Hirer Fails to Furnish Freight.—A carrier of freight by wagon, who agreed to go to a certain point, and thence transport goods at an agreed rate, but to whom the goods were not delivered, and who then found other freight, which he hauled part of the distance, must abate his demand under the contract pro tanto.⁵⁸

good set-off against the freight. *Austin v. Talk*, 20 Tex. 164.

Hawaii.—"In *La Matte v. Angl*, 1 Hawaii Rep. 136, the question is discussed with great ability by Lee, C. J., and after a full examination of the English and American authorities, he arrives at the conclusion that, in a suit to recover the freight of goods, the consignee may set off the loss and damage of the goods arising from the negligence or misfeasance of the carrier. The party receiving the goods has been held in all cases responsible for the freight—the only discrepancy between the decisions being whether the damages from injury to or nondelivery of the goods are to be recovered by a separate action or by recoupment from the freight earned." *Hill v. Leadbetter*, 42 Me. 572, 66 Am. Dec. 305.

56. Damage sustained by act of God.—*Galt v. Archer*, 48 Va. (7 Gratt.) 307.

57. Connecting carrier.—*Fitchburg, etc., R. Co. v. Hanna* (Mass.), 6 Gray 539, 66 Am. Dec. 427.

58. Amount of recovery where hirer fails to furnish freight.—*Heilbronner v. Hancock*, 33 Tex. 714.

In such case plaintiff had right of action for breach of contract and was bound to accept freight offered him and abate pro tanto his demand against defendants. This by analogy to the maritime law of affreightment. *Heilbronner v. Hancock*, 33 Tex. 714.

It was undoubtedly the duty of the carrier to have taken any other freights which were offered him to haul between the intermediate points, and to have credited the hirer with whatever he might have received for hauling such freight; and whether he was or was not, in contemplation of law, a common carrier, makes no kind of difference. Carrying freight was in the line of his business, and he owed it in good faith to the hirer to make what he could out of the trip within the line of his business, and without extraordinary trouble. *Heilbronner v. Hancock*, 33 Tex. 714.

CHAPTER XVI.

DISCRIMINATION IN RATES AND OVERCHARGE.

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§§ 1601-1632. Discrimination in Rates—§§ 1601-1603. Right to Discriminate—§ 1601. At Common Law.—At common law a carrier of freight is not bound to treat all shippers alike. It must carry for every shipper at a reasonable rate. It may favor any particular shipper or class, where the circumstances warrant a distinction, subject to the limitation that the discrimination must be reasonable.¹ The broad rule of the common law is that when the conditions and circumstances are identical, the charges of a common carrier to all shippers for the same service must be equal; but a carrier may lawfully depart from the standard or usual rates if such rates are reasonable, and the deviation is in favor of particular customers for special reasons not applicable to the whole public.² The leading principles of the common law, as applicable to common carriers, is that they are bound to carry for all, and for a reasonable remuneration from each.³ As against a common or public carrier, every person has the same right, in all cases. When his common duty controls, he can not refuse A and accommodate B. All, the entire public, have the right to the carriage for a reasonable price at a reasonable charge for the services performed, and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; all the shipper can ask of a common carrier is that for services performed he shall charge no more than a reasonable sum to him.⁴ Whether the carrier charges more or less than the price charged

1. **At common law.**—*State v. Central Vermont R. Co.*, 71 Atl. 194, 81 Vt. 463, 130 Am. St. Rep. 1065.

2. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

3. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

"At common law, a common carrier of freight was not bound to treat all shippers alike. It was only bound to carry for every shipper at a reasonable rate. It might favor any particular shipper or class of shippers where the circum-

stances of the case warranted a distinction, as where the preferred shipper or class offered goods in larger quantities or under such conditions that they could be transported at less expense. But there is always the limitation that the discrimination in preferences must be reasonable, and the terms must not be unreasonably unequal." *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

4. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and the difference between the charges can not be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract the common-law action by the carrier against the shipper is for a quantum meruit, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person under a special contract, or the usual charge made against many others (the freight tariff), is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured by the value of the service performed, and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears to the value of the service performed as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in many cases, by grant from the state. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed which would authorize a shipper, after being compelled to pay his freight according to established rates (this appears from the pleas and declarations), to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity, or a sale of service at a noncompensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person.⁵ A mere discrimination,⁶ difference in treatment

5. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

"Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable." *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

The mere fact that a less freight rate is allowed to one class of shippers for special reasons applicable only to them, than to other shippers of same general character of goods is not proof that the higher rate is unreasonable. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290, see 85 Tex. 405.

The fact that he charges less for one than for another is only evidence that a particular charge is unreasonable. *Cowden v. Pacific Coast, etc., Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142.

"Whether a charge made by A against B is reasonable can not be determined by establishing the charge against C for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is the compensating sum, the lower charge may be too small for the service." *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

6. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; criticising *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 13 Am. Rep. 72; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674.

"The hinge of the question is not found in the single fact of discrimination, for discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing." *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

The case of *Borda v. Philadelphia, etc.,*

or inequality⁷ does not amount to an unjust discrimination and will not invalidate a contract between a shipper and a carrier.⁸ To have that effect, other

R. Co., 141 Pa. 484, 21 Atl. 665, "was an action of case brought against the Philadelphia and Reading Railroad Company by the plaintiffs, who were shippers of coal, to recover damages for alleged illegal discriminations in the freight charged to the plaintiffs on shipments of coal over the defendant's road, as against lower rates charged to other shippers over the same road. The case was by agreement of the parties referred to Mr. Peter McCall as referee, who made a most exhaustive and elaborate report, denying the claim of the plaintiffs, and his report was affirmed by this court. As the shipments had been made prior to the adoption of our constitution of 1874, a preliminary question arose, whether it was the duty of the defendant to carry without discrimination. The referee held that such was the duty of the defendant, saying, 'I regard it, then, as settled law in this state, that a railroad company, a common carrier, owes a duty of equality to every citizen, and I adopt the position taken by Mr. Bullitt in argument, that railroad companies have no right to make any undue discrimination or preference in their charges; and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and by consequence renders the charge unreasonable. Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule; for, exercising as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed, is not a strict and literal equality under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue, or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; so discrimination made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and, under a different state of circumstances, a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful and inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case.'

The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire." *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

7. "The extent of the common-law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not per se invalidate the contract as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others." *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

"In *Hutchinson on Carriers*, page 353, after a protracted review of all the cases, and they are very numerous, the writer sums up the result thus: 'Mere inequality in charges does not, therefore, of itself amount to an unjust discrimination. It only becomes such when a discrimination is made in the rates charged for transportation of goods of the same class, of different shippers, under like circumstances and conditions. So a mere reduction from the established rate is not necessarily an unjust discrimination. But it becomes such when it is either intended, or has a natural tendency, to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly of the business.'" *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

8. "Says Chancellor Kent: 'Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price.' 1 Salk. 249; 8 Carr. & P. 207; 3 Barb. 388; 2 Kelly, 353. Says Nisbet, J. (in the case last cited), when treating of the last distinction between a common and private carrier: 'If he refuses to carry he is liable to be sued and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character.' Says Mr. Justice Story (*Story on Bailments*, 495), after speaking of his general obligations; 'A common carrier has, therefore, been defined to be one who

elements must enter into the contract; but when such elements are present in such force as to make the discrimination unjust or oppressive, the contract will be illegal.⁹ The courts of California,¹⁰ Florida,¹¹ Iowa¹² and South Carolina¹³ have said, quoting Story on Bailments: "At common law, a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation.

undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.' 1 Wend. 272; 2 Story, 17; 25 Penn. St. 120. In the last case the terms 'common' and 'public' are used as synonymous words. It is useless to multiply quotations to determine the signification of the term 'common' in this connection. It is used not to define, to limit, or explain the degree or amount of compensation which can be demanded for the service to be performed. Indeed, as to the amount of compensation which can be demanded, the rule as to public and private carriers is the same. It is a quantum meruit. True, the responsibility, the risk of the public carrier, is greater, and that fact may possibly enter into the estimate of the value of the service. That, however, would simply increase the damages, on account of the different degrees of responsibility attending the several bailments. It would not vary the rule." *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

9. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

"From the sole fact that there is a discrimination, a conclusion can be inferred which invalidates the special contract between the carrier and the shipper, for to warrant such a conclusion, without defying principle, another element must be added to the premises, and that element is this; the discrimination is unjust or oppressive." *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

10. *Cowden v. Pacific Coast, etc., Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142.

11. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; criticizing *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 13 Am. Rep. 72.

A common carrier is bound to carry for a reasonable remuneration, but is not bound to carry at the same price for all. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

"The cases stating the common-law rule are simply that the charge must be reasonable. Thus far, there can not be any reasonable difference between fair minds. In the next place, the right to have the service of the common carrier at a reasonable rate is common. Upon a tender of a reasonable compensation, unless there is a reasonable ground for

his refusal, in case of refusal he will be liable to an action. Under such circumstances he must receive and carry all goods offered for transportation (which it is his duty to transport) by any person whatever, upon receiving a suitable hire." *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

12. *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164.

"And in 1 Wood on Railroads, 566, it is said: 'A mere discrimination in favor of a customer is not unlawful, unless it is an unjust discrimination.' In 2 Redfield on Railways, 95, the following language is used: 'It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For unless this were so, the duty to carry for all would not be of such value to the public, since it would be easy for the carrier to select his own customers at will, by the arbitrary discrimination in his prices. Hence it was held, at an early date, that all that could be required on the part of the owner of the goods by way of compensation was, that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively.' In Hutchinson on Carriers, 243, after a review of the case, it is said: 'Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty.'" *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164.

13. *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis." The court of Massachusetts laid down the rule of reasonable compensation, and said that "if, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."¹⁴ This rule is approved by the courts of New York,¹⁵ Pennsylvania¹⁶ and Vermont;¹⁷ and the New York court added that the carrier could, at common law, make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish the parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical the charges to all shippers for the same service must be equal.¹⁸ This is also the rule in the United States,¹⁹

14. *Fitchburg R. Co. v. Gage* (Mass.), 12 Gray 393; *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416; *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564; *Spofoford v. Boston, etc., Railroad*, 128 Mass. 326.

"A railroad corporation is not obliged, as a common carrier, to transport goods and merchandise for all persons at the same rate; the common-law rule being that equal justice shall be done to all parties. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint." *Fitchburg R. Co. v. Gage* (Mass.), 12 Gray 393; *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674. And see *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

15. *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674, distinguishing *Menacho v. Ward*, 27 Fed. 529, 23 Blatchf. 502, and shows that it recognizes this right. See *Root v. Long Island R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331; *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194.

16. *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43, 56; see also, *Shipper v. Pennsylvania R. Co.*, 47 Pa. 338; *Hersh v. Northern Cent. R. Co.*, 74 Pa. 181.

The case in *Audenried v. Philadelphia, etc., R. Co.*, 68 Pa. 370, is not contrary to the general doctrine, for it did not involve the question of equality of charges for transportation; but a right of wharf-

age. The court held that the nature of wharfage required exclusive possession. The case reported in *Sandford v. Railroad Co.*, 24 Pa. 378, was under the statute incorporating the company, and the court held that under this statute a contract giving to one express company an exclusive right of transportation in the passenger trains was illegal and void. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

17. *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

18. *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674.

19. *Union Pac. R. Co. v. United States*, 117 U. S. 355, 29 L. Ed. 920, 6 S. Ct. 772, 21 S. Ct. 502; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 8 R. & C. L. J. 343; *Easton v. Houston, etc., R. Co.*, 32 Fed. 897; *Hays v. Pennsylvania Co.*, 12 Fed. 309, 4 Ky. L. Rep. 87; *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. 652. See *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593, in which it is said: "It is very doubtful whether the reasoning in the case of *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. 652, can be regarded as sound, or to be made to harmonize with the reasoning in the much more carefully considered case of *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 8 R. & C. L. J. 343."

Though a common carrier may limit his service to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the

Colorado,²⁰ Illinois,²¹ Indiana,²² Missouri,²⁴ New Hampshire,²⁵ New Jersey,²⁶ South Carolina,²⁷ Tennessee,²⁸ Texas,²⁹ Vermont,³⁰ and practically all other states. There is an apparent conflict in respect to this doctrine, in regard to which the court of New York said: "These principles are well settled, and whatever may be found to the contrary, in the cases * * * originated in the application of statutory regulations in other states and countries."³¹ The opinion of the courts of New Hampshire,³² New Jer-

risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. *York Co. v. Central Railroad* (U. S.), 3 Wall. 107, 18 L. Ed. 170; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

"Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the services shall be exactly along the same lines. But that principal of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference." *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

20. *Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480.

21. *Chicago, etc., R. Co. v. Koerner*, 67 Ill. 11, 16 Am. Rep. 599; *Toledo, etc., R. Co. v. Elliott*, 76 Ill. 67; *Erie, etc., Despatch v. Cecil*, 112 Ill. 185. See, also, *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754, citing and commenting on *Indianapolis, etc., R. Co. v. Ervin* (Ill.), 27 Am. & Eng. R. Cas. 8.

In the case reported in *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33, the court decided that railroad companies were not at liberty to discriminate at their discretion in their charges for delivery at different warehouses. In *Toledo, etc., R. Co. v. Elliott*, 76 Ill. 67, the court sustained a contract allowing a rebate of five and one-half cents less than the uniform tariff per bushel for corn. In *Chicago, etc., R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121, the question of the power of a railroad company to make a contract with a party for transportation of freight at the less rate than the general public was required to pay was sustained. The

agreement was to transport coal for three dollars per car load, the freighter furnishing the cars, while the regular tariff was nine dollars. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

22. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674.

24. *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453, 7 S. W. 567; *McGrew v. Missouri Pac. R. Co.* (Mo.), 132 S. W. 1076.

25. *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 13 Am. Rep. 72.

26. *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505; explaining *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457.

27. *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 7 S. E. 493.

28. *Ragan v. Aiken*, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684.

29. A railway company independent of Act 1879, prohibiting unjust discrimination in rates for transportation, etc., is held to the strictest impartiality in the conduct of its business in withholding all privileges or preferences from one customer which are not extended to all others, but this rule is subject to the qualification, that where a freight rate is reasonable for all customers, contracts for a less rate may be made in special cases when the discrimination is reasonable and just, but the discrimination must not subject others to unreasonable disadvantages, nor must it be made to give one individual preference to the disadvantage of another, or to give preference and advantage to one locality to the prejudice of another locality, and a mere discrimination in favor of a customer is not unlawful unless it amounts to an unjust discrimination. *Houston, etc., R. Co. v. Rust*, 58 Tex. 98.

30. *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

31. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

32. In *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 13 Am. Rep. 72, in speaking of the rule of the common law upon the subject as stated in the English courts, the supreme court of New Hampshire says: "We have not overlooked the fact that in England it seems to be sup-

sey³³ and Ohio³⁴ are not entirely out of line with the general current of judicial opinion, although fragmentary expressions found in some of the opinions seemingly pass the lines of principle.

Washington.—A railway company, being a public service corporation, is bound to receive all freight offered without discrimination.³⁵

English Cases.—Many English cases support the general doctrine.³⁶ The recent English cases are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects.³⁷

§ 1602. Effect of Statutes Generally.—Statutes providing that carriers by railroad shall give to all persons reasonable and equal rates, benefits, privileges, facilities and accommodations for transportation of freight are merely

posed that at common law common carriers are not bound to carry all and for all on reasonably equal terms," and that "the fact seems now to be overlooked" (by the English courts) "that the general principle of equality is the principle of the common law." But the New Hampshire court in Concord, etc., Railroad v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181, seems to place itself in line with the general current of judicial opinion.

33. *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457. See, also, *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593; *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

"In the latter case of *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505, the decision in *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457, is explained, and it was said: 'The contract held invalid in the *Messenger* case, above cited, was indeed one inuring to the benefit of the individual and against the corporation; but its terms were such that it could not possibly be effectuated without giving the plaintiff a preference over the public. It was, in effect, that whatever rate should be charged against any one else, twenty per centum less should be charged to the plaintiff. Plainly such a contract was not consistent with the company's duty of impartiality. As soon as the general rates were reduced to the standard of the plaintiff's, he was entitled to have his rates reduced twenty per centum lower.' It is evident from this that the courts of New Jersey did not hold, nor mean to hold, that a contract giving a special rate and providing for a drawback was in itself illegal and void." *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

34. *Scofield v. Lake Shore, etc., R. Co.*, 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846. See *Cleveland, etc., R. Co. v. Closser*, 126

Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

In *Cowden v. Pacific Coast, etc., Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, the court said: "The case of *Scofield v. Lake Shore, etc., R. Co.*, 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846, is the leading case in the United States supporting appellant's contention, and it is upon this case that he says 'he pinned his faith and hung his hope.' The case of *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731, is the leading case in this country holding to the contrary view, and the opinion of the learned judge in the *Scofield* case does not appear to overrule the doctrine there declared, but would seem to look to the statute law of Ohio for support, rather than to the common law. It says, in speaking of the Florida case: 'Reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate, not necessarily equal to all; and in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions.'"

35. *United Tanners Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

36. See *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593, citing the following: "*Garton v. Bristol, etc., R. Co.*, 1 Best. & S. 112; *Hozier v. Caledonian R. Co.*, 1 Nev. & McN. R'y Cas. 27; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226; *Ransome v. Eastern, etc., R. Co.*, 1 Com. B., N. S., 437; *Jones v. Eastern, etc., R. Co.*, 1 Nev. & McN. R'y Cas. 45; *Ox-lade v. Northern Eastern R. Co.*, 1 Nev. & McN. R'y Cas. 72; *Baxendale v. Railway Co.*, 5 Com. B., N. S., 336; *Bellsdyke, etc., Co. v. North British R. Co.*, 2 Nev. & McN. R. Cas. 105.

37. *Fitchburg R. Co. v. Gage* (Mass.), 12 Gray 393; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

declaratory of the common law, and do not abrogate the rule that there may be a discrimination in rates when founded upon a reasonable difference in the conditions attending the different shipments. This is the doctrine of the courts of Massachusetts,³⁸ New Hampshire,³⁹ Tennessee⁴⁰ and Vermont.⁴¹ The New Hampshire court said, speaking of the statute of that state: "Absolute equality in the price rate per ton for the carriage of all merchandise of the same description, over equal distances, is not required, but a price rate which will be reasonably equal for all. By enacting that the rates shall be the same for all persons, and for like descriptions of freight between the same points, the legislature could not have intended an equality that is absolute, fixed and unvarying, if such equality is unreasonable." The court proceeded to say that the whole section must be considered in order to find the true construction; that the first clause, requiring that the rates shall be the same, is explained by the second clause, requiring that "all persons shall have reasonable and equal terms;" that, "taken together, it is plain that no arbitrary rule of absolute equality, but one of reasonable and just equality, was intended."⁴² This was quoted with approval by the court of Vermont.⁴³

Construction of Federal Statute.—The federal statute which forbids and declares unlawful all special rates, rebates, drawbacks, and preferences, is intended to make so much of a contract of affreightment void as related to the forbidden matter mentioned, but is not to be construed as making void an entire transaction of affreightment in which they were included, and excusing the carrier from any liability for freight received under such contract.⁴⁴

§ 1603. Authority of Station Agent.—A station agent of a railway company can not lawfully discriminate in favor of one shipper by charging him for transportation a lower rate than was allowed to others; such does not come within the apparent scope of his authority.⁴⁵

Rebates.—See post, "Rebates and Drawbacks," § 1609.

§§ 1604-1622. Unjust or Unreasonable Discrimination—§ 1604. General Rule.—A common carrier can not lawfully make unjust, unfair or

38. *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416, see also *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

39. *Concord, etc., Railroad v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

40. **Tennessee statute.**—The legislature of Tennessee did not, by the act of November 23, 1865, intend to prohibit railroad companies altogether from making differences in rates charged on through and local freights. Such differences might, however, be carried to such an unreasonable extent as to amount to unjust discrimination within the meaning of this statute. But the act being uncertain as to what is prohibited, and also as to the mode of its enforcement, and being a penal statute, it could not, in an action to recover the penalty, be left to the jury, upon proof, to say whether such differences were unjust discrimination or not. *Cowan, etc., Co. v. East Tennessee, etc., R. Co.*, 2 Tenn. Shan. Cas. 102.

41. *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

42. *Concord, etc., Railroad v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

"The statute requires that 'the rates shall be the same for all persons and for like descriptions of freight between the same points,' and that all persons shall have reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned or operated in this state. Gen. Stat. ch. 149, § 2; Gen. Laws, ch. 163, § 2. This statute, as was decided in *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 13 Am. Rep. 72, is in general a declaration of the common-law doctrine of reasonable compensation, and no construction which establishes an arbitrary rule inconsistent with reasonable equality in rates can be given to the statute." *Concord, etc., Railroad v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

43. *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

44. *Insurance Cos. v. Carrier Cos.*, 91 Tenn. 357, 19 S. W. 755.

45. **Authority of station agent.**—*St. Louis, etc., R. Co. v. Miller (Ark.)*, 145 S. W. 889, 39 L. R. A., N. S., 634; *Myers v. St. Louis, etc., R. Co.*, 71 Ark. 552, 76 S. W. 557.

oppressive discrimination in rates between its customers.⁴⁶

§§ 1605-1609. What Constitutes Unjust Discrimination—§ 1605. General Rule.—The requirement that one shipper shall pay a higher rate for substantially similar services, rendered under substantially similar conditions, is an unjust discrimination.⁴⁷ Rates charged a shipper must not only be reasonable in themselves, with respect to the profit of the carrier, but reasonable in respect to the charges made for similar services, under similar conditions, to other shippers who are his competitors.⁴⁸ Any discrimination in charges, for which no sufficient reason exists, in the character of the service, is unjust.⁴⁹ Hence, whether a discrimination is lawful or not is determined by applying facts to the law,⁵⁰ and whether the carrier acts unlawfully or not depends upon the circumstances of the particular case.⁵¹

§ 1606. Questions of Law or Fact.—What is reasonable equality in the rates for the carriage of merchandise of the same description between the same points, and whether the rates are reasonably equal, are questions of fact,⁵² which must ordinarily be determined by the trial court.⁵³

When a Question of Law.—If the facts of an alleged unlawful discrimination are conceded, or are established by undisputed testimony, whether an unreasonable discrimination was made, such as is forbidden by statute, is a question of law for the court.⁵⁴

§ 1607. Conformity to Published Rates.—When a carrier publishes a rate for a certain service, it must furnish to all persons demanding such service

46. "In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals. * * * Chicago, etc., R. Co. v. Koerner, 67 Ill. 11, 16 Am. Rep. 599; Vincent v. Chicago, etc., R. Co., 49 Ill. 33." Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643.

"In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them as early as means will allow; that it can not directly exercise unreasonable discrimination as to whom and what it will carry; that it can not impose unreasonable or unequal terms, facilities, or accommodations: McDuffee v. Portland, etc., Railroad, 52 N. H. 430, 13 Am. Rep. 72." Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643.

Private carriers.—A private carrier may contract to haul exclusively for one person and give a preferential rate in consideration of doing all the hauling for them. Edgar Lumber Co. v. Cornie Stave Co., 95 Ark. 449, 130 S. W. 452.

47. **General rule.**—Missouri, etc., R. Co. v. New Era Mill. Co., 79 Kan. 435, 100 Pac. 273.

48. Missouri, etc., R. Co. v. New Era Mill. Co., 79 Kan. 435, 100 Pac. 273.

A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and

reasonable, and is not inconsistent with the public interest. Ragan v. Aiken, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684.

49. Missouri, etc., R. Co. v. New Era Mill. Co., 79 Kan. 435, 100 Pac. 273.

50. Houston, etc., R. Co. v. Rust, 58 Tex. 98.

Charge making liability of carrier depend solely on question of inequality of freight rates charged to plaintiff as compared to rates charged others, irrespective of other facts in case is erroneous. Houston, etc., R. Co. v. Rust, 58 Tex. 98.

51. *Indiana.*—Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

Iowa.—Cook v. Chicago, etc., R. Co., 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164.

New York.—Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

Pennsylvania.—Borda v. Philadelphia, etc., R. Co., 141 Pa. 484, 21 Atl. 665; Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

52. **Questions of law or fact.**—State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

53. The question whether a discrimination by a carrier is unjust is for the court to decide. McGrew v. Missouri Pac. R. Co. (Mo.), 132 S. W. 1076; Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

54. Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

the same rate.⁵⁵ A carrier having fixed a rate for specified service and being engaged in furnishing such service to others could not justify its refusal to perform the service for plaintiff because the rate was confiscatory.⁵⁶

§ 1608. Grant of Exclusive Advantage or Monopoly.—A contract of a railroad company to carry at a rate which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of similar goods, is unjust and can not be legally enforced.⁵⁷

§ 1609. Rebates and Drawbacks.—Rebates or drawbacks paid by a carrier are not necessarily unlawful, especially if they do not unjustly discriminate, so as to give undue preference or advantage to persons or traffic similarly situated;⁵⁸ aliter in Ohio.⁵⁹ If a common carrier makes a special contract to repay part of the sum received from the shipper, he must perform his part of the contract, unless he overthrows the presumption of fairness and right by countervailing facts.⁶⁰ The shipper need not first prove that the rate charged and paid under the contract was excessive and unjust, as his right to recover rests upon the contract stipulating for a rebate.⁶¹ There is no element of moral or legal wrong in an agreement to repay part of the compensation received. To give an illegal character to such an agreement, more must be shown than the mere fact that the parties stipulated for a rebate. In simply making a rebate, or in providing for a drawback, parties violate no law, and their contract must stand. It can not be presumed that fraud was intended or practiced, nor can it be presumed that there was any wrongful combination to secure an undue ad-

55. Conformity to published rates.—*Louisville, etc., R. Co. v. Higdon*, 149 Ky. 321, 148 S. W. 26.

56. *Louisville, etc., R. Co. v. Higdon*, 149 Ky. 321, 148 S. W. 26.

57. *Florida.—Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

Indiana.—Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

New Jersey.—Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; *S. C.*, 36 N. J. L. 407, 13 Am. Rep. 457; *State v. Delaware, etc., R. Co.*, 48 N. J. L. 55, 57 Am. Rep. 543.

In *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754, "there was a very clear preference to one party over all others in the same business, by the railroad company giving him a specified drawback upon freights on hogs carried from the same points, and of course as this was direct preference over all others it was in violation of the law."

New York.—Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

Ohio.—"In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances: *Scofield v. Lake Shore, etc., R. Co.*, 43 O. St. 571, 54 Am. Rep. 846, 3 N. E. 907.

Pennsylvania.—Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

Agreement to charge others excessive rates.—Pay same to favored shipper.—A

railroad company is not warranted in making a contract whereby it binds itself to carry for one shipper crude petroleum, or other article, at half the rate it agrees to charge all others for the same service, at the same time, and as part of the agreement, binding itself to charge all others double the amount as fixed open rate, and to pay such favored shipper one-half of it when collected, in consideration of his agreeing to establish and maintain a system of pipe lines to its road. *Brundred v. Rice*, 49 O. St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

58. Rebates and drawbacks.—*State v. Illinois Cent. R. Co.*, 246 Ill. 188, 92 N. E. 814.

59. In Ohio an action can not be maintained to enforce a promise of a repayment of rebate. *Baltimore, etc., R. Co. v. Diamond Coal Co.*, 61 O. St. 242, 55 N. E. 616.

60. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

A contract between a common carrier and a grain shipper, by which the carrier agrees to receive at the time of shipment a designated sum as compensation for the transportation of grain, and to refund a certain part of the sum received when the transportation is completed, is valid and binding. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

61. *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

vantage over other shippers; neither can it be presumed that in stipulating for a rebate the carrier intended to make, in favor of the particular shipper, a discrimination forbidden by law.⁶²

Authority of Agents to Grant Rebates.—Where, under a special contract between a carrier and a shipper, it appears that the contracting shipper was first prohibited from claiming a rebate on grain consigned by him to a certain third party, and that subsequently thereto an unauthorized agent of the company entered into a contract as to rebates with the shipper, treating the former interdiction as withdrawn and ineffective, and inducing the shipper to believe that it had no force, he is entitled to rebates on grain subsequently shipped by him to such third party.⁶³

§§ 1610-1622. Grounds for and Elements of Discrimination—§ 1610. In General.—What is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters, must be considered.⁶⁴

§§ 1611-1622. Particular Grounds of Discrimination—§ 1611. Character of Shipment.—It is a well-established rule of the common law that the carrier can not be charged with allowing undue preferences to a class of customers where the character of their shipments justified a distinction.⁶⁵

62. Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

63. Authority of agents to grant rebates.—Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

64. Grounds for and elements of discrimination.—Lough v. Outerbridge, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674.

"The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must, therefore, be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination, all the facts and circumstances must be taken into consideration." Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things may be. Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

In the case of *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754, the court was careful to say that, "it must not be inferred that a common carrier in adjusting his price can not regard the particular circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expenses of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference in that respect to some over others for carriage in the course of his business." Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

Contract for railroad company to carry coal for particular person at rebate of fifteen cents per ton from the regular tariff rates, in consideration of his expending a large sum of money in building on the company's lands, and in part for its use and convenience, a dock and pocket for storing coal, and of his undertaking to ship coal in large quantities, and to load it upon the cars, can not be declared void as against public policy, in the absence of any finding as a matter of fact that there was an unjust discrimination. In such a case, it can not be determined as a matter of law that the discrimination was unjust. Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331.

65. Character of shipment.—State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

§§ 1612-1613. Condition or Character of Shipper—§ 1612. In General.—While carriers may limit their services to the carriage of particular kinds of goods, and prescribe regulations to protect themselves against fraud, they can not discriminate between persons because of their condition or character, and must accept all goods offered within the course of their business, or respond in damages.⁶⁶

§ 1613. Dealers and Manufacturers.—A discrimination in favor of a manufacturing corporation, and against a dealer in coal arising from the railway corporation making an agreement in advance of the establishment of the manufacturing corporation to ship coal to it for a specific time and at specified rates, in order to induce such establishment, and increase the railroad's freight and earnings thereby, is not a discrimination between persons in like conditions and under similar circumstances. The railway corporation is not obliged to abandon its agreement, nor, while maintaining it, to carry freight for other shippers on the terms therein stipulated.⁶⁷ A discrimination made between manufacturers and dealers in coal in charges made for the transportation of such coal is not forbidden by a statute prohibiting discrimination between persons in like conditions and under similar circumstances, if, by reason of the coal so transported for the manufacturers, they produce a larger amount of freight for the carrier, while such a result does not follow the coal carried for the dealers.⁶⁸ Discrimination in favor of a manufacturing corporation, and against retail dealers, in the price charged for shipping coal, though justified on the ground that such corporation is engaged in a business necessarily resulting in an increase of the business of the carrier, must be discontinued if such manufacturer engages in the business of selling coal, and thus becomes a competitor with other dealers in that commodity.⁶⁹

§ 1614. Place of Production and Ownership.—Place of production may be a good ground for distinction but ownership may not be.⁷⁰

§ 1615. Time and Quantity.—A carrier may make reasonable discrimination of rates upon the basis of carriage for a certain time and in a certain quantity as to the same class of goods.⁷¹

§§ 1616-1618. Distance and Direction—§ 1616. In General.—The naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not of itself conclusive evidence of an unjust discrimination, and a difference of price for the

66. Condition or character of shipper.—*Magnus v. Platt*, 115 N. Y. S. 824, 62 Misc. Rep. 499.

67. Dealers and manufacturers.—*Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

68. *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

69. *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

70. Place of production and ownership.—*Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

The court of Pennsylvania said in the case of *Shipper v. Pennsylvania R. Co.*, 47 Pa. 338: "We are not prepared to say

that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign; in favor of home products over those which are extraterritorial, especially when the railroad lies wholly within the state." *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

71. In the case of *Fitchburg R. Co. v. Gage (Mass.)*, 12 Gray 393, the right to discriminate upon the basis of a carriage for a certain time and in certain quantities was declared. The claim of the shipper was for an equality of charge for shipments of ice with charges for shipments of bricks, because they were of the same class of freight, but the claim was not allowed. *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

same distance of transportation is not necessarily an unjust discrimination.⁷²

Through Rate Less than Sum of Local Rates.—Where no through rate between two stations in adjoining states and upon different railroads has been filed with the Interstate Commerce Commission or published, and a car load of freight is received at one of the stations, and the agent at such station agrees to carry the freight to the other station at a certain rate, and at the connecting point of the two railroads the agent of the other railroad receives the freight and agrees to complete the carriage at the rate specified, in the absence of any showing that the agreed rate is unreasonable, or that other shippers of like freight between the same stations are charged a different rate, the contract will not be held void as to the rate, notwithstanding it is less than the sum of the local rates regularly charged by the respective railroads.⁷³

§ 1617. Long and Short Hauls.—Under a constitutional or statutory provision that it shall be unlawful for any common carrier "to charge any greater compensation in the aggregate for the transportation of * * * under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance," the fact that competition exists at the longer and not at the shorter distance point does not constitute such a dissimilarity of conditions as authorizes the carrier to charge more for the short than for the long haul; ⁷⁴ such prohibition is not confined to cases when the freight is being transported between the same points.⁷⁵

§ 1618. Difference as to Other Parts of Road.—See ante, "Distance and Direction," §§ 1616-1618.

§ 1619. Large and Small Shipments.—Distance and Quantity of Freight.—A carrier may well be justified in carrying full loads a considerable distance at less rates than he would charge for small packages a short distance.⁷⁶ Under a statute prohibiting unreasonable preference or advantage a railway corporation may lawfully enter into a contract for the carriage of goods for a particular individual or corporation at a lower rate in respect to large quantities of goods and for longer distances than for one who sends them in small quantities or short distances.⁷⁷

Large and Small Shipments between Same Points.—A railroad company is not bound to carry large and small quantities of the same kind of mer-

72. Distance and direction.—*Florida.*—Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Illinois.—So held in Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562, which was an information in the nature of a quo warranto. The question was whether a charge of \$5.65 per thousand feet of lumber a distance of 110 miles, while at the same time the company charged \$5 per thousand feet of lumber for a distance of 126 miles, did not subject the company to the penalties prescribed by the act.

Indiana.—Distance may be considered in determining whether the road is acting impartially. Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 22 Am. St. Rep. 593, 26 N. E. 159, 9 L. R. A. 754.

73. Through rate less than sum of local rates.—Missouri Pac. R. Co. v. Relf, 97 Pac. 477, 78 Kan. 463.

74. Long and short hauls.—Louisville,

etc., R. Co. v. Commonwealth, 106 Ky. 633, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012, 90 Am. St. Rep. 236.

75. So held under Texas Rev. Stat., § 4257. Texas, etc., R. Co. v. Kuteman, 79 Tex. 465, 14 S. W. 693.

76. Distance and quantity of freight.—Cowan, etc., Co. v. East Tennessee, etc., R. Co., 2 Tenn. Shan. Cas. 102, 105.

There are many reasons why a railroad can afford to receive a train of loaded cars at one end of their road and transport it to the other without handling or change, at a much less rate than they could afford to receive a small quantity of freight at one depot, and transport a short distance, and deliver it at another. Cowan, etc., Co. v. East Tennessee, etc., R. Co., 2 Tenn. Shan. Cas. 102, 105.

77. Hoover v. Pennsylvania R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

chandise between the same points at the same price.⁷⁸

Where an additional freight is obtained by means of the lower charge, the discrimination is justified both at common law and under the statutes.⁷⁹

Shipper Furnishing Larger Freight than Any Other.—A contract of discrimination can not be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained.⁸⁰ Although a court will ordinarily

78. Large and small shipments between same points.—*Indiana*.—Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

It is not necessary or per se a legal wrong for a carrier to give better rates to one who ships many car loads of grain, than to one who ships a single car load or a single bushel. It is a matter of common knowledge, and therefore one of which judicial notice is taken, that an increase in the volume of business is desirable and advantageous; and in the rivalry of business competition it is lawful to favor those whose business is great, rather than those whose business is small or inconsiderable. Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

New Hampshire.—Concord, etc., Railroad v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181.

New York.—"Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331, cited in 11 Am. & Eng. Ency. of Law, 643, where in the notes the rule is stated that a railway company may discriminate in favor of companies shipping large quantities of freight." State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

"The carrier can afford to carry ten thousand tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper can not complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates." Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

South Carolina.—Avinger v. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 7 S. E. 493.

Vermont.—State v. Central Vermont R. Co., 81 Va. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

"Custom, in all branches of business, always has been to move a large amount

of given commodity, in one parcel or in a given time, at a less price per pound, yard or ton, than a smaller quantity of the same commodity; delivered in smaller parcels at different times; that the expense of handling, carrying and storing the smaller amount is greater, pro rata, than that of the same operations upon the larger amount in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality." Concord, etc., Railroad v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181; State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

79. Hoover v. Pennsylvania R. Co., 156 Pa. 220, 36 Am. St. Rep. 43, 27 Atl. 282, 22 L. R. A. 263.

80. Shipper furnishing larger freight than any other.—Scofield v. Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846; Lake Shore, etc., R. Co. v. Scofield, 2 O. C. C. 305, 1 O. C. D. 500.

Where a railroad corporation, as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freight than other shippers during a given term, agrees to make a rebate on the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances, such a contract is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby. Scofield v. Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846; Lake Shore, etc., R. Co. v. Scofield, 2 O. C. C. 305, 1 O. C. D. 500.

A railroad company whose line extends to a point of intersection with a canal of the state can not make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by §§ 3366, 3367 of the Revised Statutes, to prevent discrimination in rates of carriage. (Scofield v. Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846, followed and approved.) Baltimore, etc., R. Co. v. Diamond Coal Co., 61 O. St. 242, 55 N. E. 616.

look to the interest of a common carrier as an element in the case when a contract with him relating to freightage is attempted to be upheld or set aside, such a contract will not be sustained by the courts simply because the business to be done under it is "largely profitable" to him.⁸¹

§ 1620. Rates Offered to Meet Competition or Secure Customers.—In order to secure freight which would otherwise go by a different route, a railroad company may discriminate in rates in favor of persons living at a distance from its route, provided its charges against others similarly situated are reasonable; and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable;⁸² but less rates charged for greater distances only on the ground of the existence of competing lines is an unjust discrimination.⁸³ Carriers who have a substantial monopoly of business may lawfully seek to retain their business by offering their services to the public at a loss to themselves whenever competition is to be met, and, when it disappears, resuming their standard rates, if such rates are reasonable and just.⁸⁴

Customer Stipulating to Give Carrier All Their Business.—The carriers may, by special agreement, give reduced rates to customers who stipulate to give them all their business, and refuse these rates to others who are not able or willing so to stipulate, providing always that the charge exacted from such parties for the service is not excessive or unreasonable.⁸⁵ The fact that an offer of reduced rates was made to prevent or drive away competition is not material if such competition is irregular and partial, and the rates charged in the absence of competition are reasonable.⁸⁶

In Ohio, a corporation, engaged in carrying goods for hire as a common carrier has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.⁸⁷

§ 1621. Shipper from Spur Track.—A common carrier can not discriminate between patrons or give to a shipper to whose premises there is a spur track any preferential rate.⁸⁸

§ 1622. Carriage to Point on Belt Line.—A carrier which has published

81. *Scofield v. Lake Shore, etc., R. Co.*, 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846.

82. **Rates offered to meet competition or secure customers.**—*Ragan v. Aiken*, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684.

The right of railroad corporations to offer inducements by a reduction in rates to secure freights over through connecting lines, are contracts concerning their own authorized business, and not objectionable unless unconscionable. *Morris, etc., R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542. See *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754.

83. *Chicago, etc., R. Co. v. Koerner*, 67 Ill. 11, 16 Am. Rep. 599.

84. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

85. **Customer stipulating to give carrier all their business.**—*Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; *State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194,

130 Am. St. Rep. 1065, quoting the rule of the New York court.

86. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

If a common carrier offers to carry goods at a time designated by it at a reduced price, on condition that its customers do not at that time ship any freight by any other line, and to those customers who refuse to agree to give their exclusive business during such time, charges its usual rates, it is not, if the rates charged are just, under the obligation to carry at the reduced rate for those who refuse to assent to the condition upon which those rates are offered. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

87. *State v. Cincinnati, etc., R. Co.*, 47 O. St. 130, 23 N. E. 928.

88. **Shipper from spur track.**—*Riley v. Louisville, etc., R. Co.*, 142 Ky. 67, 133 S. W. 971.

one rate for carrying freight between points on it belt line can not exact a higher rate for carrying coal from a mine to a consuming plant, though the published rate was fixed in view of an additional in or out haul obtained from ordinary freight.⁸⁹

§§ 1623-1632. Remedies for Discrimination in Rates—§ 1623. Injunction and Mandamus.—Where an association of railroads arbitrarily and unreasonably increased the rate of transportation of lumber within the territory covered by their agreement, the enforcement will be enjoined.⁹⁰ An injunction will not be granted to compel a common carrier to transport goods at the rates fixed by law, but it will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law.⁹¹

§ 1624. Quo Warranto.—Where a corporation created by the state of Ohio fixes a rate of freight per hundred pounds, for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege or right in contravention of law," within the meaning of § 6761 of the Revised Statutes of Ohio, authorizing an action of quo warranto for misusing its franchise.⁹²

§§ 1625-1631. Action at Law—§ 1625. Right of Action.—A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation.⁹³

§ 1626. Jurisdiction.—The enforcing of a shipper's right to equal rates of transportation is not a regulation of commerce within the meaning of the constitution of the United States, and is within the jurisdiction of the state courts.⁹⁴

Carrier on High Seas.—An action to recover damages for discrimination in freight charges by a common carrier on the high seas between different ports within the same state is exclusively within the jurisdiction of the federal or admiralty courts, unless a common-law cause of action is stated. The state courts have no jurisdiction whether the action is in contract or tort.⁹⁵

§ 1627. Limitations.—Fact of Discrimination Fraudulently Concealed.—Statute of limitation does not commence to run against an action to recover for unjust discrimination or overcharge made by a common carrier until the fact of such discrimination or overcharge is discovered, where it is fraudulently concealed by the carrier.⁹⁶

§ 1628. Petition or Complaint.—The declaration in an action against a carrier to recover for discrimination to be good in law must state a case of ex-

89. **Carriage to point on belt line.**—Crescent Coal Co. v. Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768.

90. **Injunction.**—Decree, Tift v. Southern R. Co., 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709.

91. **Rogers Locomotive, etc., Works v. Erie R. Co.**, 20 N. J. Eq. 379.

92. **Quo warranto.**—State v. Cincinnati, etc., R. Co., 47 O. St. 130, 23 N. E. 928.

93. **Right of action.**—Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

At common law, a shipper had a right of action against a common carrier for unjust discriminations in freight rates between himself and others similarly situ-

ated whenever such discriminations operated to his special injury. Lilly Co. v. Northern Pac. R. Co., 64 Wash. 589, 117 Pac. 401.

94. **Jurisdiction.**—Lake Shore, etc., R. Co. v. Scofield, 2 O. C. C. 305, 1 O. C. D. 500.

95. **Carrier on high seas.**—Cowden v. Pacific Coast, etc., Co., 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142.

96. **Fact of discrimination fraudulently concealed.**—Cook v. Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512; Carrier v. Chicago, etc., R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799.

cessive charge for the service performed. When it simply states a case of inequality of charge, it states no cause of action. For the smaller charge it may be less than reasonable, and the greater charge may be exactly the value of the service and the reasonable charge for the transportation furnished.⁹⁷

Allegation That Freight Charged Plaintiff Unreasonable.—A complaint in an action against a common carrier to recover for discrimination in freight charges which simply alleges a discrimination and inequality in charges made for the transportation of the same kind of freight for different persons between the same points, without alleging that the freight charged plaintiff is unreasonable and excessive, does not state a common-law cause of action.⁹⁸

Under Statutes.—A complaint charging that the defendant railway company discriminated in favor of a designated person by charging him between specified points on its own line fifty cents less per ton than charged to plaintiff or any other person does not charge a forbidden discrimination, because the charge, though unequal, may have been reasonable and equal within the meaning of a statute providing that railroads shall give to all persons reasonable and equal rates, benefits, etc.⁹⁹

Amount Stated under a Videlicet.—Where a declaration against a railroad company for discrimination in violation of a statute forbidding the same under a penalty, alleges the discrimination, but states the amount thereof under a videlicet, the amount can not be considered to make out a case of unjust discrimination. The only question is whether any difference at all in rates is a violation of the statute entitling plaintiff to a recovery.¹

§§ 1629-1631. Evidence—§ 1629. Presumptions and Burden of Proof.—Where a complaint in an action against a carrier is founded on the assumption that defendant made unjust discriminations in freight charges contrary to Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), but does not allege that the carrier has not complied with the provision requiring it to file a schedule of rates, nor that the rate charged exceeded the rate shown on the schedule, it will not be presumed that the law in these respects was violated.²

§ 1630. Admissibility.—The fact that certain customers are charged less than others for the same services is evidence that the amount charged the former is unreasonable. Especially is this true when the lesser charged were maintained for long periods of time, and their existence concealed by lying and deceit.³

§ 1631. Weight and Sufficiency.—The schedule of rates fixed by the railroad commissioner is conclusive as to what is a proper rate in Minnesota,⁴ but

97. **Petition or complaint.**—Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

A complaint in an action against a common carrier for discrimination in freight charges which alleges that defendant under like circumstances and conditions hauled freight for other consignees on which it absorbed or paid itself certain switching charges, which it collected from the plaintiff upon false representations to the contrary, is an allegation to the effect that the defendant hauled freight for certain other consignees at a less rate than its schedule rate and that collected from the plaintiff, and does not state a cause of action, in the absence of any allegation that such discrimination was unjust or operated to the plaintiff's injury. Lilly Co. v. Northern Pac. R. Co., 64 Wash. 589, 117 Pac. 401.

98. **Allegation that freight charged plaintiff was unreasonable.**—Cowden v. Pacific Coast, etc., Co., 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221.

99. **Under statutes.**—State v. Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

1. **Amount stated under a videlicet.**—Cowan, etc., Co. v. East Tennessee, etc., R. Co., 2 Tenn. Shan. Cas. 102.

2. **Presumptions.**—Lilly Co. v. Northern Pac. R. Co., 64 Wash. 589, 117 Pac. 401.

3. **Admissibility.**—Cook v. Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512. See ante, "At Common Law," § 160.

4. State v. Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782.

is only prima facie evidence of the reasonableness of the charge fixed in Florida,⁵ Illinois,⁶ Iowa⁷ and Nebraska.⁸ The statute authorizing railroad commissioners to establish a schedule of rates of freight simply prescribes a rule of evidence, leaving to the courts the power to determine what is reasonable.⁹

§ 1632. Damages.—The damages to a shipper for unjust discrimination between him and other shippers is not necessarily the difference between the prices charged him and them, under a statute giving him treble the amount of injury suffered. The railway corporation has a right to clear and definite proof as to what the actual damage was.¹⁰

Inclusive of Increased Charges or Loss in Price.—It makes no difference whether the shipper has paid the increase of freight or has been obliged by a lower price of the article he sells to make it up to the consignee; he is equally entitled to have the amount of such payment or rebate or loss in price included in his damages against the carrier making the discrimination. In such a case, the jury may, in their estimate of compensatory damages, include the reasonable attorney's fees of counsel employed by the plaintiff in the prosecution of his action.¹¹

Punitive or Exemplary Damages.—Although the primary object of the railroad company was to make money for itself by such discrimination, yet if the natural and intended consequence was to injure the business of the plaintiffs, the defendant, though a corporation, is guilty of malice, and is liable in a proper action to punitive or exemplary damages.¹²

Rebates to Other Shippers Fraudulently Concealed.—A shipper can recover from a carrier a sum equivalent to a rebate which is allowed other shippers for the same kind and extent of service, where it collected full charges from him and concealed from him the fact that it allowed a rebate to others in his business.¹³

Greater Amount for Short than Long Haul.—A constitutional provision making it unlawful for any railroad company to charge for freight or passengers a greater amount for the transportation thereof for a less distance than the amount charged for any greater distance, and providing that suitable laws shall be passed to enforce the provision, being self-enforcing, the measure of damages for violation thereof, in the absence of statute, would be the amount of the excess charged for the shorter distance over that charged for the longer

5. *Pensacola, etc., R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661.

6. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

7. *Barris v. Chicago, etc., R. Co.*, 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449.

The schedule of rates fixed by the railroad commissioners under the Iowa statute, which provides that such schedules shall, in all suits brought against railroad corporations in that state, and which, involve the reasonableness of transportation charges on freight, be deemed, in all courts of the state, as prima facie evidence that the rates therein fixed are reasonable and just maximum rates, is not conclusive as to either shipper or carrier, concerning the question involved, but is merely prima facie evidence that such rates are reasonable. Hence, a shipper may recover triple damages, authorized by the statute, as for an overcharge, where the charges are, in fact,

unreasonable, although the rates charged are no more than those fixed by the commissioners' schedule. *Barris v. Chicago, etc., R. Co.*, 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449.

8. *State v. Fremont, etc., R. Co.*, 23 Neb. 117, 36 N. W. 305.

9. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477.

10. **Damages.**—*Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

11. **Attorney's fees.**—*Lake Shore, etc., R. Co. v. Scofield*, 2 O. C. C. 305, 1 O. C. D. 500.

12. **Punitive or exemplary damages.**—*Lake Shore, etc., R. Co. v. Scofield*, 2 O. C. C. 305, 1 O. C. D. 500.

13. **Rebates to other shippers fraudulently concealed.**—*Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512.

distance.¹⁴

§§ 1633-1655. Excessive Charges—§ 1633. Right to Make.—A common carrier has no right to make unreasonable charges for his services.¹⁵ Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact.¹⁶ Railroads have no right to regulate their charges in proportion to the prosperity which attends industries whose products they transport.¹⁷

§ 1634. What Constitutes an Overcharge and Effect.—Legality of Charge at Time of Shipment.—Where a rate given by a carrier was not accepted at the time, it is not liable to the shipper for an overcharge on goods shipped afterwards, for which the carrier charged a higher rate allowed by law at the time of shipment.¹⁸

Effect of Acceptance and Removal of Goods.—Acceptance and removal of goods by a consignee, with knowledge that the carrier is giving up his lien on the goods for a stated amount, does not create an obligation on the part of the consignee to pay charges beyond the amount stated.¹⁹

Effect of Mistake.—A carrier is not liable for an alleged overcharge on a shipment where the shipper and the freight agent misunderstood each other, the shipper claiming a special rate was made on grapes and melons, and the agent making a bill of lading for all melons, which bill was accepted by the shipper.²⁰ A railway company is not liable in an action for overcharges where the rate given by it to the shipper was due to his own mistake in giving the name of "Hancock," instead of "Ft. Hancock," which was at a much greater distance from the point of shipment.²¹

Effect of Stipulations Respecting Excessive Charges.—A clause of a contract of carriage that the carrier shall not be liable for damages on account of any demand for a greater freight rate than mentioned in the contract, but

14. Greater amount for short than for long haul.—*McGrew v. Missouri Pac. R. Co.* (Mo.), 132 S. W. 1076.

15. Right to make.—*Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164; *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194; *Root v. Long Island R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331; *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674.

"At common law, a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently, and, in the absence of a special agreement, he was bound to treat all alike in the same sense that he was not permitted to charge any one an excessive price for the services. He had no right in any case, while engaged in this public employment, to exact from any one any thing beyond what, under the circumstances, is reasonable and just." *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674.

16. Decree, Tift v. Southern R. Co., 138

Fed. 753, affirmed in 148 Fed. 1021, 79 C. A. 536.

17. Decree, Tift v. Southern R. Co., 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536.

Where a vast increase of lumber traffic had resulted in a large increase of net revenue to the carrier, and the service was inexpensive, and required neither rapidity of movement nor specially equipped cars, and the shippers were obliged to furnish and pay for the equipment, and the railroads were neither to load nor unload, and the commodity was neither fragile nor perishable, and the industry afforded a tonnage second in magnitude to any transported by the carrier, an arbitrary increase to points of destination of two cents a hundred is unreasonable and unlawful. *Decree, Tift v. Southern R. Co.*, 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536.

18. Legality of charge at time of shipment.—*Dillingham v. Labatt* (Tex. Civ. App.), 30 S. W. 370.

19. Effect of acceptance and removal of goods.—*Central R. Co. v. McCartney*, 68 N. J. L. 165, 52 Atl. 575.

20. Effect of mistake.—*Gulf, etc., R. Co. v. Dawson* (Tex. Civ. App.), 24 S. W. 566.

21. Dillingham v. Labatt (Tex. Civ. App.), 30 S. W. 370.

shall only be liable to pay the amount of excess freight charges which may be demanded, has no application where the excessive freight rate is demanded, but not paid, and suit is brought, not to recover the amount of excess, but for damages for refusal to deliver the property and illegally detaining the same.²²

Switch Constructed to Coal Company's Own Mine under Agreement with Other Shippers.—A coal company, which constructs a switch to its mine, and which is, under Ky. St. 1909, § 815 (Russell's St., § 5352), subject to the general railroad laws, to the extent that it can not make extortionate track charges to others, can not, till it has been repaid its outlay for construction, be claimed by others to make such extortionate charges; the charges being such as were agreed on with them before the construction of the track as a consideration for the right of way.²³

Estoppel to Deny Distance.—In an action to recover back alleged freight charges, when the railroad company has always charged for a certain number of miles as the correct distance between two points, it is estopped to deny that such is true distance.²⁴

§§ 1635-1655. Recovery Back of Overcharges — §§ 1635-1636. Right to Recover—§ 1635. In General.—At common law²⁵ where an exorbitant charge is coercively exacted by a carrier either in advance of or at the completion of the service,²⁶ the common carrier is subject to an action at law to recover back such overcharge. Such right is as old as the common law itself, and until congress has acted, it is as applicable to interstate and foreign as to local shipments.²⁷

Contract to Carry at Less than Maximum Rate.—Where a carrier, after agreeing to carry at a less rate than the maximum rate fixed by the railroad

22. Effect of stipulations respecting excessive charges.—Southern Kan. R. Co. v. Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

23. Switch constructed to coal company's own mine under agreement with other shippers.—Straight Creek Coal Min. Co. v. Straight Creek Coal, etc., Co. (Ky. App.), 122 S. W. 842.

24. Estoppel to deny distance.—I. & G. N. R. Co. v. Pichard, 1 Texas App. Civ. Cas., § 427.

25. Right to recover.—Independently of the statute of 1889, embodied in Civ. Code 1895, § 2316, a carrier is liable to suit by a shipper for the recovery of an overcharge of freight which such shipper has paid, under protest, in order to obtain his goods and which the carrier refused to repay on demand. Southern R. Co. v. Schlittler, 58 S. E. 59, 1 Ga. App. 20.

26. United States.—National Steamship Co. v. Tugman, 143 U. S. 28, 27 L. Ed. 87, 12 S. Ct. 361.

Arkansas.—Little Rock, etc., R. Co. v. Daniels, 49 Ark. 352, 5 S. W. 584.

A shipper may recover back rates in excess of those authorized by law which the carrier has exacted and which he has been compelled to pay to secure the transportation of his property. Chapman, etc., Land Co. v. Jonesboro, etc., R. Co., 97 Ark. 300, 133 S. W. 1119.

Georgia.—Stewart v. Comer, 100 Ga. 754, 62 Am. St. Rep. 353, 28 S. E. 461.

Florida.—Cullen v. Seaboard, etc., R. Co. (Fla.), 58 So. 182.

Indiana.—Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

Iowa.—Cook v. Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512; Heiserman v. Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903, 16 Am. & Eng. R. Cas. 49.

New Jersey.—McGregor v. Erie R. Co., 35 N. J. L. 89.

New York.—Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

North Carolina.—Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 106 N. C. 207, 10 S. E. 1046, 42 Am. & Eng. R. Cas. 498.

West Virginia.—Robinson v. Baltimore, etc., R. Co., 64 W. Va. 406, 63 S. E. 323.

Where, generally speaking, the only outlets for the transportation of oil is over a certain railroad, and an excess of legal freight appears to have been paid in order to secure transportation over it, though paid after each shipment, it is compulsory, and can be recovered. West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434.

27. Robinson v. Baltimore, etc., R. Co., 64 W. Va. 406, 408, 63 S. E. 323.

Interstate shipments.—Robinson v. Baltimore, etc., R. Co., 64 W. Va. 406, 63 S. E. 323.

commission, collects the full rate, the difference may be recovered by the shipper.²⁸

Rate Not Established as Required by Law.—It is not a bar to an action against a carrier to recover an overcharge that the rate agreed upon had not been established, as required by law.²⁹

Excess of Legal Published Rate Over Illegal Special Rate.—A carrier is not liable to an action to refund the excess over an illegal special rate if the rate actually collected is the applicable legal published rate.³⁰

Change of Classification and Rate after Shipment.—Where a carrier of freight, bound by the classification and rates made in the contract of shipment, changed the classification and demanded a higher rate as a condition precedent to delivery, the shipper, paying the excess, may recover it back.³¹

Overcharges made in violation of a statute prohibiting an increase in freight rates over the rate charged at the time the freight is tendered to a railroad, may be recovered back when paid.³²

§ 1636. Necessity for Protest—Voluntary Payment.—If, to procure the services of the carrier, the shipper is compelled to pay illegal or excessive rates, the payment is not such a voluntary payment as will preclude recovering back the illegal charge. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements. For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names, or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss; and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest.³³ The fact that the payments by arrangement of the parties, are made at

28. Contract to carry at less than maximum rate.—Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.), 71 S. W. 314. See, also, Thompson v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

29. Rate not established as required by law.—Kansas, etc., R. Co. v. Albers Comm. Co., 79 Kan. 59, 99 Pac. 819.

30. Illegal special rate.—Kansas, etc., R. Co. v. Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

31. Change of classification and rate after shipment.—Southern R. Co. v. Lowe, 170 Ala. 598, 54 So. 51.

A shipper could recover a freight charge which was in excess of the rate fixed by the schedule filed, and of the rate agreed upon in the bill of lading. Hardaway v. Southern R. Co., 73 S. E. 1020, 90 S. C. 475.

32. Overcharges made in violation of statute forbidding increase in rate.—Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

33. Alabama.—Mobile, etc., R. Co. v. Steiner, etc., Co., 61 Ala. 559.

Illinois.—Chicago, etc., R. Co. v. Chicago, etc., Coal Co., 79 Ill. 121.

Indiana.—Lafayette, etc., R. Co. v. Pattison, 41 Ind. 312.

Iowa.—Heiserman v. Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903, 16 Am. & Eng. R. Cas. 49.

Kansas.—Kansas, etc., R. Co. v. Albers Comm. Co., 99 Pac. 819, 79 Kan. 59.

Massachusetts.—Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

North Carolina.—Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 42 Am. & Eng. R. Cas. 498, 106 N. C. 207, 10 S. E. 1046; Robinson v. Ezzell, 72 N. C. 231.

New Jersey.—McGregor v. Erie R. Co., 35 N. J. L. 89.

New York.—Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

Ohio.—Peters, etc., Co. v. Marietta, etc., R. Co., 42 O. St. 275, 51 Am. Rep. 814; Stephan v. Daniels, 27 O. 527.

Pennsylvania.—Philanthropic Bldg. Ass'n v. McKnight, 35 Pa. 470.

Wisconsin.—Wood v. Lake, 13 Wis. 84.

Instances.—A carrier contracted to

the end of each month does not change the rule.³⁴

§§ 1637-1638. Carriers and Persons Liable—§ 1637. Overcharge Exacted by Connecting Carrier.—Railroad company is not liable for an overcharge for freight exacted by a connecting carrier, in the absence of any showing that it ever received any part of such overcharge.³⁵

transport grain at a stipulated rate. The shipper's agent, not knowing what the contract was, paid the shipping bills as presented without question, supposing them correct, and the bills, when paid, were forwarded to the shipper. Many of them were excessive, but this was not discovered for some time, and then the matter was taken up by the shipper with the carrier, and a part of the overcharge refunded; and, under the promise that the whole matter would be adjusted, the question was postponed, from time to time, when further settlement was refused. Held, that the payment of the overcharge was not a voluntary payment, but recoverable. *Kansas, etc., R. Co. v. Albers Comm. Co.*, 99 Pac. 819, 79 Kan. 59.

Payment without knowledge that charge was excessive.—Payment by a shipper to a common carrier of a sum in excess of what it was charging his competitors in the same business can not be regarded as being voluntarily made by him, when he was without knowledge that the exaction was not lawful, and was in belief of the truth of the assertions of the agents of the carrier, that the rate paid by him was the same as that charged to all other shippers. *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164; *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa 732, 18 N. W. 903, 16 Am. & Eng. R. Cas. 49.

A shipper is entitled to recover from a common carrier a sum equivalent to the rebate which is allowed other shippers for whom it performed the same kind and extent of services, where it had collected full charge from such shipper without allowing him any rebate, and denied and concealed from him, when making such collection, the fact that it had allowed any rebate to his competitors in business. *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 25 Am. St. Rep. 512, 46 N. W. 1080, 9 L. R. A. 164.

Payment upon alternative of nonshipment.—Payment of freight charges required by the carrier before delivery, upon the alternative of nonshipment, is not a voluntary payment. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320.

Where the bill of lading contained was the following condition: "Owner or consignee shall pay at the rate below stated, freight charges before delivery, and according to weights as ascertained by either carrier; the shipper had one al-

ternative only according to which he might refuse to pay the freight exacted by the carrier, that is, not to ship. If he did ship, however, either he or his consignee must pay the freight before the goods would be delivered. There is nothing voluntary about such a payment." *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320.

Settlement charged based upon average weights of few cases.—If a carrier renders a bill to a shipper, and charges as for a specified weight for each case, and the shipper pays accordingly, this does not constitute a settlement which will bar a recovery for overcharges. Nor is it any defense to the action that the weights charged were based upon the averaging of a few cases weighed where this fact was unknown to the plaintiff, and, therefore, not the result of any agreement with him. *Higley v. Burlington, etc., R. Co.*, 99 Iowa 503, 61 Am. St. Rep. 250; *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa 732, 18 N. W. 903, 16 Am. & Eng. R. Cas. 49.

34. Peters, etc., Co. v. Marietta, etc., R. Co., 42 O. St. 275, 51 Am. Rep. 814.

35. Overcharge exacted by connecting carrier.—*Chicago, etc., R. Co. v. Henderson* (Tex. Civ. App.), 73 S. W. 36.

In an action against a railroad company to recover an alleged overcharge of freight, it appeared that defendant had contracted to transport the goods for a certain sum, but that, when the goods arrived at their point of destination, the connecting carrier refused to deliver them, except on the payment of additional freight, but there was no showing that defendant received any part of the sum so collected. Held, that a judgment against defendant for the overcharge exacted by the connecting carrier was unauthorized. *Chicago, etc., R. Co. v. Henderson* (Tex. Civ. App.), 73 S. W. 36.

Recovery from carrier.—Under Va. Code, 1887, § 1295, providing that, when a common carrier accepts anything for transportation beyond the terminus of its own line, it shall assume an obligation for its safe carriage to such destination, unless it is released from such liability by a written contract signed by the owner, a carrier accepting freight for transportation beyond its lines, and who has obtained no such written release signed by the owner, is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the con-

Liability of Succeeding Carrier.—A connecting carrier, who is a party to a contract of through shipment, made by the initial carrier having authority to make such contract, is bound to pay back to the shipper any excess of freight charges received.³⁶

Application of Fixed Tariffs to All Roads.—Where the tariff of a carrier fixes a rate on shipments originating on its own line, or on enumerated connecting lines, it assumes the obligation to carry at that rate for shippers whose shipments originate on other lines as well; and, if such a shipper pays a higher rate, he can recover the overcharge.³⁷

§ 1638. Favored Shipper to Whom Express Charges Paid.—Money paid by a shipper, in ignorance of an agreement by which the railroad company had bound itself to carry for one shipper at half the rate it agrees to charge all others for same service and to pay such favored shipper one-half thereof when collected, and received by the favored shipper, may be recovered back in an action for money had and received by the former against the latter.³⁸

§§ 1639-1640. Form of Action—§ 1639. Action for Money Had and Received.—Where a common carrier has exacted excess charges, the excess may be recovered in a common-law action for money had and received, whether the charges are in excess of reasonable rates at common law or of rates prescribed and made prima facie reasonable under statutory authority.³⁹

§ 1640. Statutory Redress as Abrogating Common-Law Remedy.—Common-Law Remedy Not Abrogated by Penal Statute.—The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges.⁴⁰

necting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it was not to be accountable for any damage after the freight was receipted for by a connecting carrier. *Virginia Coal, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310.

36. Liability of succeeding carrier.—*Reynolds v. Seaboard Air Line Railway*, 81 S. C. 383, 62 S. E. 445.

Under 24 St. at Large, p. 1, making each carrier the agent of its connecting carrier, and providing that a through contract of shipment shall be the contract of each carrier, etc., a connecting carrier, acting on a through bill of lading issued by the initial carrier for an intrastate shipment, is a party to the contract, and is liable to the shipper for exacting excessive freight charges. *Reynolds v. Seaboard Air Line Railway*, 62 S. E. 445, 81 S. C. 383.

37. Application of fixed tariffs to all roads.—*Missouri, etc., R. Co. v. New Era Mill Co.*, 100 Pac. 273, 79 Kan. 435.

38. Favored shipper to whom excess charges paid over.—*Brundred v. Rice*, 49 O. St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

Where the real purpose for which a corporation is formed is to use it as an instrumentality in the accomplishment of an illegal purpose, the fact of incor-

poration will not avail the promoters as a defense in a suit against them to recover money obtained from the plaintiff by such methods. *Brundred v. Rice*, 49 O. St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

39. Action for money had and received.—*Cullen v. Seaboard, etc., R. Co. (Fla.)*, 58 So. 182.

Alabama.—*Mobile, etc., R. Co. v. Steiner, etc., Co.*, 61 Ala. 559.

Iowa.—*Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187.

New York.—*Fisher v. New York Cent., etc., R. Co.*, 46 N. Y. 644.

Wisconsin.—*Smith v. Chicago, etc., R. Co.*, 43 Wis. 686; *Graham v. Chicago, etc., R. Co.*, 53 Wis. 473, 10 N. W. 609.

Under a grant to a railroad company of a right to take such tolls as it shall think reasonable, it seems that a person aggrieved by the exaction of unreasonable tolls would still have a remedy by an action at law, and that the courts would have power to determine whether the tolls charged were reasonable in fact. *Attorney General v. Chicago, etc., R. Co.*, 35 Wis. 425.

40. Common-law remedy not abrogated by penal statute.—*Florida.*—The common-law right to recover freight charges collected in excess of reasonable rates is essentially different from the right of action given by Gen. St. 1906, § 2911, to

Aliter in Kansas⁴¹ and Missouri.⁴²

§ 1641. Jurisdiction.—Jurisdiction of State Court under Interstate Commerce Act.—The interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) does not prevent recovery in a state court against a carrier for overcharges in freight paid under a mistake of fact.⁴³

Necessity for Publishing Rate.—Until a schedule of rates filed and published by a common carrier, pursuant to the act of congress entitled "An Act to Regulate Commerce" (Act, Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. Stat. 1901, p. 3153]), has been by the interstate commerce commission declared excessive and unreasonable, a shipper can not maintain an action at common law in a state court to recover for the excess of freights exacted on interstate shipments, if the rates charged were those fixed by such schedule.⁴⁴

§ 1642. Limitations and Lapse of Time.—The common-law remedy for the recovery of freight charges collected by a carrier in excess of reasonable rates may be enforced, though the statutory right of action to recover charges in excess of the rates properly chargeable under the railroad commission law is extinguished by the lapse of time.⁴⁵

Current Open Account.—A series of illegal discriminations by a common carrier at different times against a shipper of goods constitutes but one cause of action.⁴⁶ Hence, if a shipper of freight is for many years charged for excessive weight on articles shipped by him, and makes payment accordingly, the amounts due him for these overcharges constitute an open, current account constituting but one cause of action. The statute of limitations, therefore, is of

recover charges in excess of rates fixed by the railroad commissioners, and there is no legislative intent expressed or implied to supersede the common-law right of action. *Cullen v. Seaboard, etc., R. Co.* (Fla.), 58 So. 182.

Iowa.—*Heiserman v. Burlington, etc., R. Co.*, 16 Am. & Eng. R. Cas. 49, 63 Iowa 732, 18 N. W. 903.

The injured party may waive the tort created by statute and sue upon the implied contract raised by the law, whereby the carrier is obligated to repay to the consignee or consignor of the property all sums exacted in excess of reasonable compensation. *Heiserman v. Burlington, etc., R. Co.*, 16 Am. & Eng. R. Cas. 49, 63 Iowa 732, 18 N. W. 903.

Massachusetts.—*Clark v. Merchants', etc., Transp. Co.*, 24 N. E. 49, 141 Mass. 352.

Maine.—*Gooch v. Stephenson*, 13 Me. 371.

New York.—*Candee v. Hayward*, 37 N. Y. 653; *Crittenden v. Wilson* (N. Y.), 5 Cow. 165, 15 Am. Dec. 462.

The statutory remedy for overcharge in freight approved by art. 4258, Rev. Stat., is not exclusive, but cumulative, and an action for recovery of the overcharges may still be maintained. *Murray & Bro. v. G., C. & S. F. R. Co.*, 63 Tex. 407.

41. *Beadle v. Kansas, etc., R. Co.*, 51 Kan. 248, 32 Pac. 910, stating what is said of the common-law remedy against common carriers in *Beadle v. Kansas, etc., R. Co.*, 48 Kan. 379, 29 Pac. 696, by Simpson, C., is wholly obiter.

42. *Winsor Coal Co. v. Chicago, etc., R. Co.*, 52 Fed. 716.

43. **Jurisdiction of state court under interstate commerce act.**—*Chicago, etc., R. Co. v. Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562.

An action by a shipper held not within Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906, and is within the jurisdiction of a state court. *Kansas, etc., R. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

44. **Necessity for publishing rate.**—*Robinson v. Baltimore, etc., R. Co.*, 64 W. Va. 406, 63 S. E. 323.

On the trial of a common law action to recover excess of freight exacted on interstate shipments, the rates charged being according to a schedule of rates filed and published by a common carrier pursuant to an act of congress entitled "An Act to Regulate Commerce" (Act, Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. Stat. 1901, p. 3153]), nothing but the evidence of a prior adjudication of the interstate commerce commission that such rates are unreasonable and unjust will justify a judgment for plaintiff. *Robinson v. Baltimore, etc., R. Co.*, 64 W. Va. 406, 63 S. E. 323.

45. **Limitations and lapse of time.**—*La Floridienne, etc., Co., Societe Anonyme v. Atlantic, etc., R. Co.* (Fla.), 58 So. 185.

46. **Current open account.**—*Highley v. Burlington, etc., R. Co.*, 99 Iowa 503, 61 Am. St. Rep. 250; *Langdon v. New York, etc., R. Co.*, 15 N. Y. Supp. 255.

no defense until the last item is barred.⁴⁷

§ 1643. Demand of Repayment.—And a repayment of freight charges in excess of those lawfully chargeable by a railway company need not be demanded before bringing suit to recover back the excess.⁴⁸

§ 1644. Persons Entitled to Recover.—Where a carrier improperly collects freight charges from the consignee, in violation of its agreement with the shipper, the shipper may maintain an action against it to recover them back,⁴⁹ and where a shipper is both consignor and consignee, he may recover an overcharge.⁵⁰

Shipment by Agent of Owner.—Where, in an action to recover for an overcharge of freight, it appeared that while the shipment had not been made personally by the owner of the property, who was the plaintiff, yet that the person making the shipment was the agent of the owner, and that the railway company presented its bill for the freight to the owner and collected the same from him, plaintiff was entitled to recover.⁵¹

Party Aggrieved.—Vermont Statute, §§ 3902-3904, authorizing the party aggrieved to recover from a carrier an overcharge for freight, does not permit a buyer to sue a carrier for an overcharge collected from the seller for transporting the goods and included by the seller in the price and paid to him by the buyer; the words "party aggrieved" in their natural sense being the one from whom the overcharge is collected.⁵²

§ 1645. Declaration or Complaint.—In an action against a carrier for charging an illegal freight rate, if the declaration states the weight of the freight, the time and place where delivered to defendant for transportation, and places to which it was to be transported, distance, the amount which was demanded and received by defendant and that it was more than was lawful, contrary to the statute in such case made and provided, it is a sufficient notice of the cause of action to the defendant to enable it to make all just and proper defenses.⁵³

47. *Highley v. Burlington, etc., R. Co.*, 99 Iowa 503, 61 Am. St. Rep. 250.

48. **Demand of repayment.**—*West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

49. **Persons entitled to recover.**—*National Steamship Co. v. Tugman*, 143 U. S. 28, 27 L. Ed. 87, 12 S. Ct. 361.

50. Plaintiff sued in justice's court to recover overcharge of freight, and amended in county court alleging that he owned goods shipped with others. Held, since contract was with plaintiff, he being both the consignor and consignee, he had the right to sue, where amendment changed neither cause of action nor character in which plaintiff sued. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

Where plaintiff sells an article and contracts with a carrier to transport it at a given rate of freight, and it is agreed between the parties that the purchaser shall pay the freight bill and deduct the amount in price, and the carrier delivers the article and collects from the purchaser a higher rate than agreed upon, the purchaser being ignorant of the terms of the agreement between the seller and the carrier, and the seller having no notice that a higher rate than agreed upon was de-

manded of the carrier, held, that the seller could recover of the carrier the difference between the rate agreed upon and the rate actually collected. *Georgia R., etc., Co. v. Crossley & Co.*, 57 S. E. 97, 128 Ga. 35.

51. **Shipment by agent of owner.**—*Southern R. Co. v. Schlittler*, 1 Ga. App. 20, 58 S. E. 59.

52. **Party aggrieved under Vermont statute.**—*State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

53. **Declaration or complaint.**—*Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

Instances.—A count of a complaint in an action to recover for a freight overcharge alleged that defendant was a common carrier, and undertook to haul logs at a fixed price, but, instead of charging plaintiff the stipulated freight rate, defendant extorted an excessive rate, and refused to haul or deliver the logs unless plaintiff would pay such sum; that plaintiff offered to pay the reasonable charge, and demanded that the logs should be hauled for such freight charges, which defendant refused to do, and the plaintiff was compelled to pay such extortionate and illegal rate to an amount stated, in order to have the freight moved, and that

Allegation of Payment of Excessive Rate on Shipment in Question.—

In a suit by a shipper to recover reparation for a charge of an excessive freight rate, a declaration failing to charge that complainant paid the excessive rate on his shipment, or that it was paid by any one for him, or on his account, is demurrable.⁵⁴

Effect of Interstate Commerce Act.—A complaint in the language of Kirby's Dig. §§ 6621, 6730, for the recovery of an excess over reasonable charges paid to a carrier for an interstate shipment, which is also good as stating a common-law cause of action, is not rendered bad by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], dealing with the subject of reasonable and just rates, in view of section 22 of that act (24 Stat. 387 [U. S. Comp. St. 1901, p. 3171]), providing that nothing therein contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies.⁵⁵

§ 1646. Issues and Proof.—Where, in an action against a carrier to recover an overcharge, made by placing the freight in a higher classification than it properly took, the complaint alleged that defendant coerced payment of the higher rate by refusing to deliver the goods until it was paid, plaintiff can not recover upon showing that the payment was made after delivery of the freight, but under a mistake as to the rate, or that the proper rate was unintentionally concealed.⁵⁶ And, where, after a carrier quoted a rate on an interstate shipment, and the animals to be transported were loaded in cars, the carrier quoted a higher rate, which the shipper paid under protest, in an action for excess charges defendant could not show under the general issue that the rate first quoted was less than the established rate and therefore illegal.⁵⁷

§ 1647. Reference.—Where an association of railroads arbitrarily and unreasonably increased the rate of transportation of lumber within the territory covered by their agreement, the enforcement will be enjoined, and where the counsel for the railroad stipulated that they would repay to the shippers the sum

plaintiff paid such charge under protest, reserving a right to recover back the overcharge and paid to defendant a sum named which was more than the proper and contracted charges or rate; that defendant extorted from plaintiff the sum named, which defendant refuses to pay back to plaintiff. Held, to state a good cause of action. *Fairford Lumber Co. v. Tombigbee Valley R. Co.*, 165 Ala. 275, 51 So. 770.

A contract provided that a railroad company would place to and switch from a certain compress such through cotton from local stations as plaintiff might secure for compression, charging therefor, for the switching, the same charges as were charged at certain places named. Held, that a petition to recover excessive charges, alleging that the compress at the points named paid nothing for switching charges, states no cause of action, where it failed to allege that there were no charges, or that there were less charges for switching services like those rendered by the defendant. *Hawkinsville, etc., R. Co. v. Livingston*, 63 S. E. 832, 132 Ga. 203.

A petition against a carrier to recover

excessive freight rates, alleging the distance from the starting point to destination, that a certain sum was a reasonable compensation for carrying the commodity over defendant's line for such distance, that defendant wrongfully charged plaintiff a larger sum stated, more than a reasonable charge, which plaintiff was compelled to pay and did pay under protest, and that plaintiff had never consented that the charge was reasonable, but had demanded the return of the excessive and unreasonable part thereof, which had been refused, stated a cause of action. *Ft. Smith, etc., R. Co. v. Chandler Cotton Oil Co.*, 106 Pac. 10, 25 Okla. 82.

54. Allegation of payment of excessive rate on shipment in question.—*Davis v. Mobile, etc., R. Co.*, 194 Fed. 374.

55. Effect of interstate commerce act.—*Halliday Mill. Co. v. Louisiana, etc., R. Co.*, 80 Ark. 536, 98 S. W. 374.

56. Issues and proof.—*Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020.

57. Baldwin, etc., Land Co. v. Columbia, etc., R. Co., 114 Pac. 469, 58 Ore. 285.

total of the increased exaction, if the increase should be held illegal, a reference will be had to ascertain the amount thus due complainants, and a decree rendered therefor.⁵⁸

§ 1648. Judicial Notice.—On the trial of a common-law action to recover excess of freight exacted on interstate shipments, the rates charged being according to a schedule of rates filed and published by a common carrier pursuant to an act of congress entitled “An Act to Regulate Commerce” (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. Stat. 1901, p. 3153]), the court on such trial will not take judicial notice of a prior adjudication of the interstate commerce commission that such rates are unreasonable and unjust, but if relied on by plaintiff, the same must be proven by the record thereof.⁵⁹

§ 1649. Examination of Witnesses.—In an action to recover an overcharge it is not proper for defendant carrier’s counsel to ask plaintiff as to whether he owes the defendant a certain debt, or as to the existence of a judgment against the shipper by the defendant.⁶⁰

§ 1650. Presumptions and Burden of Proof.—Where, in an action against a carrier to recover an overcharge upon its proportion of a joint rate, the carrier alleged that the joint rate was unlawful because in conflict with legally established rates, the burden was upon it to establish that fact.⁶¹

Weight of Shipment by Cars.—To recover for overcharges for freight at the destination of the goods there must be a showing of the weight of the shipment carried by each car, when the charge is based on car capacity.⁶²

Justness of Published Rates.—Under Gen. St. 1906, § 2899, the schedules of freight rates prescribed and certified as required by law must, in all suits brought against any railroad, including the common-law action to recover excess charges, be deemed prima facie evidence that such rates are just and reasonable.⁶³

That Part of Overcharge by Terminal Reached Initial Carrier.—Where no freight charges were paid in advance, but each succeeding carrier advanced to its predecessor the charges up to its own line, so that the terminal carrier collected all charges at destination, plaintiff, in order to recover for an overcharge from the initial carrier, must show that parts of the alleged overcharge by the terminal carrier reached the initial carrier.⁶⁴

§ 1651. Admissibility of Evidence.—Practical Construction of Terms “Compressed Cotton” and “Uncompressed Cotton.”—Where the terms “compressed cotton, any quantity,” and “uncompressed cotton, any quantity,” are used in a tariff sheet without further amplifying words, the contemporaneous, practical construction placed thereon by the carrier and shippers as to baled cotton delivered for shipment in an uncompressed state with the understanding that it was to be compressed and then from the place of initial delivery transported to the place of original consignment, where there was no other promulgated tariff rate between the designated point concerning cotton shipments, is competent evidence in determining the meaning of the terms.⁶⁵

58. Reference.—Decree, *Tift v. Southern R. Co.*, 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536.

59. Judicial notice.—*Robinson v. Baltimore, etc., R. Co.*, 64 W. Va. 406, 63 S. E. 323.

60. Examination of witnesses.—*National Steamship Co. v. Tugman*, 143 U. S. 28, 27 L. Ed. 87, 12 S. Ct. 361.

61. Presumption and burden of proof.—*Kansas, etc., R. Co. v. Albers Comm. Co.*, 99 Pac. 819, 79 Kan. 59.

62. Weight of shipment by cars.—*McManus v. Chicago, etc., R. Co.*, 138 Iowa 150, 115 N. W. 919, 128 Am. St. Rep. 180.

63. Justness of published rates.—*Cullen v. Seaboard, etc., R. Co. (Fla.)*, 58 So. 182.

64. That part of overcharge by terminal reached initial carrier.—*McManus v. Chicago, etc., R. Co. (Iowa)*, 136 N. W. 769.

65. Practical construction of terms “compressed cotton” and “uncompressed cotton.”—*Chicago, etc., R. Co. v. Dodson (Okla.)*, 94 Pac. 673, reversed on rehearing in 25 Okla. 822, 107 Pac. 921.

Whether Cotton "Weight" or "Measurement Freight."—In a suit against a railway company for overcharging on certain freight, by rating cotton as "measurement freight" instead of "weight freight" (the company's charges being limited per foot as well as per hundred pounds), it was error to admit the evidence of merchants and shippers to prove that, by custom, cotton was "weight freight" and not "measurement freight." The company might lawfully rate cotton either by measurement or weight, but could not charge according to both standards on the same lot of freight.⁶⁶

Classification of Freight.—In an action to recover an overcharge in freight, evidence that defendant railroad company had carried the same kind of freight as lumber in previous years is admissible.⁶⁷

Rates Fixed by Railroad Commission.—Where a common-law right of action to recover freight charges collected in excess of reasonable charges exists and is shown by proper pleadings, the rates fixed by the railroad commissioners may be given in evidence to show *prima facie* what was a reasonable rate.⁶⁸

Evidence of Through Rates.—On an issue as to reasonable rates for the carriage of goods over a particular division, evidence of through rates and the division thereof was admissible.⁶⁹

Testimony of Rate Clerk as to What Is Reasonable Charge.—In an action against a carrier to recover an excess of charges paid, testimony of the rate clerk of the railroad commission as to what would be a reasonable charge, based on the report of a former auditor of the railroad, was admissible, notwithstanding errors in the report; it being open to the carrier to show the errors.⁷⁰

Letter of General Freight Agent.—Where a shipper and carrier have agreed on a rate to be charged, admission of a letter from the carrier's general freight agent to the shipper, written in accordance with the agreement, and quoting such rates, is not error.⁷¹

Letter from Railroad Commissioner.—A letter from one of the railroad commissioners is not proper evidence to show the commission rates on goods shipped by a common carrier in an action against the carrier for overcharges.⁷²

Merger of Prior Verbal in Written Contract.—In a suit against a carrier for overcharge, a plaintiff who proved the written contract of shipment was signed by mistake can recover on the verbal contract made before written contract was signed.⁷³

66. *Central R. Co. v. Hearne*, 32 Tex. 546.

67. **Classification of freight.**—*Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020.

68. **Rates fixed by railroad commission.**—*La Floridienne, etc., Co. Societe Anonyme v. Atlantic, etc., R. Co. (Fla.)*, 58 So. 185.

69. **Evidence of through rates.**—*Halliday Mill Co. v. Louisiana, etc., R. Co.*, 80 Ark. 536, 98 S. W. 374.

70. **Testimony of rate clerk as to what is reasonable charge.**—*Halliday Mill Co. v. Louisiana, etc., R. Co.*, 80 Ark. 536, 98 S. W. 374.

71. **Letter of general freight agent.**—*Gulf, etc., R. Co. v. Leatherwood*, 69 S. W. 119, 29 Tex. Civ. App. 507.

72. **Letter from railroad commissioner.**—*Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.)*, 71 S. W. 314.

73. **Merger of prior verbal in written contract.**—*Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

In a suit against a carrier for freight overcharges, plaintiff claimed that the shipment was under an oral contract fixing the rate at \$186.87 per car and that a written contract stipulating a rate of 56¾ cents per hundred, was signed by mistake or fraud. Held, that if the jury found the facts in favor of plaintiff, he was entitled to recover the difference between what he was compelled to pay and the amount defendant was entitled to at \$186.87 a car while if the jury found that the written contract controlled, plaintiff could then only recover for overcharges in weights and charges for feeding and watering but in no event, could he recover for both. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

A shipper having agreed with the agent upon a rate of freight, and being busy until after dark, loading, thereafter went to the depot, and being assured by the agent that the contract was all right, signed it without reading it, put it in his

§ 1652. Weight and Sufficiency of Evidence.—In an action to recover against a railroad company for excessive freight charge, the sufficiency of the evidence to sustain a judgment for plaintiff is determined by the usual rules of evidence,⁷⁴ in accordance with which the courts have passed upon the sufficiency of the evidence to prove the fact that prima facie there is an overcharge;⁷⁵ that the shipment was intrastate or interstate;⁷⁶ that the middle man who received the goods knew the shipment was intrastate;⁷⁷ that a rate was established and published as required by the interstate commerce act;⁷⁸ that the railroad had ample facilities for weighing the shipments⁷⁹ or the weight of shipments in question;⁸⁰ and that a transfer charge was borne by the connecting carrier and was not collected in addition to the scheduled through rate.⁸¹

pocket, ran and boarded the train, which left immediately, and did not discover the overcharge until he reached Chicago. Held, admissible evidence of mistake or fraud. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

74. Weight and sufficiency of evidence.—*Sunderland Bros. Co. v. Chicago, etc., R. Co.*, 89 Neb. 660, 131 N. W. 1047.

75. If a bill of lading provides that if the goods shipped are transported in a box car the rate shall be a certain amount per hundred pounds actual weight, and if transported on a flatcar, a certain rate per hundred pounds up to a certain limit, the goods being shipped far below this limit in weight and the carrier transports part of the goods on flat cars and part in box cars, thus making the freight charges aggregate more than if the whole consignment had been transported on either kind of car alone, there is prima facie an overcharge. *Stewart v. Comer*, 100 Ga. 754, 28 S. E. 461, 62 Am. St. Rep. 353.

76. That shipment intrastate or interstate.—In a shipper's action to recover an overcharge, on the ground that the shipment was intrastate, evidence held to show that the shipper intended to ship the cattle through to a point outside the state by an uninterrupted journey. *Galveston, etc., R. Co. v. Wood, etc., Cattle Co. (Tex.)*, 146 S. W. 538, reversing judgment in 130 S. W. 857.

Evidence, in an action to recover the amount of overcharge paid to a railroad upon a switching contract, making special rates for that service, held not to show that any of the shipments handled by the railroad were interstate shipments. *Baird v. Erie R. Co.*, 132 N. Y. S. 971, 148 App. Div. 465, affirming judgment 129 N. Y. S. 329, 72 Misc. Rep. 162.

77. Knowledge that shipment interstate.—In an action against a railroad company for exacting greater compensation than that fixed by the Railroad Commission, in which the issue was as to whether a shipment from another state had lost its character as interstate commerce, the middleman who received the goods at the point of transshipment within the state testified that he had bought them from the consignor on December 24th. A letter from the consignor read: "We confirm sale to you on the 24th inst."

The middleman referred to this letter as confirming the sale. Held, that a finding that on December 26th the middleman was informed of the interstate character of the shipment, "but at the time of making the contract" he did not know from whence the goods were to come, was sustained by the evidence. Judgment 73 S. W. 429, 32 Tex. Civ. App. 1, affirmed. *Gulf, etc., R. Co. v. State*, 78 S. W. 495, 97 Tex. 274, affirmed in 27 S. Ct. 360, 204 U. S. 403, 51 L. Ed. 540.

78. In an action to recover excess freight charges, evidence that a certain rate, higher than that contracted for by the carrier, which higher rate was demanded by the agent at the final destination, was in the printed tariff furnished him, which tariff was on file in the office of the general freight agent, does not show that it was established and published as required by the interstate commerce act. *Gulf, etc., R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119, affirmed in 97 Tex. 634, no op.

79. Facilities for weighing shipments.—In an action against a railroad for overcharge of freight rates on potatoes, where the official tariff of rates stated that, when it was "practicable" for the potatoes to be weighed, they should be charged for at the actual weight, but when it was not "practical" to weigh them, estimated weights should govern, and the evidence shows that the railroad had ample facilities at various points to weigh the potatoes either by hand scales or track scales, a verdict and judgment for plaintiff will be sustained. *Joynes v. Pennsylvania R. Co.*, 83 Atl. 318, 234 Pa. 321.

80. Weight of shipments.—In an action against a carrier for alleged overcharges made at the terminus of a connecting line, where it was alleged and proved that the charge over defendant's road was based on a minimum car capacity of 20,000 pounds, and the rate upon the connecting carrier's line was based on a maximum car capacity of 24,000 pounds, in the absence of a showing of the weight of the shipments, there could be no recovery for the alleged overcharges. *McManus v. Chicago, etc., R. Co.*, 138 Iowa 150, 115 N. W. 919, 128 Am. St. Rep. 180.

81. Where there was no physical connection between the roads of two carriers,

§ 1653. Questions for Jury.—During a freight war between two railroads, one of them made special contracts with several shippers for shipments of cotton at certain rates, which were to continue whether rates went up or down. They went up, and another shipper, being obliged to pay the increased rate on cotton, brought an action to recover the excess above the rates fixed in the contracts. Held, that an instruction that, if plaintiff was charged a higher rate than others, he could recover, was erroneous, as it should have been submitted to the jury to determine, on all the facts, whether the charge was unreasonable or more than was exacted of the public generally.⁸²

§ 1654. Charge of Court.—In a suit for freight overcharges, the court instructed that if defendant agreed to furnish stable cars at a specified rate and did furnish them and nothing was said before shipment to change the verbal contract made between the shipper and defendant's agent, plaintiff was entitled to recover the difference between the contract price and the freight charged. Held, that the charge was correct in view of other evidence that the written contract fixing a higher rate was signed by mistake.⁸³

§ 1655. Amount of Recovery.—Where a carrier charges less for one than another, the difference between the charges can not be made the measure of damages in any case, unless it is proved that the smaller charge is the true reasonable charge, and that the higher charge is excessive to that degree.⁸⁴

Attorney's Fees.—A shipper is not entitled to recover attorney's fees under the Interstate Commerce Act (Act, Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]),⁸⁵ nor under Kirby's Ark. Dig., § 6621, until he had paid or tendered the full amount of the freight charges.⁸⁶

but freight was transferred from one to the other by a local bridge company, and a charge was made therefor, evidence held to show that such charge was borne by the connecting carrier, and was not collected in addition to the scheduled through rates, and hence there could be no recovery for alleged overcharges by reason thereof. *Chesapeake, etc., R. Co. v. Morton*, 136 S. W. 158, 143 Ky. 201.

82. Questions for jury.—*Houston, etc., R. Co. v. Rust*, 58 Tex. 98.

83. Charge of court.—*Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

84. Amount of recovery.—*Cowden v. Pacific Coast, etc., Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142.

85. Attorney's fees.—*Kansas, etc., R. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

86. Kansas, etc., R. Co. v. Tonn, 102 Ark. 20, 143 S. W. 577.

CHAPTER XVII.

STOPPAGE IN TRANSITU.

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§ 1656. **Scope of Treatment.**—This chapter is intended to treat of that portion of the subject of stoppage in transitu that may be of interest to carriers, and to exclude whatever can not concern them, such, for instance, as the subsequent rights and liabilities of the vendor and vendee inter se.

§§ 1657-1660. **Nature of Right in General**—§ 1657. **Definition of and Nature of Right in General.**—The right of stoppage in transitu is the right which the vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman, in the transit to the consignee or vendee, and before they arrive into his actual possession, upon it being discovered that he is insolvent or financial'y embarrassed.¹

1. **Definition.**—*Georgia.*—*Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Louisiana.—*Williams & Co. v. Dotterer*, 111 La. 822, 35 So. 921.

Missouri.—*Letts-Spencer Grocer Co. v. Missouri Pac. R. Co.*, 138 Mo. App. 352, 122 S. W. 10.

Ohio.—*Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.

Texas.—*Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

Wisconsin.—*Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

A seller may revoke a consignment of goods after the shipment has been made and a bill of lading signed by which the

goods are deliverable to the buyer by name, where such bill of lading has not been delivered to the buyer, since, until the bill of lading is parted with, no title to the property nor any right to the possession passes from the seller. *Hauterman v. Bock* (N. Y.), 1 Daly 366.

In case of a sale of personal property not executed by delivery, but to be consummated by a delivery at another place, although in consequence of earnings paid, or otherwise, the property is so vested in the buyer that on complying or offering to comply with the contract on his part, he may recover the sum from the seller or his agent; yet, until delivery, and while the goods are in transitu, the seller may, on the buyer becoming bankrupt, or being likely to be so, arrest the

Qualified Extension of Mutual Contract Rule.—The privilege to stop goods in transitu is a qualified extension in equity of that rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform his part.² It is, in fact, an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession.³ The right of stoppage in transitu does not depend on title but on a lien for the price.⁴

Distinction between Stoppage in Transitu and Lien.—A distinction, however, between the right of stoppage in transitu and the right of lien has been drawn as follows: The right of stoppage in transitu is not founded on any contract between the parties, nor on any ethical principle, but upon the custom of merchants; and while it is analogous to the right of lien, the two differ in some important respects. That is, the right of lien is not available unless the seller is in possession of the goods in the character of an unpaid former owner, and this right is determined as soon as the buyer or his agent lawfully obtains possession. On the other hand, the right of stoppage in transitu does not come into existence until the goods have passed out of the vendor's possession into the hands of a carrier for transmission.⁵

Vested in Consignee.—The right of stoppage in transitu in case of insolvency, can be exercised only where the property by the shipment is vested in the consignee for his own use.⁶

Not on Ground of Fraud.—The right of stoppage in transitu does not proceed on the ground of fraud in the vendee, but, on the contrary, supposes the title to the property to be fairly vested in him; and the exercise of that right affirms that title, and only sets up a right to retain the possession of it as a security for the price.⁷

Security.—Nor does the fact that the seller has a right to collect the price from another party in case of the vendee's default effect the right of stoppage in transitu.⁸

goods, while in transit to his vendee. *Howatt v. Davis*, 19 Va. (5 Munf.) 34, 7 Am. Dec. 681.

2. Qualified extension of mutual contract rule.—*Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 Ohio Dec. Reprint 723.

3. Extension of vendor's lien.—*Georgia*.—*Branan v. Atlanta, etc.*, R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Missouri.—*Letts-Spencer Grocer Co. v. Missouri Pac. R. Co.*, 138 Mo. App. 352, 122 S. W. 10.

Ohio.—*Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723; *Jordan, etc., Co. v. James*, 5 O. 88.

Texas.—*Craig v. Marx*, 65 Tex. 649.

The right of stoppage in transitu is nothing more than an extension of the right of lien which by the common law the vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. *Rowley v. Bigelow (Mass.)*, 12 Pick. 307, 23 Am. Dec. 607.

4. Craig v. Marx, 65 Tex. 649; *Summers v. Mills*, 21 Tex. 77.

5. Distinction between stoppage in transitu and lien.—*Branan v. Atlanta, etc.*, R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

6. Vested in consignee.—*The Merrimack (U. S.)*, 8 Cranch 317, 3 L. Ed. 575.

7. Not on ground of fraud.—*Rogers v. Thomas*, 20 Conn. 53.

Rescission for fraud.—G. agreed to sell twenty-four mules on being informed by D. that the money to pay for them had been deposited with a certain firm. He shipped the mules to such firm, and drew on them for the purchase money. D. fraudulently obtained from G. a statement that he had bought the mules, and on the strength of such statement obtained possession of the mules before the firm knew of the draft, and sold and delivered them to B.'s agent, who shipped them to B. Thereupon G. exercised his right of stoppage in transitu. Held, that G. had a right to retake the mules from the railroad company while in transit to B. *Bergman v. Indianapolis, etc.*, R. Co., 104 Mo. 77, 15 S. W. 992.

It seems that where an infant obtains credit for goods by fraudulent representations as to his age, he being a merchant in the retail mercantile business at the time, the seller may reclaim the goods in transitu. *Jones v. Christian*, 86 Va. 1017, 11 S. E. 984.

8. Security.—*Bell v. Moss (Pa.)*, 5 Whart. 189.

Sale of Part of Goods Lying in Bulk.—No title passes, on a sale of a part of goods lying in bulk, until separation; and, on delivery to a carrier for transportation to the buyer, the seller may suspend such inchoate delivery, and revoke the authority of a carrier or other intermediary to perfect it.⁹

Power of Vendee to Make Carrier His Bailee.—The vendee can not change the capacity in which the carrier holds the goods, so as to make him the buyer's bailee, without the carrier's assent, to the prejudice of the seller's right of stoppage in transitu.¹⁰

Effect of Carrier's Lien.—Though carriers have a lien for freight, which must be satisfied before goods can be taken from their possession, it does not prevent the vendor from asserting his right of stoppage in transitu.¹¹

§ 1658. **Origin and Status of Doctrine.**—The doctrine of stoppage in transitu appears to have been derived from, or to be analogous to, the revendication of the civil law. This has been thus defined: "Revendication is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim in specie, such part of the goods as remains in the hands of the vendee entire, and without having changed its quality."¹² It is based upon the plain reason of justice and equity, that one man's goods shall not be taken to pay another man's debts, and is highly favored on account of its intrinsic justice.¹³

Restrictions upon Rule against Public Policy.—The right of stoppage in transitu is regarded with favor and the engrafting of further restrictions upon the rule governing it is not warranted by public policy.¹⁴

§ 1659. **Must Be in Transitu.**—Stoppage in transitu, as the terms import, can only take place while the goods are on their way.¹⁵ In order that vendor

9. **Sale of part of goods lying in bulk.**—Keeler v. Goodwin, 111 Mass. 490.

10. **Power of vendee to make carrier his bailee.**—In re New York, etc., Goods Co., 95 C. C. A. 140, 169 Fed. 612.

11. **Effect of carrier's lien.**—Hays v. Mouille & Co., 14 Pa. 48.

12. **Revendication.**—Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.

13. **Based upon justice and equity.**—Koontz v. Wheeling, etc., R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

"It was said by Lord Kenyon, 3 T. R. 467, that 'the doctrine of stopping goods in transitu is bottomed on the case of Snee v. Prescott, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods, consigned to the vendee, before delivery, in case of the bankruptcy of the vendee.' The doctrine is thus stated by Lord Hardwicke. After referring to the rule, that an action against a carrier for loss of goods should be brought in the name of the consignee, he proceeds: 'But suppose such goods are actually delivered to a carrier, to be delivered to A., and while the carrier is upon the road, and before actual delivery to A., by the carrier, the consignor hears A., his consignee, is likely to become bankrupt, or is actually one, and countermands the delivery, and gets them back in his own possession again, I am of opinion that no action of trover would lie for the as-

signees of A., because the goods, while they were in transitu, might be so countermanded.' 1 Atk. 248." Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.

14. **Restrictions upon rule against public policy.**—Branan v. Atlanta, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; Calahan v. Babcock, 21 O. St. 281, 8 Am. Rep. 63, cited in Koontz v. Wheeling, etc., R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471; Pleasants v. Pendleton, 27 Va. (6 Rand.) 473, 18 Am. Dec. 726.

"It is established law in England, that if goods be consigned to a merchant, and when they reach him he has become bankrupt, they go to his assignees, though the consignor should remain wholly unpaid, and though when he consigned them, he considered his correspondents to be in good credit. The harshness and injustice of this principle is felt, and lamented by the judges, and they go as far as they can in favor of an unpaid vendor. Thus, in Hammond v. Anderson, 4 Bos. & Pull. 70, Sir. J. Mansfield, Ch. J. says, the right of stopping in transitu is a favorable right, which the courts of law are always disposed to assist." Pleasants v. Pendleton, 27 Va. (6 Rand.) 473, 18 Am. Dec. 726.

15. **Must be in transit.**—Neimeyer Lumbar Co. v. Burlington, etc., R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; Craig v. Marx, 65 Tex. 649.

may exercise the right, the goods at the time must be in transitu from him to his immediate vendee.¹⁶

Neither Property nor Possession in Vendor.—The right of stoppage in transitu presupposes not only that the property in the goods has passed to the consignee, for his own use, but that the possession is in a third person, in transitu to the consignee.¹⁷ It can not, therefore, touch a case where the actual or constructive possession still remains in the shipper, or his exclusive agents.¹⁸

§ 1660. Insolvency Essential to Existence of Right.—For more extensive treatment of this element, see post, "Insolvency of Vendee," §§ 1669-1671.

In General.—The insolvency of the vendee is indispensable to the existence of the right of stoppage in transitu.¹⁹

In Transitu to Absconder.—Thus, a seller can not stop goods in transitu simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown.²⁰

Deed of Trust Given by Vendee.—And the mere fact that the vendor, after the shipment of the goods, learned that a deed of trust had been given on them to secure a debt of the vendee, will not entitle him to exercise the right of stoppage in transitu.²¹

Death of Trusted Member of Partnership.—Where, however, goods are sold upon credit to a member of a partnership in the partnership name, upon the express understanding and agreement that he shall personally superintend the sale and disposition of the goods at their place of destination, and credit is given upon this assurance, and upon special trust and confidence in the partner so making the purchase, in case the partner died before the goods reached their destination, or came to the possession of the vendees; it was the right of the vendors to reclaim the goods (by stopping them in their passage), and rescind the contract.²²

§ 1661. Property Subject to Right.—The right of stoppage in transitu may extend over the goods themselves,²³ or the proceeds of their sale,²⁴ but

16. *Neimeyer Lumber Co. v. Burlington, etc.*, R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

17. **Neither property nor possession in vendor.**—The *St. Joze Indiano* (U. S.), 1 Wheat. 208, 4 L. Ed. 73; The *Merrimack* (U. S.), 8 Cranch 317, 3 L. Ed. 575.

18. The *St. Joze Indiano* (U. S.), 1 Wheat. 208, 4 L. Ed. 73.

19. **Insolvency essential to existence of right.**—*Alabama.*—*Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Georgia.—*Branan v. Atlanta, etc.*, R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Illinois.—*Hill v. Illinois, etc.*, R. Co., 151 Ill. App. 439.

Michigan.—*Gustine v. Phillips*, 38 Mich. 674.

Montana.—*Walsh v. Blakely*, 6 Mont. 194, 9 Pac. 809.

Ohio.—*Koontz v. Wheeling, etc.*, R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471; *Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Jordan, etc.*, Co. v. James, 5 O. 88; *Howe v. Cincinnati, etc.*, R. Co., 18 O. C. C. 333, 10 O. C. D. 182; *Benedict v. Schaettle*, 12

O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.

Virginia.—*Howatt v. Davis*, 19 Va. (5 Munf.) 34, 7 Am. Dec. 681.

Absence of consideration.—It has been held that a consignor can stop goods in transitu in only two cases: Where he has received no consideration; and where the consignee is insolvent. *Wood v. Roach* (U. S.), 2 Dall. 180, 1 Yeates 177, 1 Am. Dec. 276, 1 L. Ed. 340.

Complete sale.—If the sale to the consignee is complete, the consignor has no right to divert the shipment except in the case of the insolvency of the consignee. *Hill v. Illinois, etc.*, R. Co., 151 Ill. App. 439.

20. **In transitu to absconder.**—*Smith v. Barker*, 102 Ala. 679, 15 So. 340.

21. **Deed of trust to secure debt of vendee.**—*Houston, etc.*, R. Co. v. *Poole*, 63 Tex. 246.

22. **Death of trusted member of partnership.**—*Fulton, etc.*, Co. v. *Thompson*, 18 Tex. 278.

23. **Property subject to right.**—*Berndston v. Strang*, 3 L. R. Ch. 538.

24. *Berndston v. Strang*, 3 L. R. Ch. 538; *Hause & Son v. Judson* (Ky.), 4 Dana 7, 29 Am. Dec. 377; *O'Brien v. Nor-*

not over the policy moneys paid in respect of insurance affected by the vendee.²⁵
May Stop Residue.—And a vendor may stop the residue of goods which have not arrived at their final destination.²⁶

§§ 1662-1668. Sale on Credit and Nonpayment of Price—§§ 1662-1665. Nonpayment of Price—§ 1662. In General.—It is obvious that the goods must be unpaid for to give the consignor the right of stoppage, since if payment had been made the consignor would retain no lien, or quasi lien, upon them whatever.²⁷ Thus, one who sells property for cash is entitled to stop the goods in transitu before delivery to secure the amount due.²⁸

§ 1663. Goods Shipped in Payment of Antecedent Debt.—And, of course, the right does not exist, where goods are shipped in payment of an antecedent debt.²⁹

§ 1664. Vendor Indebted to Vendee.—Nor does the right of stoppage in transitu apply to a consignment to a creditor to whom the consignor is indebted to the full value of the goods.³⁰

§ 1665. Consignor Indebted to Consignee.—And an agent, indebted to his principal, and shipping goods to him in the vessel of a third person, has no right to stop them in transitu after the captain has signed the bill of lading.³¹

§ 1666. Part Payment.—Nor will part payment by the vendee prevent the vendor from stopping the goods in transitu.³² And the right to stop in transitu is not affected by the facts that part payment of the goods had been received, and a draft intended to cover the balance of the cost had been presented and accepted after their arrival.³³

§ 1667. Acceptance of Bills or Notes.—The right of stoppage in transitu is not lost, however, by the acceptance of bills or notes for the goods, unless

ris, 16 Md. 122, 77 Am. Dec. 284; Hall v. Richardson, 16 Md. 397, 77 Am. Dec. 303.

The vendor may have the same power to exercise the right of stoppage in transitu with respect to the proceeds of the goods, as he had with respect to the goods themselves, where such right is asserted after they are converted into money, under an order of the court issuing an attachment of the goods at the instance of a creditor of the vendee. *Hause & Son v. Judson* (Ky.), 4 Dana 7, 29 Am. Dec. 377; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Hall v. Richardson*, 16 Md. 397, 77 Am. Dec. 303.

25. Insurance money.—*Berndston v. Strang*, 3 L. R. Ch. 538.

26. May stop residue.—*Buckley v. Funniss* (N. Y.), 17 Wend. 504.

27. Nonpayment of price.—*United States v. Wood v. Roach* (U. S.), 2 Dall. 180, 1 L. Ed. 340, 1 Yeates 177, 1 Am. Dec. 276. *The E. H. Pray*, 27 Fed. 474; *The St. Joze Indiano* (U. S.), 1 Wheat. 208, 4 L. Ed. 73.

Georgia.—*Branan v. Atlanta*, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Maine.—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—*Stubbs v. Lund*, 7 Mass.

453, 4 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

Missouri.—*Smith Co. v. Louisville*, etc., R. Co. (Mo. App.), 122 S. W. 342.

Ohio.—*Howe v. Cincinnati*, etc., R. Co., 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220; *Jordan*, etc., Co. v. *James*, 5 O. 88; *Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Benedict v. Schaettle*, 12 O. St. 515.

Virginia.—*Jones v. Christian*, 86 Va. 1017, 11 S. E. 984.

28. Property sold for cash.—*Williams & Co. v. Dotterer*, 111 La. 822, 35 So. 921.

29. Goods shipped in payment of antecedent debt.—*Wood v. Roach* (U. S.), 2 Dall. 180, 1 L. Ed. 340, 1 Yeates 177, 1 Am. Dec. 276.

30. Vendor indebted to vendee.—*Clark v. Mauran* (N. Y.), 3 Paige 373.

31. Consignor indebted to consignee.—*Summeril v. Elder* (Pa.), 1 Bin. 106.

32. Part payment.—*Burnham v. Winsor*, Fed. Cas. No. 2,180; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Atkins v. Colby*, 20 N. H. 154; *Jordan*, etc., Co. v. *James*, 5 O. 88; *Howatt v. Davis*, 19 Va. (5 Munf.) 34, 7 Am. Dec. 681; *Hodgson v. Loy*, 7 T. R. 440.

33. Part payment and acceptance of draft for balance.—*Burnham v. Winsor*, Fed. Cas. No. 2,180.

under the agreement they must be regarded as equivalent to absolute payment.³⁴ Thus, where a consignee sent notes to the consignor in payment for goods still in the hands of the carrier, and received a receipted bill stating that consignor had received payment by two notes therefor, the acceptance of the notes did not constitute a payment so as to destroy the consignor's right of stoppage in transitu, and remit him to his remedy on the notes on the insolvency of the consignee.³⁵ When goods, however, are purchased and paid for by the order, note, or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right of stoppage in transitu.³⁶ The fact that the seller has negotiated the bills is immaterial in this connection.³⁷ Nor is it essential that the notes be tendered back prior to the exercise of the right.³⁸

§ 1668. Credit.—A seller of goods has the right of stoppage in transitu, though the sale is on credit, and the right may be exercised before the expiration of the term of credit.³⁹

§§ 1669-1671. Insolvency of Vendee—§ 1669. Right Based on Insolvency of Vendee.—See ante, "Insolvency Essential to Existence of Right," § 1660.

In General.—Where property is sold on credit, and the vendor discovers that the buyer is solvent, before the property has left the control of the seller, though in transit to the vendee, such insolvency confers upon the vendor the right of stoppage in transitu, and he may detain the property, while in the possession of the carrier, and insist on payment before it passes out of his control.⁴⁰

34. Acceptance of bills or notes.—*England.*—Miles *v.* Gorton, 2 Crompt. & M. 504; Edwards *v.* Brewer, 2 M. & W. 375; Feise *v.* Wray, 3 East 93.

Canada.—Lewis *v.* Mason, 36 U. C. Q. B. 590.

Iowa.—Clapp Bros. & Co. *v.* Sohmer & Co., 55 Iowa 273, 7 N. W. 639.

Maine.—Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

New York.—Holbrook *v.* Vose (N. Y.), 19 N. Y. Super. Ct. 76; Ainis *v.* Ayers, 62 Hun 376, 16 N. Y. S. 905, 42 N. Y. St. Rep. 827.

Pennsylvania.—Bell *v.* Moss (Pa.), 5 Whart. 189; Donath *v.* Broomhead, 7 Pa. 301.

Acceptance of bills of exchange.—Where goods are sold on credit and shipped to the buyer to be delivered to him, and the buyer becomes insolvent before payment is made, the seller's right to stop the goods in transitu is not devested by the seller's taking bills of exchange drawn in his favor by the master of the vessel on the buyer. Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

35. Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

36. Note of third party accepted as payment.—Eaton *v.* Cook, 32 Vt. 58.

37. Negotiation.—*England.*—Feise *v.* Wray, 3 East 93; Miles *v.* Gorton, 2 Crompt. & M. 504.

Canada.—Lewis *v.* Mason, 36 U. C. Q. B. 590.

Maine.—Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

New York.—Holbrook *v.* Vose (N. Y.), 19 N. Y. Super. Ct. 76.

Pennsylvania.—Bell *v.* Moss (Pa.), 5 Whart. 189.

38. Return of notes.—Edwards *v.* Brewer, 2 M. & W. 375; Bell *v.* Moss (Pa.), 5 Whart. 189.

39. Credit.—Clapp Bros. & Co. *v.* Peck, 55 Iowa 270, 7 N. W. 587; Clapp Bros. & Co. *v.* Sohmer & Co., 55 Iowa 273, 7 N. W. 639; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63; Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Smith Co. *v.* Louisville, etc., R. Co. (Mo. App.), 122 S. W. 342; Heinz *v.* Railroad Transfer Co., 82 Mo. 233; Atkins *v.* Colby, 20 N. H. 154; Diem *v.* Koblit, 49 O. St. 41, 29 N. E. 1124, 54 Am. St. Rep. 531; Benedict *v.* Schaettle, 12 O. St. 515; Howe *v.* Cincinnati, etc., R. Co., 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220.

40. In general.—*England.*—Fraser *v.* Witt, L. R., 7 Eq. 64.

Alabama.—Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Iowa.—Clapp Bros. & Co. *v.* Sohmer & Co., 55 Iowa 273, 7 N. W. 639.

Louisiana.—Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

Maine.—Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

Maryland.—O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

Missouri.—Smith Co. *v.* Louisville, etc., R. Co. (Mo. App.), 122 S. W. 342; Carder

And if the person to whom they are consigned is not insolvent; if from misinformation or excess of caution, the consignor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods. It is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him from the insolvency of the consignee.⁴¹

§ 1670. Nature of and Existence of Insolvency.—Need Not Be Technically Declared.—The validity of the right of stoppage in transitu depends on the bankruptcy or insolvency of the vendee; but it is not necessary that it should be a technically declared insolvency;⁴² insolvency, with respect to such

v. Atchison, etc., R. Co., 170 Mo. App. 698, 153 S. W. 517; Letts-Spencer Grocer Co. v. Missouri Pac. R. Co., 138 Mo. App. 352, 122 S. W. 10.

Nebraska.—*Schuster v. Carson, 28 Neb. 612, 44 N. W. 734.*

New Hampshire.—*Atkins v. Colby, 20 N. H. 154.*

New York.—*Stevens v. Wheeler (N. Y.), 27 Barb. 658.*

North Carolina.—*Farrell v. Richmond, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 37 Am. & Eng. R. Cas. 704, 11 Am. St. Rep. 760.*

Ohio.—*Adams Exp. Co. v. Wentworth, 1 C. S. C. R. 142, 13 O. Dec. 464; Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723; Diem v. Koblitz, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; Howe v. Cincinnati, etc., R. Co., 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220; Jordan, etc., Co. v. James, 5 O. 88; Koontz v. Wheeling, etc., R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.*

Oregon.—*Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009, rehearing denied in 48 Ore. 272, 86 Pac. 791.*

Pennsylvania.—*White v. Welsh, 38 Pa. 396.*

Tennessee.—*Bloomington, etc., Co. v. Memphis, etc., R. Co., 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371; Mississippi Mills v. Union, etc., Bank, 77 Tenn. (9 Lea) 314; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; Allyn & Co. v. Willis & Bro., 65 Tex. 65; Stuart v. Mau & Co., 2 Texas App. Civ. Cas. § 784; Fox & Bro. v. Willis & Bro., 60 Tex. 373; Houston, etc., R. Co. v. Poole, 63 Tex. 246.*

Vermont.—*Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46.*

Virginia.—*Pleasants v. Pendleton, 27 Va. (6 Rand.) 473, 18 Am. Dec. 726; Howatt v. Davis, 19 Va. (5 Munf.) 34, 7 Am. Dec. 681.*

Wisconsin.—*Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.*

41. "It has been said, that 'the mischief and inconvenience that would ensue on a contrary supposition, are extreme. The goods might be put on board, and might

lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated, at any moment, by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller." *Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.*

Fraud.—The basis of the right of stoppage in transitu is the insolvency of the buyer without reference to whether the contract of sale was produced by fraud. *Allyn & Co. v. Willis & Bro., 65 Tex. 65.*

Right of consignee to object.—A consignee, insolvent at the time of the sale of the goods, and still remaining insolvent, can not object to their stoppage in transitu. *Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723.*

Erroneous instruction.—A charge of the court that the right of stoppage in transitu of goods sold existed in the seller, not only in the event of the insolvency of the vendee, but for other adequate cause, without explaining the meaning applied by the court to the words "other adequate cause," is error. *Fox & Bro. v. Willis & Bro., 60 Tex. 373.*

42. **Need not be technically declared.**—*Maryland.*—*O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284.*

Ohio.—*Benedict v. Schaettle, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723, cited in Diem v. Koblitz, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.*

Tennessee.—*Bloomington, etc., Co. v. Memphis, etc., R. Co., 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.*

Fairness of the rule.—Fair dealing will be better insured by leaving to the consignor his privilege of stoppage in transitu, in all cases of insolvency, whether evidenced by the ordinary accompanying acts, or shown actually to exist. The rights of a fair consignee will be sufficiently protected by giving him an in-

right, being merely a general inability to pay,⁴³ evidenced by stoppage of payment.⁴⁴

Actual Insolvency Not Essential.—Actual insolvency of the consignee is not essential. It is sufficient if before the stoppage in transitu he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidence of insolvency.⁴⁵ Thus, it is sufficient to show that the vendee is embarrassed, and probably not able to pay his debts.⁴⁶ And any well-founded information of an embarrassment on the part of the buyer in meeting the de-

demnity when the right of stoppage in transitu is exercised upon rumor or suspicion without any foundation in fact, and by depriving the consignor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the consignee, or his assignee, on the payment or tender of the agreed price. *Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723, cited in *Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

43. General inability to pay.—*Missouri*.—*Seigfried v. Chicago, etc., R. Co. (Mo. App.)*, 126 S. W. 798.

New Hampshire.—*Inslee v. Lane*, 57 N. H. 454.

Ohio.—*Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

Tennessee.—*Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

It is not required, when the right of stoppage in transitu is exercised, that the buyer should have been declared a bankrupt or insolvent by legal proceedings, or that he should have made an assignment, but insolvency fairly means that the party should be shown to have been unable to meet the debt due the seller, at the time of the exercise of the right, when the debt should fall due. The purchaser may not have actually failed or have gone to protest, but might be hopelessly insolvent. *Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

Strict proof of insolvency is not essential to the exercise of the right of stoppage in transitu; "insolvency" in that sense meaning general inability to pay debts. *Seigfried v. Chicago, etc., R. Co. (Mo. App.)*, 126 S. W. 798.

44. Stoppage of payment.—*Missouri*.—*Seigfried v. Chicago, etc., R. Co. (Mo. App.)*, 126 S. W. 798.

Pennsylvania.—*Bender & Co. v. Bowman*, 2 Leg. Gaz. 178.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

Wisconsin.—*Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351, 4 Am. & Eng. R. Cas., N. S., 608.

Evidence that a corporation failed to pay a claim for lumber sold for more than ten months after it became due, and after demand therefor had been made; that the seller, while endeavoring to collect the claim, found that there was no such corporation located at the place given in the order for the lumber as its place of business, and that its name was not in the city directory—sustains a finding that it was insolvent, so as to justify the seller in stopping the goods in transit. *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351, 4 Am. & Eng. R. Cas., N. S., 608.

A sold whisky on credit to C. B., a creditor of C, levied on the whisky before it left the possession of the carrier. A brought an action against B in the exercise of his right of stoppage in transitu. B contended; first, that C was not insolvent, inasmuch as he had not been declared a bankrupt; and, second, that, if stoppage of payment constituted insolvency, C was insolvent before A shipped the goods. Held that, when C stopped payment, he became insolvent sufficiently to allow A to exercise his right of stoppage in transitu; and that, if A. did not know of C's insolvency at the time of shipment, the fact that he was in reality insolvent before that time would make no difference. *Bender & Co. v. Bowman (Pa.)*, 2 Leg. Gaz. 178.

45. Actual insolvency not essential.—*Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723; *Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182.

In *Benedict v. Schaettle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. Reprint 723, the court said: "If the vendee, before the stoppage in transitu, had, by his conduct in business, afforded the ordinary apparent evidence of insolvency, he ought not to complain of the precautionary measure taken by the vendor, though it should turn out that he was ultimately able to pay." *Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182.

46. Embarrassed.—*Ryberg v. Snell*, Fed. Cas. No. 12,190, 2 Wash. C. C. 403; *Secomb, etc., Co. v. Nutt (Ky.)*, 14 B. Mon. 324; *Howatt v. Davis*, 19 Va. (5 Munf.), 34, 7 Am. Dec. 681.

mands of his creditors is a sufficient notice of insolvency to justify the vendor in stopping the goods.⁴⁷ And it has been held that a vendor of goods has the right to refuse or countermand the final delivery if the vendee be in failing circumstances.⁴⁸

Evidence of Insolvency.—Direct proof of insolvency is not necessary to establish the seller's right of stoppage in transitu, but it may be proved by circumstances.⁴⁹

Refusal to Honor Drafts.—The refusal of a buyer to honor drafts drawn by the seller for the price is not in itself evidence of the insolvency of the buyer essential to justify the exercise of the right of stoppage in transitu.⁵⁰

Evidence to Prove Solvency.—Where a vendor who has on closing of his vendee's store by attachment endeavored to exercise his right of stoppage in transitu as to certain of the goods attached intervenes as claimant in the attachment suit, evidence that the vendee had a large amount of property in another state is admissible to prove the solvency of the vendee when the vendor attempted to exercise the right of stoppage.⁵¹

§ 1671. Time of Existence of and of Notice of Insolvency.—Insolvency Existing at Time of Sale.—It has been held that, in order to confer this right, it is not sufficient that the requisite insolvency exists at the time of the sale, but it must intervene between that time and the exercise of the right,⁵² but now it is a well-established doctrine that it is not essential to the vendor's right of stoppage in transitu that the purchaser's insolvency should have arisen since the sale and shipment,⁵³ and the seller of goods may stop them in transitu, on account of the purchaser's insolvency existing before, but not known to the seller until after the sale.⁵⁴ Thus, concealed embarrassments

47. More, etc., *Co. v. Lott*, 13 Nev. 376.

48. *White v. Welsh*, 38 Pa. 396.

49. **Evidence of insolvency.**—*Reynolds v. Boston*, etc., R. Co., 43 N. H. 580.

No peculiar evidence is required to prove insolvency alleged to justify a stoppage of goods in transitu, such as proceedings in bankruptcy or an assignment of property. Any competent testimony that will satisfy a jury is sufficient. *Hays v. Mouille & Co.*, 14 Pa. 48.

50. **Refusal to honor drafts.**—*Smith Co. v. Louisville*, etc., R. Co. (Mo. App.), 122 S. W. 342.

51. **Evidence to prove solvency.**—*Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

52. *Rogers v. Thomas*, 20 Conn. 53.

53. **Insolvency existing before sale.**—*Louisiana.*—*Blum & Co. v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725.

Maryland.—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Missouri.—*Schwabacher v. Kane*, 13 Mo. App. 126.

New Hampshire.—*Reynolds v. Boston*, etc., R. Co., 43 N. H. 580.

North Carolina.—*Farrell v. Richmond*, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 37 Am. & Eng. R. Cas. 704, 11 Am. St. Rep. 760.

Ohio.—*Diem v. Koblitz*, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Jordan*, etc., *Co. v. James*, 5 O. 88; *Adams Exp. Co. v. Wentworth*, 1 C. S. C. R. 142, 13 O. Dec. 464; *Howe v. Cincinnati*, etc.,

R. Co., 18 O. C. C. 333, 10 O. C. D. 182; *Benedict v. Schættle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. 723.

Texas.—*Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

The object in allowing the privilege of stoppage in transitu to the consignor being his protection against the insolvency of the consignee, such privilege, unless waived by the consignor, ought properly to extend to cases of insolvency, whether existing at the time of sale, or occurring at any time before the actual delivery of the goods. *Benedict v. Schættle*, 12 O. St. 515, affirming 1 Disn. 445, 12 O. Dec. 723; *Howe v. Cincinnati*, etc., R. Co., 18 O. C. C. 333, 10 O. C. D. 182; *Adams Exp. Co. v. Wentworth*, 1 C. S. C. R. 142, 13 O. Dec. 464; *Jordan*, etc., *Co. v. James*, 5 O. 88.

Overt act of insolvency subsequent to sale.—Insolvency need not be evidenced by any overt act intervening between the sale and the exercise of the right. *Schættle v. Benedict*, 11 Disn. 445, 12 O. Dec. 723.

54. **Unknown at time of sale.**—*Alabama.*—*Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17.

Louisiana.—*Blum & Co. v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725.

Missouri.—*Schwabacher v. Kane*, 13 Mo. App. 126.

New Hampshire.—*Reynolds v. Boston*, etc., R. Co., 43 N. H. 580.

North Carolina.—*Farrell v. Richmond*,

of the buyer, or even insolvency, if neither notorious nor known to the seller at the time of the sale, will not prevent the right of stoppage in transitu.⁵⁵

Shipping with Knowledge of Insolvency.—If the insolvency of the consignee occurs and is known to the consignor before he ships the goods, he can not exercise the right of stoppage in transitu on account of such insolvency.⁵⁶

§§ 1672-1683. Persons Entitled to Exercise Right—§ 1672. Privity of Contract.—It is generally held that in order for one to possess the right of stoppage in transitu, privity of contract must exist between him and the consignee of the goods.⁵⁷ Thus, where a shipment of horses was delivered to a carrier for transportation, a demand on the carrier, by one who was neither shipper nor consignee, but claimed ownership, to stop the shipment in transitu because of alleged fraud in the sale of the horses, did not render it liable, on failure to so stop the consignment, for the value thereof.⁵⁸

§ 1673. Vendor or Quasi Vendor.—It may be stated as a rule that only the vendor, or quasi vendor, of the goods is entitled to exercise the right of stoppage in transitu, or delegate such power to another.⁵⁹

etc., R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 37 Am. & Eng. R. Cas. 704, 11 Am. St. Rep. 760.

Ohio.—Benedict v. Schaettle, 12 O. St. 515.

Pennsylvania.—Bender & Co. v. Bowman (Pa.), 2 Leg. Gaz. 178.

The right to stoppage in transitu may be exercised, as well where the insolvency of the vendee existed at the time of sale as where it occurred afterward; there being no waiver of the right from knowledge of the insolvency or otherwise. Benedict v. Schaettle, 12 O. St. 515.

55. Blum & Co. v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725.

56. **Shipping with knowledge of insolvency.**—Evans, etc., Cultivator Co. v. Missouri, etc., R. Co., 64 Mo. App. 305; Fenkhausen v. Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; Houston, etc., R. Co. v. Poole, 63 Tex. 246.

The right to stop the merchandise in transit depended upon the fact that vendor ascertained the insolvency of vendee after the sale and shipment. If the fact of the insolvency had been known to appellee before he made the sale to vendee, then he would not have the right to stop the merchandise in transit. Houston, etc., R. Co. v. Poole, 63 Tex. 246.

57. **Privity of contract.**—*Arkansas.*—Memphis, etc., R. Co. v. Freed, 38 Ark. 614, 9 Am. & Eng. R. Cas. 212.

Massachusetts.—Rowley v. Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 607.

Nebraska.—Neimeyer Lumber Co. v. Burlington, etc., R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

Vermont.—Eaton v. Cook, 32 Vt. 58.

Washington.—Switzler v. Northern Pac. R. Co., 45 Wash. 221, 88 Pac. 137, 12 L. R. A., N. S., 254, 13 Am. & Eng. Ann. Cas. 357.

A ordered goods of B, who transmitted the order to C, with directions to fill

it and ship to A; all three living in different places. C, in accordance with his directions from B, shipped the goods to A, and sent the bill and bill of lading to B, who failed before the goods reached A. C claimed the right of stoppage in transitu, and the carrier delivered the goods to him. Held, in a suit by A against the carrier for the value of the goods, that he was entitled to recover; C having no right of stoppage in transitu; there being no privity of contract between C and A. Memphis, etc., R. Co. v. Freed, 38 Ark. 614, 9 Am. & Eng. R. Cas. 212.

D., of Omaha, ordered a bill of lumber of S., of Dallas. S., not having the lumber, sent the order to N., at Waldo, requesting him to ship the lumber to D., on account of S., and send him the invoice and bill of lading. This was done. Held, that N. was not D.'s vendor, but merely consignor, and hence that he could not, on the insolvency of S., exercise the right of stoppage in transitu. Neimeyer Lumber Co. v. Burlington, etc., R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

58. Switzler v. Northern Pac. R. Co., 45 Wash. 221, 88 Pac. 137, 12 L. R. A., N. S., 254, 13 Am. & Eng. Ann. Cas. 357.

59. **Vendor or quasi vendor.**—*England.*—Tucker v. Humphrey, 4 Bing. 516; Molby v. Hay, 13 M. & R. 396; Ingles v. Usherwood, 1 East 515; Feise v. Wray, 3 East 93; Turner v. Liverpool Dock, 6 Exch. 543; Oakford v. Drake, 2 F. & F. 493.

Illinois.—Lake Shore, etc., R. Co. v. National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

Maine.—Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—Ilsley v. Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Seymour v. Newton, 105 Mass. 272.

Where the seller of goods, under a contract to deliver them on shipboard,

Mortgagees.—A demand of goods in the hands of a carrier by virtue of a chattel mortgage after condition broken but without any legal process made by a constable acting merely as agent of the mortgagees will not make the carrier liable for conversion if it refuses to surrender them where the goods were received from a third person who has a bill of lading therefor.⁶⁰

Purchased by Vendor on His Own Credit.—The fact that the vendor purchased the goods on his own credit for the vendee does not affect his right of stoppage in transitu.⁶¹

§ 1674. **Transferee of Bill of Lading.**—The right may be exercised by a bona fide transferee of the bill of lading.⁶² And one who pays the price of the goods for the buyer, and takes from him an assignment of the bill of lading as security, may exercise the right of stoppage in transitu.⁶³ But a transfer by the sellers and shippers of goods of the bill of lading for them as a mere collateral for pre-existing obligations, nothing being advanced, given up, or lost on the part of the transferee, will not preclude the sellers from exercising the right of stoppage in transitu.⁶⁴

§ 1675. **Principal against Factor.**—A principal consigning goods to his factor may exercise the right upon the insolvency of the factor, although he is indebted to the latter for advances on the consignment.⁶⁵ And a principal consigning goods to his factor may exercise the right upon the insolvency of the latter, although the factor has a joint interest with him in the consignment.⁶⁶

§ 1676. **Factor against Principal.**—The right may be exercised by an agent or factor who has purchased the goods upon his own credit for his principal, and shipped them to the latter at cost.⁶⁷ Thus, a foreign merchant, who for a commission only to himself purchases upon his own credit, and ships upon

enters into a contract with a third party to purchase such goods on joint account, each party to furnish one-half of the funds, the joint venture and the interest of such third party ends with a delivery of the goods on shipboard to the purchaser of such seller, and thereafter the title to such goods is in the purchaser, subject to the seller's right of stoppage in transitu, and the right of stoppage in transitu exercised by the seller is for his own benefit, and not for the benefit of the other party to the joint venture. In *re Comstock*, Fed. Cas. No. 3,079, 3 Sawy. 320.

60. **Mortgagees.**—*Kohn v. Richmond*, etc., R. Co., 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726.

In *Kohn v. Richmond*, etc., R. Co., 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726, it is said in the opinion: "It seems to us that the whole case turns upon the question whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden of proving that a third person who makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, and for showing not only that such third person is the rightful owner, but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who

is most likely to have the means of meeting it, and not upon the carrier, who can not be supposed to know anything about the real ownership of the goods and has a right to assume that the person from whom he received possession of the goods was such rightful owner; possession of personal property being evidence of title."

61. **Purchased by vendor on his own credit.**—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

62. **Transferee of bill of lading.**—*Morison v. Gray*, 2 Bing. 260, 9 E. C. L. 405, 9 Moore 484; *Waring v. Cox*, 1 Camp. 369.

63. **Assignment of bill of lading as security.**—*Gossler v. Schepeler* (N. Y.), 5 Daly 476.

64. **Transfer of bill of lading as collateral for prior obligations.**—*Lesassier v. Southwestern*, Fed. Cas. No. 8,274, 2 Woods 35.

65. **Principal against factor.**—*Kinloch v. Craig*, 3 T. R. 119.

66. **Where factor has joint interest.**—*Newsom v. Thornton*, 6 East 17.

67. **By factor against principal.**—*Ingles v. Usherwood*, 1 East 515; *Feise v. Wray*, 3 East 93; *Tucker v. Humphrey*, 4 Bing. 516, 15 E. C. L. 63; *Turner v. Liverpool Dock*, 6 Exch. 543; *Oakford v. Drake*, 2 F. & F. 493; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272; *Ilsléy v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

the credit which he gives to his employer, is a consignor or vendor, entitled to the benefit of the rule relative to stopping goods in transitu after the shipment.⁶⁸ But where the consignor remains owner of the goods consigned, no special property can exist in the factor, or any lien, general or special, unless he have possession, either actual or constructive, of the goods. If the goods are in transitu, or if the factor has only a right of possession, the lien does not attach, that he may stop the goods in transitu.⁶⁹

§ 1677. Agent against Vendee of Principal.—But where goods are sold through an agent, and shipped to the vendee, the agent can not stop the goods merely because his principal owes him on account of money advanced in their purchase.⁷⁰

§ 1678. Part Owner.—It has been held that the right of stoppage in transitu may be exercised by one who has an interest in and a right to receive only a certain portion of the goods, though he does not hold a bill of lading.⁷¹

§ 1679. Holder of Lien.—One is not entitled to exercise the right merely because he has a lien upon the goods.⁷²

§ 1680. Surety.—At common law the right can not be exercised by a mere surety for the purchase price, even where he is entitled to a commission on the amount.⁷³

§ 1681. Consignee.—And it has been stated that “a vendee acting in good faith has the right to intercept the goods before they reach their destination, and by taking possession of them defeat the vendor’s lien or right to repossess himself of the property.”⁷⁴ And it has been held that where a party delivers to a railroad company chattels to be transported from the point of delivery to another designated point on its line, and pays the charges for such transportation in advance, he has the right, as against the company, to resume the exclusive possession and control of his chattels before they have reached the destination named in the bill of lading, whenever and wherever he can do so without unreasonable interference with the business of the company.⁷⁵ It has also been held, however, that while goods are in progress over a through line, they can not, without the carrier’s consent, or the payment of freight for the whole distance, be stopped by the consignee short of the destination fixed by contract.⁷⁶ And the supreme court has decided that the stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of special privilege which the carrier may concede, but which the shipper can not, in the present state of the law, demand as a matter of lawful right.⁷⁷ Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges.⁷⁸

68. *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

69. **Where consignor is owner.**—*Woodruff v. Nashville, etc.*, R. Co., 39 Tenn. (2 Head) 87.

70. **Agent against vendee of principal.**—*Gwyn, etc., Co. v. Richmond, etc.*, R. Co., 85 N. C. 429, 6 Am. & Eng. R. Cas. 452, 39 Am. Rep. 708.

71. **Part owner.**—*Jenkyne v. Osborne* (Eng.), 8 Scott N. R. 505, 7 M. & G. 678, 49 F. C. L. 678.

72. **Holder of lien.**—*Lenahart v. Cooper*, 3 Bing. N. Cas. 99; *Sweet v. Pym*, 1 East 4.

73. **Surety.**—*Siffken v. Wray*, 6 East 371.

74. **Consignee.**—*Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278.

75. **Payment of through freight.**—*Cleveland, etc., R. Co. v. Sargent*, 19 O. St. 438; *Scotthorn v. South Staffordshire R. Co.*, 8 Ex. 341, 22 L. J. Ex. 121, 7 Railw. Cas. 870.

76. **Consignee.**—*Withers v. Macon, etc.*, R. Co., 35 Ga. 273.

77. **For inspection or reconsignment.**—*Southern R. Co. v. St. Louis Hay, etc., Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678.

78. **Discrimination as to privilege.**—*Southern R. Co. v. St. Louis Hay, etc., Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678.

Power of Connecting Carrier to Prevent Stoppage.—A railroad company having no interest in a contract for through transportation, made between other parties, can not prevent the consignee from stopping the goods before reaching their line of road.⁷⁹

§ 1682. May Be Exercised through Agent.—Of course, the right of stoppage in transitu may be exercised through an agent.⁸⁰

Authority of Agent to Exercise.—And any agent having general authority to act for the consignor may exercise the right of stoppage in transitu in behalf of the latter, without being specially authorized.⁸¹ Thus, a stoppage made for the benefit of the consignor by a forwarding merchant at an intermediate port, to whom goods are sent with directions to forward them, though not made until after such merchant had written to the consignee advising him of the arrival of the goods, asking orders relative to them, and stating that he should "hold on to the goods until the consignee should order them away," is valid, if the consignor affirm the act.⁸²

Agent Acting without Authority—Ratification.—Even where a stoppage in transitu is made without authority from the consignor, it may be validated by ratification before the vendee obtains possession of, or demands, the goods.⁸³ It has been held, however, that the ratification, to be effectual, must be made prior to the vendee's demand for the goods.⁸⁴

§ 1683. General Power of Consignor to Stop Delivery to Consignee.—**General Rule.**—Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them, and can not by a subsequent direction to the carrier prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods in transitu.⁸⁵ Where the master, however, after delivering bills of lading to the shipper, is notified by a sequestration of the goods by the vendor that he has been defrauded, he should, having bonded them as agent of the ship, on arriving at the port of destination, inquire into the consignee's title, and may refuse to deliver, if satisfied that the latter is but an agent, and not a consignee for value.⁸⁶

§ 1684. Effect of Attachment, Execution, or Other Lien against Vendee.—As the vendor's right of stoppage is superior to any lien against the vendee,⁸⁷ and since the power which a purchaser of goods has of taking pos-

79. Power of connecting carrier to prevent stoppage.—*Withers v. Macon, etc.*, R. Co., 35 Ga. 273.

80. May be exercised through agent.—*Maine.*—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—*Seymour v. Newton*, 105 Mass. 272.

New Hampshire.—*Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580.

Pennsylvania.—*Bell v. Moss (Pa.)*, 5 Whart. 189.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

81. Authority of agent to exercise.—*Maine.*—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—*Seymour v. Newton*, 105 Mass. 272.

New Hampshire.—*Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580.

Pennsylvania.—*Bell v. Moss (Pa.)*, 5 Whart. 189.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

Any agent, authorized to act for the consignor, either generally or in relation to the consignment in question, may stop goods in transitu, without any authority to adopt that particular measure. *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580.

82. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

83. Agent acting without authority—Ratification.—*Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

84. *Bird v. Brown*, 4 Exch. 786; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580.

85. General rule.—*Philadelphia, etc.*, R. Co. v. *Wireman*, 88 Pa. 264.

86. Fraud.—*Wilson v. Churchman*, 4 La. Ann. 452.

87. Superior to any lien against vendee.—*England.*—*Smith v. Goss, Camp*. 282.
Canada.—*McLean v. Breithaupt*, 12 Ont.

session from the hands of the carrier can not, without his direct intervention, be exercised by or on behalf of a creditor by way of attachment or levy on his interest,⁸⁸ the right of stoppage in transit is not divested, though the goods are levied on by execution or attachment at the suit of a creditor of the vendee, provided it is exercised before the transit is at an end.⁸⁹

App. 383; *Morgan Envelope Co. v. Bonstead*, 7 Ont. 697.

Alabama.—*Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Arkansas.—*Mason v. Wilson*, 43 Ark. 172.

California.—*Blackman v. Pierce*, 23 Cal. 509.

Connecticut.—*Aguirre v. Parmelee*, 22 Conn. 473.

Iowa.—*O'Neill v. Garrett*, 6 Iowa 480; *Greve & Co. v. Dunham*, 60 Iowa 108, 14 N. W. 130.

Kansas.—*Symns v. Schotten*, 35 Kan. 310, 10 Pac. 828; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

Kentucky.—*Wood v. Yeatman* (Ky.), 15 B. Mon. 270.

Louisiana.—*Blum & Co. v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725.

Louisiana statute.—A bought cotton of B at Shreveport. He did not pay for it, but shipped it on a steamer to C, a merchant at New Orleans. Held, that under Acts 1874, No. 66, § 3, C's lien on the cotton for a balance due him from A on general account was superior to B's right to reclaim the cotton, upon A's failure to pay the price upon its arrival at New Orleans as agreed. *Florshein Bros. v. Howell*, 33 La. Ann. 1184.

Maine.—*Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

Maryland.—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Massachusetts.—*Seymour v. Newton*, 105 Mass. 272; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12.

Missouri.—*Letts-Spencer Grocer Co. v. Missouri Pac. R. Co.*, 138 Mo. App. 352, 122 S. W. 10.

Mississippi.—*Dickman v. Williams*, 50 Miss. 500.

Nebraska.—*Schuster v. Carson*, 28 Neb. 612, 44 N. W. 734.

Nevada.—*Chicago, etc., R. Co. v. Painter*, 15 Neb. 394, 19 N. W. 488; *More, etc., Co. v. Lott*, 13 Nev. 376.

New Hampshire.—*Inslee v. Lane*, 57 N. H. 454.

New York.—*Clark v. Lynch* (N. Y.), 4 Daly 63; *Buckley v. Furniss* (N. Y.), 15 Wend. 137; *Covell v. Hitchcock* (N. Y.), 23 Wend. 611.

Ohio.—*Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63.

Oregon.—*Frame v. Oregon Liquor Co.*, 48 Ore. 272, 85 Pac. 1009, rehearing denied in 48 Ore. 272, 86 Pac. 791.

Pennsylvania.—*Cabeen v. Campbell*, 30 Pa. 254.

Tennessee.—*Mississippi Mills v. Union, etc., Bank*, 77 Tenn. (9 Lea) 314.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Allyn Co. v. Willis & Bro.*, 65 Tex. 65; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

Vermont.—*Kitchen v. Spear*, 30 Vt. 545.

Wisconsin.—*Sherman v. Rugee*, 55 Wis. 346, 13 N. W. 241.

88. Power to take possession from carrier.—*Clark v. Lynch* (N. Y.), 4 Daly 63.

89. Attachment or execution by creditor or vendee.—*England*.—*Smith v. Goss*, Camp. 282.

Canada.—*McLean v. Breithaupt*, 12 Ont. App. 383; *Morgan Envelope Co. v. Bonstead*, 7 Ont. 697.

United States.—*In re New York, etc., Goods Co.*, 95 C. C. A. 140, 169 Fed. 612.

Alabama.—*Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

Arkansas.—*Mason v. Wilson*, 43 Ark. 172.

California.—*Blackman v. Pierce*, 23 Cal. 509.

Connecticut.—*Aguirre v. Parmelee*, 22 Conn. 473; *Woodruff v. Noyes*, 15 Conn. 335.

Georgia.—*Landauer & Bro. v. Cochran, etc., Co.*, 54 Ga. 533.

Iowa.—*O'Neill v. Garrett*, 6 Iowa 480; *Greve & Co. v. Dunham*, 60 Iowa 108, 14 N. W. 130.

Kansas.—*Symns v. Schotten*, 35 Kan. 310, 10 Pac. 828; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

Kentucky.—*Wood v. Yeatman* (Ky.), 15 B. Mon. 270; *Hause v. Judson* (Ky.), 4 Dana 7, 29 Am. Dec. 377.

Louisiana.—*Blum & Co. v. Marks*, 21 La. Ann. 268; 99 Am. Dec. 725; *Hepp v. Glover*, 15 La. 461, 35 Am. Dec. 206.

Maine.—*Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

Maryland.—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Massachusetts.—*Seymour v. Newton*, 105 Mass. 272; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12.

Mississippi.—*Dickman v. Williams*, 50 Miss. 500; *Morris v. Shryock*, 50 Miss. 590; *Dreyfus v. Mayer*, 68 Miss. 282, 12 So. 267.

Missouri.—*Estey v. Truxel*, 25 Mo. App. 238.

Nebraska.—*Schuster v. Carson*, 28 Neb. 612, 44 N. W. 734.

Nevada.—*Chicago, etc., R. Co. v.*

Payment of Freight by Attaching Creditor.—The vendor's right of stoppage in transitu is terminated only by the passage of the goods into the actual or constructive possession of the vendee. Where the vendee, who is insolvent, has refused to receive the goods, a creditor of the vendee can not, by paying the freight to the railroad company, attach the goods as the property of the vendee.⁹⁰

Painter, 15 Nev. 394, 19 N. W. 488; *More*, etc., *Co. v. Lott*, 13 Nev. 376.

New Hampshire.—*Inslee v. Lane*, 57 N. H. 454.

New York.—*Clark v. Lynch* (N. Y.), 4 Daly 63; *Buckley v. Furniss* (N. Y.), 15 Wend. 137; *Covell v. Hitchcock* (N. Y.), 23 Wend. 611.

North Carolina.—*Farrell v. Richmond*, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760, 37 Am. & Eng. R. Cas. 704.

Ohio.—*Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63; *Benedict v. Schaettle*, 12 O. St. 515.

Oregon.—*Frame v. Oregon Liquor Co.*, 48 Ore. 272, 85 Pac. 1009, rehearing denied 48 Ore. 272, 86 Pac. 791.

Pennsylvania.—*Cabeen v. Campbell*, 30 Pa. 254; *Mouille v. Hays* (Pa.), 4 Clark 413; *Bender & Co. v. Bowman*, 2 Leg. Gaz. 178; *Hays v. Mouille*, 14 Pa. 48.

Tennessee.—*Mississippi Mills v. Union*, etc., Bank, 77 Tenn. (9 Lea) 314; *Keep Mfg. Co. v. Moore*, 79 Tenn. (11 Lea) 285.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; *Allyn & Co. v. Willis & Bro.*, 65 Tex. 65.

Vermont.—*Kitchen v. Spear*, 30 Vt. 545.

Wisconsin.—*Sherman v. Rugee*, 55 Wis. 346, 13 N. W. 241.

. Where the vendors of goods which have been attached under a chancery proceeding, and are within the control of the chancellor, by whose order part has been sold, assert their claim under the right of stoppage in transitu, their claim will be considered as superior to that of the attaching creditors. *Hause v. Judson* (Ky.), 4 Dana 7, 29 Am. Dec. 377.

Where goods, shipped from New York and consigned to New Orleans, to be forwarded to the vendee in Mississippi, are, on his insolvency before delivery in Mississippi, attached on board a steamboat by third persons, the vendor may still assert his priority. *Hepp v. Glover*, 15 La. 461, 35 Am. Dec. 206.

Goods were sold in Philadelphia, on credit, and placed on board a packet by the vendor, directed to the vendee, who resided in the state of Delaware. On the arrival of the packet at the landing, they were demanded by the vendee; but the captain refused to deliver them unless he was paid a balance due for former freights. The vendee not doing this,

they were taken again to the city of Philadelphia, and, the vendee becoming insolvent, the captain attached the goods for his balance as the property of the vendee. Afterwards the vendee tendered the amount of freight due upon the goods, and demanded them of the captain, and, upon his not delivering them up, replevied them. Held, that the vendor, under the circumstances, was not deprived of his right to stop the goods in transitu. *Allen v. Mercier* (Pa.), 1 Ashm. 103.

Garnishment.—A vendor's right of stoppage in transitu continues until actual delivery of the goods to the consignee or his agent, as well against a garnishing creditor of the consignee as against the consignee himself. *Chicago*, etc., R. Co. v. *Painter*, 15 Neb. 394, 19 N. W. 488.

Direction to direct to third person.—If, before goods in transit are delivered to an insolvent buyer, the seller directs that they be diverted to a third person, a creditor of the buyer, attaching them after this direction is given, can not hold them. *Estey v. Truxel*, 25 Mo. App. 238.

Delivery of bill of lading to officer.—Seizure of the goods under process against the consignee does not amount to a delivery so as to prevent the exercise of the right of stoppage in transitu; and the facts that the consignee delivered the bill of lading to the officer, or allowed him to take it, with the vendor's letter of advice inclosing it, or that the officer afterwards stored the goods in the consignee's building do not alter the case. *Sherman v. Rugee*, 55 Wis. 346, 13 N. W. 241.

Detained by forwarding merchant for advances.—A wholesale merchant shipped goods to a customer, which before reaching their destination, were detained by a forwarding merchant, to whom the purchaser was indebted, as security for his claim. Held that, on the purchaser becoming insolvent, the seller could exercise the right of stoppage in transitu, the goods not having come into the actual or constructive possession of the purchaser, and could recover the goods on payment or tender of the legitimate advances made thereon; nor would this right be affected by the consent of the purchaser to such detention. *Condict & Co. v. Rosenfield & Son*, 36 Tex. 23.

90. Payment of freight by attaching creditor.—*Greve & Co. v. Dunham*, 60 Iowa 108, 14 N. W. 130.

Payment by officer.—An officer levied

Sale by Order of Court.—Nor is the right of stoppage in transitu, existing at the time of an attachment laid on the goods, defeated or impaired by the attachment, nor altered by the sale of the goods by an order of court for the purpose of converting them into money.⁹¹

In Possession of Purchaser from Attaching Creditor.—Nor is it essential to the enforcement of the seller's right of stoppage in transitu that the goods against which the right is sought to be enforced shall be found, and the seller may exercise that right though the property in question had been attached by a creditor of the buyer, and taken possession of by a third person, who claimed to have purchased them, on his giving a bond to produce them if the issue was decided against him.⁹²

Existence of Insolvency Prior to Sale.—But it has been held that where the insolvency of the buyer exists prior to the sale, the seller being ignorant thereof, the seller can not assert his right of stoppage in transitu, as against a creditor attaching the goods after delivery to the carrier and before the assertion by the seller of such right. This decision however, is based on the discredited doctrine that such insolvency must intervene between the time of the sale and the exercise of the right.⁹³

Attached after Delivery to Vendee.—Of course, the right of stoppage in transitu can not be exercised after the goods have been delivered by the carrier to the consignee; and a creditor of the vendee may then attack them, and have them sold to satisfy his claim.⁹⁴

Vendors Not Bound to Intervene.—Vendors are not bound to intervene in the attachment suits in order to maintain their right of stoppage in transitu when the goods are seized under attachment when on the route.⁹⁵

§§ 1685-1691. Whether Right May Be Defeated by Transfer of Bill of Lading or by Attempted Transfer of Title to Goods—§ 1685. Transfer of Bill of Lading.—**Bona Fide Transfer and Delivery of Bill of Lading for Value.**—The right of stoppage in transitu is defeated by the prior indorsement and delivery by the vendee of a bill of lading of the goods to a bona fide indorsee for a valuable consideration, without notice of facts on which such right would otherwise exist.⁹⁶ Thus, the right of stoppage by the seller is lost

an execution upon goods which had been stopped in transitu. He paid the carrier the charges on the goods. Consignors brought an action to recover the goods. Held, the consignors' rights were not lost by the subsequent attachment. *Keep Mfg. Co. v. Moore*, 79 Tenn. (11 Lea) 285.

91. **Sale by order of court.**—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

92. **In possession of purchaser from attaching creditor.**—*Dreyfus v. Mayer*, 68 Miss. 282, 12 So. 267.

93. **Existence of insolvency prior to sale.**—*Rogers v. Thomas*, 20 Conn. 53.

94. **Attached after delivery to vendee.**—*Boyd v. Mosely*, 32 Tenn. (2 Swan) 661.

95. **Vendors not bound to intervene.**—*Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

96. **Bona fide transfer and delivery of bill of lading for value.**—*England.*—*Lickbarrow v. Mason*, 2 T. R. 63; *Leask v. Scott*, L. R., 2 Q. B. D. 376; *Newsom v. Thornton*, 6 East 22.

Canada.—*Clemston v. Grand Trunk R. Co.*, 42 U. C. Q. B. 273.

United States.—*Water v. Ross*, 2 Wash

C. C. 283, Fed. Cas. No. 17,122; *St. Paul Roller-Mill Co. v. Great Western Dispatch Co.*, 27 Fed. 434.

Alabama.—*Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17.

California.—*Newhall v. Central Pac. R. Co.*, 51 Cal. 345, 21 Am. Rep. 713.

Colorado.—*First Nat. Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479.

Georgia.—*Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Maine.—*Lee v. Kimball*, 45 Me. 172; *Winslow v. Norton*, 29 Me. 421, 50 Am. Dec. 601.

Maryland.—*Tiedeman v. Knox*, 53 Md. 612; *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

Massachusetts.—*Brooke Iron Co. v. O'Brien*, 135 Mass. 442.

Missouri.—*Dymock v. Missouri, etc., R. Co.*, 54 Mo. App. 400; *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97.

New Jersey.—*Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469, 41 Atl. 695.

New York.—*Dows v. Perrin*, 16 N. Y. 325; *Ives v. Polak* (N. Y.), 14 How. Prac.

when, before it is exercised, the purchaser has sold the goods, and indorsed the bill of lading, to a subpurchaser for value in good faith.⁹⁷

Sale of Goods Act.—And it has been held that a seller of goods can not exercise the right of stoppage in transitu, as against the vendee's transferee, where the latter is protected by English Sale of Goods Act 1893, merely because the vendee was in possession of the bill of lading with the consent of the seller, if such transferee had no notice of the vendor's rights.⁹⁸

Knowledge That Goods Have Not Been Paid for.—And an assignee for value of a bill of lading may acquire a good title to the property as against the consignor, which will defeat the right of stoppage in transitu, though he knows it has not been paid for by the consignee, unless he has notice of such circumstances as render the bill not fairly and honestly assignable.⁹⁹

Bill of Lading Obtained by Fraud.—Again, the right of stoppage in transitu is lost as against a bona fide purchaser of the bill of lading from the orig-

411; *Dows v. Greene* (N. Y.), 32 Barb. 490; *Rawls v. Deshler*, 4 Abb. Dec. 12, 42 N. Y. 572; *Becker v. Hallgarten*, 86 N. Y. 167; *Stevens v. Wheeler* (N. Y.), 27 Barb. 658; *Haggerty v. Palmer* (N. Y.), 6 Johns. Ch. 437.

Ohio.—*Jordan, etc., Co. v. James*, 5 O. 88; *Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

Pennsylvania.—*Schumacher v. Eby*, 24 Pa. 521.

Tennessee.—*Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371; *Curry v. Roulstone*, 2 Tenn. (2 Overt.) 110, Fed. Cas. No. 3497.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

A vendor who has parted with title to the goods sold and has delivered them to a common carrier for the vendee has no right of stoppage in transitu after the vendee has transferred the title to another by assignment of the bill of lading. *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

In an action against a carrier for goods received, but returned by order of the consignor, it appeared that the bill of lading was sent to T. Bros. & Co., consignees, and by them transferred to plaintiff for value. Held that, though T. Bros. & Co. were insolvent, their transfer to plaintiff defeated the consignor's right of stoppage in transitu. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

M. shipped flour on the U. road to G., and sent him U.'s bills of lading therefor. G. delivered them to the C. road, took new bills of lading for further shipment of the flour, and sold them to plaintiff, when in fact the flour was in possession of the U. road, in another state. G. failed the same day, and plaintiff notified the U.

road of its ownership of the property. After plaintiff's claim, M. stopped the flour in transitu. The C. road, upon being sued, surrendered the U. road's bills of lading to plaintiff. Held, that the equities of M. and plaintiff were equal, and plaintiff's legal title would prevail, since M.'s lien for the purchase price by way of stoppage in transitu was not asserted before the plaintiff's rights intervened. *Ætna Nat. Bank v. Union, etc., R. Co.*, 69 Mo. App. 246.

97. Indorsed to subpurchaser.—*Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Statute of California.—Since Civ. Code Cal., § 2127, declares that all the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange, the indorsee or holder of bills of lading received in good faith from the vendee, under an agreement to apply the proceeds of the sale of the goods to the payment of prior advances made by the indorsee to the vendee, can hold the goods against the lien or right of stoppage in transitu of the vendor. *Sheppard v. Newhall*, 47 Fed. 468.

Statute of Georgia.—It is provided by § 3553 of the Civil Code of Georgia that a bona fide assignee of a bill of lading of goods for a valuable consideration, and without notice that the same were unpaid for, and the purchaser insolvent, will be protected in his title against the seller's right of stoppage in transitu. *Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

98. Sale of goods act.—*Cahn v. Pockett's Bristol Channel S. P. Co. (C. A.)*, 1 Q. B. 643.

99. Knowledge that goods have not been paid for.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

inal vendee who has obtained it by fraud.¹

Transfer of Bill of Lading Essential to Complete Delivery.—And it has been held that it is only the transfer of a bill of lading which can operate as a complete delivery so as to bar the right of stoppage in transitu.² Thus, it has been held that the assignment of a bill of lading is equivalent to an actual delivery of the goods; the law recognizes no substitute for such assignment, and where parties seek to make a substitute for assigning bill of lading by delivering the receipted bills for freight and wharfage, neither this nor any other substitute will effect a determination of the vendor's right of stoppage in transitu.³

Sufficiency of Transfer.—It has been held that the right of stoppage in transitu can not be exercised, as against the consignee under a sale from the original purchaser, merely on the ground that the bills of lading were sent to the latter, and he had not transferred them to the consignee.⁴ Thus, where a buyer resold the property to defendant, and the seller shipped it to defendant, and sent the bills of lading to defendant as consignee, it was held that no further transfer was necessary to defeat the seller's right of stoppage in transitu for insolvency of the buyer.⁵ It was held that a bill of lading, running to the order of the shipper, being delivered unendorsed to the purchaser by the shipper's agent, with intent to pass the title, transfers the title to the property as absolutely as would a bill of sale.⁶

§ 1686. Transfer of Duplicate of Bill of Lading.—A quantity of tobacco was shipped and a bill of lading in duplicate was taken. The duplicate was transmitted to the consignee, and the original attached to a draft on him, and was forwarded to a bank for collection. Before the draft was presented the consignee transferred the duplicate to a purchaser of the tobacco, and received payment, and afterwards refused to accept the draft. Some two weeks after the shipment the consignee failed and the seller and shipper of the goods notified the carrier not to deliver them. Some days after this notice the party purchasing from the consignee demanded the goods from the carrier, and upon being refused, sued to recover them. It was held that plaintiff had sufficient notice to have put him on inquiry as to what disposition had been made of the original bill of lading, and that the transfer to him of the duplicate did not convey any such title as would defeat the right of the seller to stop the goods.⁷

§ 1687. Transfer for Antecedent Debt.—In General.—On the question whether the right of stoppage in transitu may be defeated by the transfer of the bill of lading in payment of an antecedent debt, the authorities are conflicting, but the weight of authority, in the United States, seems to support the doctrine that an antecedent debt may be a sufficient consideration for the abso-

1. Bill of lading obtained by fraud.—*Dows v. Greene* (N. Y.), 32 Barb. 490.

In *Pease v. Sloahee*, L. R., 1. P. C. App. 219, it appeared that the vendor indorsed and delivered the bill of lading to the vendee, and the later redelivered it to the vendor as security for the price, and afterwards obtained possession of it by a fraudulent representation, and indorsed it to a bona fide purchaser. It was held that the vendor's right of stoppage in transitu was defeated.

2. Transfer of bill of lading essential to complete delivery.—*Ives v. Polak* (N. Y.), 14 How. Prac. 411; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164; *Branan v. Atlanta*,

etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

3. Substitute for assignment of bill of lading.—*Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

4. Failure to indorse bill of lading.—*Shepard, etc., Lumber Co. v. Burroughs*, 41 Atl. 695, 62 N. J. L. 469.

5. *Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469, 41 Atl. 695.

6. *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. 434.

7. Transfer of duplicate of bill of lading.—*Castanola v. Missouri Pac. R. Co.*, 21 Am. & Eng. R. Cas. 75, 24 Fed. 267.

lute transfer, of a bill of lading, so as to cut off the right of stoppage in transitu.⁸

Contrary View.—But it has also been held that an antecedent debt is not a sufficient consideration for the absolute transfer of the bill of lading so as to cut off the right of stoppage in transitu.⁹ Thus, it has been held that a sale of the goods to the carrier in payment of a pre-existing debt by the vendee, before their delivery to him, does not deprive the vendor of his right of stoppage in transitu.¹⁰

§ 1688. Pledge of Bill of Lading.—Security for Present Advances.—It has been held that the right of stoppage in transitu is not terminated by an indorsement of the bill of lading as security for present advances, as the vendor is entitled to the surplus after the payment of the secured claims.¹¹

Rescission of Sale—Lien for Price.—It has been held that where a seller of grain, on learning that the buyer is insolvent and intends to get possession with intent to defraud, elects to rescind the sale, and stops the grain in transit, he can not thereafter claim that by the stoppage he acquired a lien for the price, as against one to whom the bills of lading had been transferred by the buyer as collateral.¹²

Security for Antecedent Debt.—It has also been held that an antecedent debt is sufficient consideration for the assignment of a bill of lading as security, so as to terminate the right of stoppage in transitu.¹⁴ But it has been held that the transfer of a bill of lading as a mere collateral to previous obligations

8. Transfer for antecedent debt.—*St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. 434.

California.—*Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647.

Colorado.—*First Nat. Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479.

Maine.—*Lee v. Kimball*, 45 Me. 172.

Missouri.—*Dymock v. Midland Nat. Bank*, 67 Mo. App. 97.

New Jersey.—*Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469, 41 Atl. 695.

9. Contrary view.—*Rodger v. Comptoir d'Escompt de Paris*, L. R., 2 P. C. 393 (but see *Leask v. Scott*, L. R., 2 Q. B. Div. 376, where a contrary doctrine is proclaimed); *Wheeling, etc., R. Co. v. Koontz*, 15 O. C. C. 288, 9 O. C. D. 102, 103.

10. Wheeling, etc., R. Co. v. Koontz, 15 O. C. C. 288, 9 O. C. D. 102, 103.

11. In re Westzthins, 5 Barn. & Adol. 817; *Coventry v. Gladstone*, 6 L. R. Eq. 44; *Kemp v. Falk*, 7 App. Cas. 575; *Spalding v. Reden*, 6 Beav. 376; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

Thus, it has been held that a bona fide transfer of the bill of lading by way of mortgage or pledge does not take away the right of stoppage in transitu; but in such case the vendor will hold the goods subject to the lien of the mortgage or pledge. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

In *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861, it is said in the opinion: "In any event, it must, we think, be conceded that, if the transfer of a bill of lading by way of pledge or mortgage, or

as collateral security for a loan, do not absolutely defeat the right of stoppage in transitu, the seller can not exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188."

It has been held, that a bona fide holder of a bill of lading as collateral security for advances has a title to the goods which is paramount to the unpaid vendor's right of stoppage in transitu. *Dymock v. Missouri, etc., R. Co.*, 54 Mo. App. 400; *First Nat. Bank v. Pettit*, 56 Tenn. (9 Heisk.) 447.

C., a cotton shipper from Memphis, drew drafts on T., his consignee in Boston, and had them discounted at the bank, pledging the cotton by delivery of the bills of lading. P., from whom C. purchased the cotton, attached it in transitu at Louisville. Being informed of the attachment, T. refused to accept the drafts; thereupon, the bank became a party to the suit at Louisville, and claimed the cotton. The court held, that the delivery of the bills of lading was a constructive delivery of the cotton to the bank, and that lien was created by such pledge superior to the attachment lien of P. *First Nat. Bank v. Pettit*, 56 Tenn. (9 Heisk.) 447.

13. Rescission of sale—Lien for price.—*Kearney Mill, etc., Co. v. Union Pac. R. Co.*, 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

14. Security for antecedent debt.—*St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. 434; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Peters v. Elliott*, 78 Ill. 321.

without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage in transitu.¹⁵

§ 1689. Subpurchasers of Goods.—A sale of the goods by the consignee before the termination of the transit will not defeat the right of the consignor to stop them in transit, if such sale be not made by a bona fide transfer of the bill of lading.¹⁶ While the transit continues, the right of the consignor to stop them, upon the occurrence of insolvency in the vendee, may be defeated by a bona fide sale, for a valuable consideration, accompanied with a transfer of the bill of lading. All these requisites must, however, concur. A sale for a valuable consideration, unaccompanied by a transfer of the bill of lading, although sufficient to pass the property in the goods, does not affect the power of the consignor to stop them in transitu. Absence of the bill of lading, is constructive notice that the consignee has not paid for the goods, and that the consignor has not waived his right of resuming his lien for the purchase money.¹⁷

Subpurchase upon Faith of Letter from Agent of Consignor.—As stoppage in transitu is neither inconsistent with nor a rescission of the act of sale; a letter written to the vendee, by an intermediate agent, advising of their arrival and that they are held subject to his orders, does not preclude such agent from stopping the goods in transitu for the benefit of the vendor, even as against a purchaser upon the faith of such letter.¹⁸

Consigned by Original Vendor to Subpurchaser.—When goods are sold

15. Contrary view.—*Lesassier v. Southwestern*, Fed. Cas. No. 8,274, 2 Woods 35; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Barnard v. Campbell*, 58 N. Y. 73.

16. Subpurchasers of goods.—*England.*—*Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Small v. Moates*, 9 Bing. 574; *McIwen v. Smith*, 6 Rolls App. 340; *Craven v. Ryder*, 6 Taunt. 433, 1 E. C. L. 439.

United States.—*Spring v. South Carolina Ins. Co. (U. S.)*, 8 Wheat. 268, 287, 5 L. Ed. 614.

Sale by vendee.—*Georgia.*—*Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

Illinois.—*Delta Bag Co. v. Kearns*, 112 Ill. App. 269.

Indiana.—*Pattison v. Culton*, 33 Ind. 240, 5 Am. Rep. 199.

Iowa.—*Clapp Bros. & Co. v. Sohmer & Co.*, 55 Iowa 273, 7 N. W. 639.

Massachusetts.—*Ilisley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

New York.—*Holbrook v. Vose*, 19 N. Y. Super. Ct. 76.

Ohio.—*Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471; *Jordan, etc., Co. v. James*, 5 O. 88.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

17. *Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

The right of stoppage in transitu of goods sold on a credit, when the consignee is insolvent, exists against such consignee and all purchasers from him, until there has been an actual delivery of the goods to the consignee, or to a purchaser under his order; and until such delivery has been made, and possession of the goods obtained, the title of a bona fide purchaser from the consignee, without notice, can only be made good against the exercise of such right by an assignment of the bill of lading. *Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

Possession of subpurchaser acquired by means of replevin suit.—Where goods are shipped by one to another, but are, before they reach their destination, stopped in transit because of the insolvency of the consignee, and where such consignee has attempted to make a resale of such goods, such resale is not effected where the purchaser did not receive an order upon the railroad company for such goods and did not have a bill of lading therefor; and the subsequent possession of such goods by such purchaser, acquired by means of a replevin suit, does not alter the case, notwithstanding such purchaser may in perfect good faith have paid his money in expectation of getting the goods in question. *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.

18. Subpurchase upon faith of letter from agent of consignor.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

to one person, who, before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage in transitu.¹⁹

Agreement to Transfer.—And, of course, the consignee can not affect the right of stoppage in transitu by agreeing, before receipt of the goods, to transfer them to another.²⁰

Custom to Dispense with Production of Bill of Lading.—The custom of the carrier to dispense with the production of bills of lading, and to deliver to the holders of receipted bills for freight and wharfage, can in no wise modify or qualify the right of stoppage in transitu.²¹

Subpurchaser's Knowledge That Price Has Not Been Paid.—A right of stoppage in transitu of property sold by the buyer to another is not, however, conferred by mere knowledge of the latter that the goods had not been paid for.²²

Valid Sale.—A consignor, however, loses his right to stop goods in transitu, although the consignee has become insolvent, after such consignee, having power to sell, has disposed of them, before their arrival, to a third person, unacquainted with any circumstance to taint the fairness of the transaction.²³

Carrier as Purchaser.—When goods have been shipped by common carrier and have arrived at destination and consignee has not paid the freight or indicated any intention to receive the goods, a sale by the consignee to the carrier in consideration of the unpaid freight on such goods and other pre-existing debts, does not constitute the carrier a bona fide purchaser.²⁴

Apparent Sale without Consideration.—But the rule that the right of stoppage in transitu may be defeated by a sale to a third person, and an indorsement of the bill of lading in good faith for a valuable consideration, does not apply to an apparent sale, made fraudulently, without consideration, for the purpose of defeating the right.²⁵

Sale after Delivery by Carrier.—Of course, there can be no stoppage in transitu after the goods have been delivered by the carrier to the consignee, as such delivery terminates the transitu, and the vendor's lien for the purchase money, and perfects the consignee's title to the goods; and, therefore, a subsequent sale to a bona fide purchaser rests the title to the goods in such subpurchaser.²⁶

19. Consigned by original vendor to subpurchaser.—*Eaton v. Cook*, 32 Vt. 58.

20. Agreement to transfer.—*Clapp Bros. & Co. v. Sohmer & Co.*, 55 Iowa 273, 7 N. W. 639.

21. Custom to dispense with production of bill of lading.—*Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

22. Subpurchaser's knowledge that price has not been paid.—*Shepard, etc., Lumber Co. v. Burroughs*, 62 N. J. L. 469, 41 Atl. 695.

23. Valid sale.—*Spring v. South Carolina Ins. Co. (U. S.)*, 8 Wheat. 268, 287, 5 L. Ed. 614.

24. Carrier as purchaser.—*Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

25. Apparent sale without consideration.—*Rosenthal v. Dessau (N. Y.)*, 11 Hun 49; *Schneider v. Leibs Bros. & Co.*, 3 Texas App. Civ. Cas., § 286.

Fraud.—G. agreed to sell twenty-four

mules on being informed by one D. that the money to pay for them had been deposited with a certain firm. He shipped the mules to said firm, and drew on them for the purchase money. D. fraudulently obtained from G. a statement that he had bought the mules, and on the strength of such statement obtained possession of the mules from said firm before they knew of the draft, and sold and delivered them to plaintiff's agent, who shipped them to plaintiff. Held, that G. had a right to retake the mules from the railroad company while in transit to plaintiff. *Bergman v. Indianapolis, etc., R. Co.*, 104 Mo. 77, 15 S. W. 992.

26. *United States*.—*Schmidt v. Pennsylvania, Fed. Cas. No. 12,464*, 4 Fed. 548; *Sheppard v. Newhall*, 54 Fed. 306, 4 C. C. A. 352.

Missouri.—*Klien v. Fischer*, 30 Mo. App. 568.

Nebraska.—*United States, etc., Pump Co. v. Oliver*, 16 Neb. 612, 21 N. W. 463.

New York.—*United States, etc., Pump Co. v. Oliver*, 16 Neb. 612, 21 N. W. 463;

Delivery to Subpurchaser of Bill of Goods and Order on Storekeeper.—It has been held that, where a vendor delivers to a vendee a bill of parcels of goods lying in a public store and an order on the storekeeper for their delivery, his right of stoppage in transitu ceases against a third person who purchases for a valuable consideration and bona fide.²⁷

Order upon Custom House Given to Consignee and Like Order Given by Him to Subpurchaser.—It has also, been held, however, that where the buyer of goods on credit knows his inability to pay, and frequently intends not to, the seller can reclaim the goods, even though he has given an order for them upon the custom house, where they are entered to the buyer, and the latter has in turn given a like order to a purchaser for value.²⁸

§ 1690. Pledge or Mortgage of Goods.—In General.—Goods are not those of the purchaser until they come into his possession, in any sense of the law that would enable him, in the event of his insolvency, to mortgage or pledge them in a manner to defeat the lien of the consignor, to stop them in transitu.²⁹ The right to stoppage in transitu may be defeated, however, by a bona fide mortgage for valuable consideration, accompanied with a transfer of the bill of lading.³⁰

§ 1691. Assignment for Benefit of Creditors.—Of course, an assignment by the vendee for the benefit of creditors is not a bar to the right of stoppage.³¹ Thus, where payment on a cash sale of goods has not been made, the seller may replevy them from a carrier before delivery, and the buyer's assignee in insolvency has no greater rights than the buyer.³²

Authority of Insolvency Messenger.—Nor can an insolvency messenger, before an assignee is appointed, cut off a seller's right of stoppage in transitu, by accepting goods from a carrier after the insolvent purchaser had refused to receive them in order that they might be reclaimed by the seller; the messenger being a mere middleman like the carrier, on whom no responsibility rests to accept or refuse title for the insolvency estate.³³

Hollingsworth v. Napier (N. Y.), 3 Caines 182, 2 Am. Dec. 268.

Tennessee.—*Boyd v. Mosely*, 32 Tenn. (2 Swan) 661.

27. Delivery to subpurchaser of bill of goods and order on storekeeper.—*Hollingsworth v. Napier* (N. Y.), 3 Caines 182, 2 Am. Dec. 268.

28. Order upon custom house given to consignee and like order given by him to subpurchaser.—*Ives v. Polak* (N. Y.), 14 How. Prac. 411.

29. In general.—*Condict & Co. v. Rosenfield & Son*, 36 Tex. 23; *Kingman & Co. v. Denison*, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347.

At the time of the delivery of the goods shipped to a merchant on his written order, his store and stock were in the possession of an agent who represented several mortgagees, whose mortgages were given after the goods were ordered, and under one of which a sale was made at about the date of such delivery, and the goods bid in by one of the mortgages, who remained in possession, and from whom, and the merchant who was acting as agent for the mortgagee, a portion of the goods ordered were replevied by the vendor, who claimed the right to stop them in transit. Held, that if the merchant was insolvent when he made the order, or be-

came so at any time before he claimed the delivery of the goods, the vendor's rights were paramount to any acquired at the mortgage sale; which question of actual delivery was for the jury. *Kingman & Co. v. Denison*, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347.

30. Mortgage accompanied by bill of lading.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

31. Assignment for benefit of creditors.—*Maine.*—*Tufts v. Sylvester*, 79 Me. 213, 9 Atl. 357, 1 Am. St. Rep. 303.

Massachusetts.—*Stanton v. Eager* (Mass.), 16 Pick. 467; *Arnold v. Delano* (Mass.), 4 Crsh. 33, 50 Am. Dec. 754.

Michigan.—*Lentz v. Flint, etc., R. Co.*, 53 Mich. 444, 19 N. W. 138.

New York.—*Harris v. Hart*, 13 N. Y. S. 606, affirmed in *Harris v. Pratt*, 17 N. Y. 249; *Buckley v. Furniss* (N. Y.), 17 Wend. 504.

Pennsylvania.—*Bell v. Moss* (Pa.), 5 Whart. 189.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

—*Tufts v. Sylvester*, 79 Me. 213, 9 Atl. 357, 1 Am. St. Rep. 303.

32. Lentz v. Flint, etc., R. Co., 53 Mich. 444, 19 N. W. 138.

33. Authority of insolvency messenger. 357, 1 Am. St. Rep. 303.

After Delivery by Carrier.—In the absence of fraud or notice to a carrier to stop goods in transit, the seller can not recover the same from the buyer's assignee for benefit of creditors, who paid the freight thereon, and took them into his possession as part of his assignor's stock.³⁴

§§ 1692-1710. Duration and Termination of Transit—§ 1692. Beginning of Transit.—Of course, it is essential to the exercise of the right of stoppage in transitu that the goods should be in transit at the time.³⁵

In Hands of Middleman.—There can be no stoppage in transitu without the interposition of a middleman between the seller and purchaser.³⁶ The transit begins with the delivery of the goods to the middleman for carriage to the vendee.³⁷

In Hands of Carrier.—The transit begins when the goods are delivered to the carrier for transportation to the vendee.³⁸

In Hands of Packer.—The goods may be put in transit by delivery to such a middleman as a packer.³⁹

In Warehouse.—Where the goods are in the carrier's possession, the fact that they are in its warehouse, and not loaded on the cars, does not affect the right of stoppage.⁴⁰ And it has been held that goods are in the hands of a warehouseman at the time of the sale, and are transferred on his books to the vendee's name, but the vendor is to have them forwarded, and to pay freight charges, etc., they are legally in transit until they reach their final destination.⁴¹

§ 1693. Terminates with Delivery to Vendee.—In the absence of a usage or agreement to the contrary, the right of stoppage in transitu exists until the property is actually or constructively delivered to the consignee, or his representative, or is taken possession of by him, or his representative, when, of course, the right terminates.⁴² The transit of goods is not complete, however,

34. After delivery by carrier.—*Felix v. Brandstetter Co.* (Iowa), 89 N. W. 971.

35. Branan v. Atlanta, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; *Cooper v. Bill*, 2 Hurlst. & C. 722.

36. In hands of middleman.—*Cooper v. Bill*, 3 Hurlst. & C. 722.

37. Calahan v. Babcock, 21 O. St. 281, 8 Am. Rep. 63.

38. In hands of carrier.—*Armentrout v. St. Louis, etc., R. Co.*, 1 Mo. App. 158; *Ober v. Indianapolis, etc., R. Co.*, 13 Mo. App. 81; *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. 264.

39. In hands of packer.—*Atkins v. Colby*, 20 N. H. 154; *Ellis v. Hunt*, 3 T. R. 467.

40. In warehouse.—*Hodgson v. Lay*, 7 T. R. 440; *Northey v. Field*, 2 Esp. 613.

41. Mohr v. Boston, etc., R. Co., 106 Mass. 67.

42. The transit of goods continues from the time the vendor parts with the possession until the purchaser acquires it; i. e., from the time the vendor's right to retain the goods and his right of lien are gone, to the time the vendee acquires the actual exercise of dominion and ownership over them. *Treadwell v. Aydtlett, etc., Co.*, 56 Tenn. (9 Heisk.) 388.

Terminates with delivery to vendee.—*England.*—*Bolton v. Lancashire, etc., R. Co.*, 1 C. P. 431; *Ex parte Barrow, L. R.*, 6 Ch. Div. 783; *Ex parte Cooper*, 11 Ch.

Div. 68; *James v. Griffin*, 2 Mees. & W. 623; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Coventry v. Gladstone*, 6 L. R. Eq. 44; *Jackson v. Nichol*, 5 Bing. N. C. 510.

Canada.—*McLean v. Breithaupt*, 12 Ont. App. 383.

United States.—*In re Paterson Co.*, 108 C. C. A. 493, 186 Fed. 629, 34 L. R. A., N. S., 31; *The E. H. Pray*, 27 Fed. 474; *The Natchez*, 31 Fed. 615; *In re New York, etc., Goods Co.*, 95 C. C. A. 140, 169 Fed. 612; *Ryberg v. Snell*, Fed. Cas. No. 12,190, 2 Wash. C. C. 403; *Conyers v. Ennis*, Fed. Cas. No. 3,149, 2 Mason 236.

Arkansas.—*Jacobs v. Bentley*, 86 Ark. 186, 110 S. W. 594.

Dakota.—*Powell v. Kechnic*, 3 Dak. 319, 19 N. W. 410.

Florida.—*Smith v. Gail*, 44 Fla. 803, 33 So. 527.

Georgia.—*Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164; *Branan v. Atlanta, etc., R. Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; *Macon, etc., R. Co. v. Meador Bros.*, 65 Ga. 705.

Illinois.—*Delta Bag Co. v. Kearns*, 112 Ill. App. 269.

Indiana.—*Rogers v. Schneider*, 13 Ind. App. 23, 41 N. E. 71.

Iowa.—*Alsberg, etc., Co. v. Latta*, 30 Iowa 442; *McFetridge, etc., Co. v. Piper*, 40 Iowa 627; *Clapp Bros. & Co. v. Peck*,

so as to prevent stoppage in transitu, unless there has been something on the part of the carrier amounting to an attornment.⁴³ Again, it should be noted, property sold on credit may have been delivered, so as to affect title, and yet not have come into the possession of the buyer, so as to bar the right of stoppage in transitu; the vital question being, are the goods in transit between the seller and buyer.⁴⁴

Carriage by Water.—Where the vessel is not owned or chartered by the vendee, but by the carrier, the right of stoppage in transitu continues, where goods are transmitted by water, after the arrival of the vessel, until the consignee takes possession of them.⁴⁵ A seller of goods for cash on delivery, who delivers without payment, can not, however, recover possession from the master

55 Iowa 270, 7 N. W. 587; Greve & Co. v. Dunham, 60 Iowa 108, 14 N. W. 130.

Kansas.—Symms v. Schotten, 35 Kan. 310, 10 Pac. 828.

Kentucky.—Secomb, etc., Co. v. Nutt (Ky.), 14 B. Mon. 324.

Louisiana.—Hepp v. Glover, 15 La. 461, 35 Am. Dec. 206.

Maine.—Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489.

Massachusetts.—Naylor v. Dennie (Mass.), 8 Pick. 198, 19 Am. Dec. 319; Durgy Cement, etc., Co. v. O'Brien, 123 Mass. 12; Seymour v. Newton, 105 Mass. 272; Mohr v. Boston, etc., R. Co., 106 Mass. 67; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

Michigan.—Kingman & Co. v. Denison, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347.

Missouri.—Smith Co. v. Louisville, etc., R. Co. (Mo. App.), 122 S. W. 342; St. Nicholas Hotel Co. v. Meyer-Schmid Grocer Co., 140 Mo. App. 592, 120 S. W. 714; Wheless v. Meyer-Schmid Grocer Co., 140 Mo. App. 572, 120 S. W. 708.

Nevada.—More, etc., Co. v. Lott, 13 Nev. 376.

New Hampshire.—Atkins v. Colby, 20 N. H. 154; Reynolds v. Boston, etc., R. Co., 43 N. H. 580; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; Inslee v. Lane, 57 N. H. 454.

New Jersey.—Shepard, etc., Lumber Co. v. Burroughs, 62 N. J. L. 469, 41 Atl. 695.

New York.—Stevens v. Wheeler (N. Y.), 27 Barb. 658; Covell v. Hitchcock (N. Y.), 23 Wend. 611; Harris v. Hart, 13 N. Y. S. 606; Lupin v. Marie (N. Y.), 2 Paige 169.

North Carolina.—Farrell v. Richmond, etc., R. Co., 102 N. C. 390, 37 Am. & Eng. R. Cas. 704, 3 L. R. A. 647, 9 S. E. 302, 11 Am. St. Rep. 760.

Ohio.—Jordan, etc., Co. v. James, 5 O. 88; Calahan v. Babcock, 21 O. St. 281, 8 Am. Rep. 63; Wheeling, etc., R. Co. v. Koontz, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; Koontz v. Wheeling, etc., R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, which is affirmed in 61 O. St. 551, 56 N. E. 471.

Oregon.—Frame v. Oregon Liquor Co.,

48 Ore. 272, 85 Pac. 1009, rehearing denied in 86 Pac. 791.

Pennsylvania.—Donath v. Broomhead, 7 Pa. 301; Bender & Co. v. Bowman (Pa.), 2 Leg. Gaz. 178; Hays v. Mouille & Co., 14 Pa. 48.

South Carolina.—Parker v. McIver (S. C.), 1 Desaus. 274, 1 Am. Dec. 656.

Tennessee.—Bloomington, etc., Co. v. Memphis, etc., R. Co., 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371; Mississippi Mills v. Union, etc., Bank, 77 Tenn. (9 Lea) 314; Treadwell v. Aydlett, etc., Co., 56 Tenn. (9 Heisk.) 388.

Texas.—Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; Condict & Co. v. Rosenfield & Son, 36 Tex. 23; Halff, etc., Co. v. Allyn & Co., 60 Tex. 278; Ulman, etc., Co. v. Babcock, 63 Tex. 68; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; Stuart v. Mau & Co., 2 Texas App. Civ. Cas., § 784.

Vermont.—Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768; Guilford v. Smith, 30 Vt. 49; Kitchen v. Spear, 30 Vt. 545.

Wisconsin.—Jeffris v. Fitchburg R. Co., 4 Am. & Eng. R. Cas., N. S., 608, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919; James Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108.

43. Attornment.—Jeffris v. Fitchburg R. Co., 4 Am. & Eng. R. Cas., N. S., 608, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919.

44. Quasi delivery.—Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

Statute of Georgia.—The Georgia Civil Code, § 2285, declares that the right of stoppage in transitu continues until the vendee obtains the actual possession of the goods; and it is also declared, in § 3553, of the same Code, that, if the goods are delivered before the price is paid, the seller can not retake because of failure to pay, but, until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. Branan v. Atlanta, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; Macon, etc., R. Co. v. Meador Bros., 65 Ga. 705.

45. Carriage by water.—Naylor v. Dennie (Mass.), 8 Pick. 198, 19 Am. Dec. 319; Durgy Cement, etc., Co. v. O'Brien, 123 Mass. 12.

and owners of a vessel on which they have been shipped, after the master in the usual course of business and without notice has given a negotiable bill of lading therefor to the fraudulent buyer.⁴⁶

Delivery by Log-Driving Company.—Where logs are bargained and sold, to be delivered "over the dam" at the outlet of Moosehead Lake, thence to be driven by a certain log-driving company to the purchaser's booms and the mill, the right of stoppage in transitu remains in the seller until the logs come into actual possession of the buyer at his boom; and, the buyer having become insolvent in the meantime, the seller has the right to resume the possession of the logs.⁴⁷

Intention of Parties.—As a general rule, whether the final delivery has been effected which determines the right of stoppage in transitu, is to be decided according to the intention of the parties in each case, by examining whether they contemplated any further and more absolute reduction into possession on the part of the vendee.⁴⁸

Bill of Lading as Determining Destination.—A bill of lading for goods to a railroad depot, the shipping point for a neighboring town for which they were destined, can not determine that depot as the destination contemplated between the buyer and seller. Were it otherwise, the legal effect of the bill of lading would be for the court and not the jury.⁴⁹

Undisclosed Reservations in Accepting Delivery.—The right of a vendor of goods to stop them in transitu ceases whenever they have reached their destination, and the carrier has there parted with all control of them to the vendee, regardless of undisclosed reservations of the vendee in receiving them.⁵⁰

Wrongful Refusal to Deliver.—The right of stoppage terminates only with an actual delivery, unless the carrier consents to hold the goods for the consignee or wrongfully refuses to deliver them.⁵¹

§ 1694. What Constitutes Delivery.—As to what constitutes delivery of freight by the carrier, see ante, "Transportation and Delivery by Carrier," chapter 10.

Delivery for Transmission by Forwarding House.—The delivery to a mercantile house, merely for transmission by a forwarding house to the vendee, does not amount to a delivery to the vendee.⁵²

Taking Samples, etc.—Taking samples and paying warehouse rent has been held sufficient evidence of the vendee's possession prior to an attempt to

46. Negotiable bill of lading given by master to fraudulent vendee.—*Western Transp. Co. v. Marshall* (N. Y.), 4 Abb. Dec. 575, 6 Abb. Prac., N. S., 280.

Landed on wharf.—Where goods were shipped at Troy, and directed to the vendee at Vergennes, and were landed upon the wharf at Vergennes, which was half a mile from the vendee's place of business, and it was proved that the wharf was the usual place of the vendee's receiving goods in that town, and that, after they were landed upon the wharf, neither the wharfinger, nor any person for him or for the carriers, had any charge of the goods, but that it was usual for the vendee, and others who received goods at that wharf, to receive the goods upon the wharf and transport them to their places of business, and it appeared that the goods were not subject to any lien for freight or charges, it was held that the wharf was the place of ultimate destination of the goods intended by the con-

signee, and that the goods, when landed there, came into the constructive possession of the vendee, and were beyond the bounds of the vendor's right of stoppage in transitu. *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

47. Delivery by log-driving company.—*Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

48. Intention of parties.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

49. Bill of lading as determining destination.—*Half, etc., Co. v. Allyn & Co.*, 60 Tex. 278.

50. Undisclosed reservations in accepting delivery.—*Smith v. Gail*, 44 Fla. 803, 33 So. 527.

51. Wrongful refusal to deliver.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

52. Delivery for transmission by forwarding house.—*Hays v. Mouille & Co.*, 14 Pa. 48.

stop in transitu.⁵³ But taking samples, marking, etc., are not in themselves sufficient to change the possession.⁵⁴ And it has been declared to be doubtful whether such acts on the part of the vendee as marking or sampling the goods shipped without actually taking them from the possession of the carrier amounts to such a constructive possession as to defeat the right of stoppage in transitu, unless there are some circumstances indicating that it was intended that the carrier should retain the goods as an agent for the vendee.⁵⁵

Relanding.—It has been held that the right of stoppage in transitu was terminated by the vendees having the goods relanded from the vessel, and taken to the vendor's warehouse to be repacked for transit.⁵⁶

Vendee Obtaining Possession by Fraud and Reselling.—One who ships property on a contract of sale to commission merchants to be delivered to the shipper on payment of a draft, which he forwards with a bill of lading, has a right to stop it in transitu, after it has been obtained by the purchaser by fraudulent means without payment and sold by him to an agent who has shipped such property to his principal.⁵⁷

Bill of Lading Taken in Name of Vendee.—Where, at the buyer's request, goods were shipped in his name as consignor to A, and the buyer failed, the seller, in taking the bill of lading in the name of the buyer, had lost his dominion over them, and consequently the right of stoppage in transit.⁵⁸

§ 1695. Delivery of Part.—A delivery of a portion of the goods does not in itself constitute a delivery of the whole, unless it appears that it was intended to operate as a delivery of the whole consignment.⁵⁹

53. Taking samples, etc.—*Foster v. Frampton*, 6 Barn. & Cress. 107.

54. *Whitehead v. Anderson*, 9 M. & W. 548.

55. *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

56. Relanding.—*Valpy v. Gibson*, 4 C. B. 837, 56 E. C. L. 837.

57. Vendee obtaining possession by fraud.—*Bergman v. Indianapolis, etc.*, R. Co., 104 Mo. 77, 15 S. W. 992.

58. Bill of lading taken in name of vendee.—*Treadwell v. Aydtlett, etc.*, Co., 56 Tenn. (9 Heisk.) 388.

59. Delivery of part.—*England.*—*Tanner v. Scovell*, 14 Mee. & W. 28; *Jones v. Jones*, 8 Mee. & W. 431; *Ex parte Cooper*, 11 Ch. Div. 73.

United States.—*In re Bearns*, 18 N. B. R. 500, Fed. Cas. No. 1,191.

Georgia.—*Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

Kentucky.—*Secomb, etc., Co. v. Nutt (Ky.)*, 14 B. Mon. 324.

Maine.—*Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

New York.—*Stevens v. Wheeler (N. Y.)*, 27 Barb. 658; *Buckley v. Furniss (N. Y.)*, 17 Wend. 504.

Pennsylvania.—*White v. Welsh*, 38 Pa. 396.

Wisconsin.—*Jeffris v. Fitchburg R. Co.*, 4 Am. & Eng. R. Cas., N. S., 608, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919.

Where, after the freight and wharfage were paid and the bills therefor receipted, the bill of lading was exhibited, but not assigned, and the goods, though upon the

wharf, were not actually delivered by the carrier to the consignee, the right of stoppage in transitu was not defeated by a sale to a bona fide purchaser for value, payment of the purchase money, delivery of the freight and wharfage bills, together with an order upon the carrier for the goods, and actual delivery of a part of the goods in pursuance of such order. The goods remaining undelivered when the right of stoppage was exercised were subject to the right. *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164.

Withdrawal of part of goods from bonded warehouse.—L. contracted to sell to B. 1,500 cases of wine "to arrive," at a fixed price per case, less duties. On arrival the wine was stored in the name of L. in a bonded warehouse selected by B. B. withdrew 900 cases, L. signing the authorization required by the treasury department, and then filed a petition in bankruptcy, whereupon L. withdrew the remaining 600 cases, and paid the warehouse charges on the whole 1,500 cases. The note given by B. for the amount of the purchase fell due after his failure, and was not paid. On application to expunge proof of claim for the 900 cases, on the ground that L. had no right to take the 600, and that the assignee could set off their value, held, that the right of stoppage in transit still existed as to the 600 cases. Giving the authorization as to a part was by consent of the parties, such a separation that a delivery thereof was not a constructive delivery of the whole. *In re Bearns*, Fed. Cas. No. 1,191, 18 N. B. R. 500.

Drift of Portion of Logs into Possession of Vendee.—The right of stoppage in transitu is not lost, as to logs still being driven, although some portion of the logs sold have drifted into the possession of the purchaser.⁶⁰

Intended to Operate as Delivery of Whole.—Where a delivery of a part of the goods is intended, however, to operate as a delivery of the whole, it is a constructive delivery of the whole.⁶¹

§ 1696. **Possession of Goods by Carrier after Arrival at Destination in General.**—**Effect of Mere Arrival.**—Mere arrival of the goods at their destination does not terminate the transitus, so as to defeat the right of stoppage, if they remain in the carrier's possession as carrier.⁶² So, when goods have been shipped by common carrier, and have arrived at the point of destination, and notice thereof has been given to the consignee, who does not pay the freight, or indicate an intention to receive the goods, and the goods thereafter remain in the custody of the carrier, without any agreement that the carrier shall hold the same as agent or warehouseman for the consignee, there is no delivery to the consignee, and the vendor may recover the goods by stoppage in transitu.⁶³

60. Drift of portion of logs into possession of vendee.—*Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

61. Intended to operate as delivery of whole.—*England.*—Ex parte Cooper, 11 Ch. Div. 73; *Jones v. Jones*, 8 Mee. & W. 431; *Tanner v. Scovell*, 14 Mee. & W. 28.

Kentucky.—*Secomb, etc., Co. v. Nutt (Ky.)*, 14 B. Mon. 324.

New York.—*Buckley v. Furniss (N. Y.)*, 17 Wend. 504; *Stevens v. Wheeler (N. Y.)*, 27 Barb. 588.

Pennsylvania.—*White v. Welsh*, 38 Pa. 396.

Wisconsin.—*Jeffris v. Fitchburg R. Co.*, 4 Am. & Eng. R. Cas., N. S., 608, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919.

62. England.—*Bolton v. Lancashire, etc., R. Co.*, 1 C. P. 431; Ex parte Cooper, 11 Ch. Div. 68; *Crawshay v. Eades*, 1 B. & C. 181, 8 E. C. L. 78; *Holst v. Pownall*, 1 Esp. 240; *Tucker v. Humphrey*, 4 Bing. 516, 15 E. C. L. 63.

Canada.—*McLean v. Breithaupt*, 12 Ont. App. 383.

United States.—In re New York, etc., Goods Co., 95 C. C. A. 140, 169 Fed. 612.

Arkansas.—*Jacobs v. Bentley*, 86 Ark. 186, 110 S. W. 594.

Dakota.—*Powell v. Kechnie*, 3 Dak. 319, 19 N. W. 410.

Georgia.—*Macon, etc., R. Co. v. Meador Bros.*, 65 Ga. 705.

Indiana.—*Rogers v. Schneider*, 13 Ind. App. 23, 41 N. E. 71.

Iowa.—*McFetridge, etc., Co. v. Piper*, 40 Iowa 627; *Greve & Co. v. Dunham*, 60 Iowa 108, 14 N. W. 130; *Alsberg, etc., Co. v. Latta*, 30 Iowa 442; *Clapp Bros. & Co. v. Peck*, 55 Iowa 270, 7 N. W. 587.

Kansas.—*Symms v. Schotten*, 35 Kan. 310, 10 Pac. 828.

Massachusetts.—*Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375; *Naylor v. Dennie (Mass.)*, 8 Pick.

198, 19 Am. Dec. 319; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Seymour v. Newton*, 105 Mass. 272.

Missouri.—*Letts-Spencer Grocer Co. v. Missouri Pac. R. Co.*, 138 Mo. App. 352, 122 S. W. 10.

New Hampshire.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580; *Atkins v. Colby*, 20 N. H. 154; *Inslee v. Lane*, 57 N. H. 454.

New York.—*Covell v. Hitchcock (N. Y.)*, 23 Wend. 611; *Harris v. Hart*, 13 N. Y. S. 606.

North Carolina.—*Farrall v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760, 37 Am. & Eng. R. Cas. 704; *Jackson v. Nichol*, 5 Bing., N. Cas., 508.

Ohio.—*Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63; *Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, which is affirmed in 61 O. St. 551, 56 N. E. 471; *Wheeling, etc., R. Co. v. Koontz*, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

Pennsylvania.—*Hays v. Mouille & Co.*, 14 Pa. 48.

South Carolina.—*Parker v. McIver (S. C.)*, 1 Desaus. 274, 1 Am. Dec. 656.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784; *Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278.

Vermont.—*Guilford v. Smith*, 30 Vt. 49; *Kitchen v. Spear*, 30 Vt. 545.

63. Wheeling, etc., R. Co. v. Koontz, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

A., residing in Vermont, purchased goods of B., in New York, to be forwarded by railroad to R., where A. resided. Immediately on their arrival at R., and before they were placed in the warehouse of the railroad company, A. having in the meantime become insolvent, C., a creditor of A., caused the goods to be attached, and to be taken directly from the

Question for Jury.—As affecting the right of stoppage in transitu on account of the insolvency of the vendee, it is a question for the jury whether the transit has ended when the vendee, being unable to pay the freight, was, to save demurrage, allowed by the railroad to unload the cars, and pile the goods in its yard until he could pay the freight.⁶⁴

Intention to Return Goods after Insolvency.—Where goods forwarded by rail arrive at their destination, and the carrier notifies the consignee thereof, but they are not delivered for several days, and until after the appointment of a receiver of the consignee's property, the question whether the consignee, by allowing the goods to remain with the carrier, intended, in the exercise of the right of a purchaser to return goods after insolvency, to preserve the right of the seller to stop in transitu, is for the jury.⁶⁵

In Freight House Awaiting Delivery.—Goods are deemed to be in transitu, not only while they remain in the possession of the carrier, but also when they are in any place of deposit, connected with the transmission and delivery of them.⁶⁶ Thus, where goods are in a carrier's freight house at a place to which they were consigned, and the consignee has not received them, nor taken any other action in regard to them, they are still in the carrier's possession, and subject to the exercise of the right of stoppage in transitu.⁶⁷ And the transfer of goods, consigned in the usual general terms, by a consignor on credit, from the coaches of a carrier by railway, to a freight depot or warehouse at the station designated for their discharge, in the vicinity of the consignee's

cars and removed away from the railroad. The officer paid the freight upon the goods, and retained possession of them under the attachment, until B. demanded them of him. Held, that B.'s right of stoppage in transitu had not ceased at the time of the attachment or of the demand, and that he was entitled to the goods. *Kitchen v. Spear*, 30 Vt. 545.

64. Question for jury.—*Rogers v. Schneider*, 13 Ind. App. 23, 41 N. E. 71.

65. Intention to return goods after insolvency.—*Harding Paper Co. v. Allen*, 65 Wis. 576, 27 N. W. 329.

66. In freight house awaiting delivery.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278; *Condict & Co. v. Rosenfield & Son*, 36 Tex. 23; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

67. United States.—In re New York, etc., Goods Co., 169 Fed. 612, 95 C. C. A. 140.

Dakota.—*Powell v. Kechnie*, 3 Dak. 319, 19 N. W. 410.

Iowa.—*Alsberg, etc., Co. v. Latta*, 30 Iowa 442; *Clapp Bros. & Co. v. Peck*, 55 Iowa 270, 7 N. W. 587.

Kansas.—*Symms v. Schotten*, 35 Kan. 310, 10 Pac. 828.

Massachusetts.—*Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

Missouri.—*Letts-Spencer Grocer Co. v. Missouri Pac. R. Co.*, 138 Mo. App. 352, 122 S. W. 10.

New Hampshire.—*Inslee v. Lane*, 57 N. H. 454.

North Carolina.—*Williams v. Hodges*, 113 N. C. 36, 18 S. E. 83.

Ohio.—*Wheeling, etc., R. Co. v. Koontz*,

61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435, affirming 5 N. P. 15, 7 O. Dec. 478; *Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63; *Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

Pennsylvania.—*Bender & Co. v. Bowman (Pa.)*, 2 Leg. Gaz. 178.

Texas.—*Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Tillman v. Kansas City Distilling Co.*, 3 Texas App. Civ. Cas., § 285; *Condict & Co. v. Rosenfield & Son*, 36 Tex. 23; *Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

The transfer of goods from the cars into the depot or warehouse at the station designated for their discharge, in the vicinity of the buyer's place of business, there to await the payment by him of the charges thereon, does not ipso facto constitute a delivery thereof, terminating the right of stoppage in transitu. *Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63.

A. sold whisky on credit to C., shipping by the D. Railroad. After the whisky reached its destination, but before it left the car, it was levied on at the suit of B., a creditor of C. It was stored in D.'s warehouse soon after, and, while there, A. gave D. notice not to deliver to C. until paid for. C. never demanded the liquor, and never paid for it or the freight on it. In a feigned issue between A. and B., to test the ownership of the whisky, held, that the levy by the sheriff did not impair the right of stoppage in transitu, as he could seize only the interest which the vendee had, and that the transitus was not ended. Judgment for A. *Bender & Co. v. Bowman (Pa.)*, 2 Leg. Gaz. 178.

place of business, there to await the payment by him of the charges thereon, does not ipso facto constitute a delivery thereof; but will be deemed the reasonable exercise of a right and duty by the carrier in the course and furtherance of their transit, referable to and in virtue of his original employment by the consignor, not as an act of, but as precedent to delivery.⁶⁸ So, when goods have been shipped by common carrier, and have arrived at the point of destination, and notice thereof has been given to the consignee, who does not pay the freight nor indicate an intention to receive the goods, and the goods thereafter remain in the custody of the carrier without any agreement that the carrier shall hold the same as agent or warehouseman for the consignee, there is no delivery to the consignee, and the vendor may recover the goods by stoppage in transitu.⁶⁹

Held in Warehouse for Default in Payment of Freight.—If goods have arrived at their destination and are lodged in a warehouse for default of payment of freight, they are not deemed in possession of vendee so as to defeat the right of stoppage in transitu.⁷⁰ Thus, evidence that lumber was delivered to a carrier for transportation to the consignee, and that the company had piled it in a shed after it had reached its destination, and held it for payment of freight and charges, under a local custom allowing the consignee to take possession on payment of such freight and charges, shows that the lumber was in possession of the company as a carrier, and not as a warehouseman, or as the agent of the consignee; so that a stoppage in transit for insolvency of such consignee was permissible.⁷¹

§ 1697. Possession of Carrier as Agent of Consignee or as Warehouseman.—The carrier may convert himself into an agent for the vendee, or receive and store the goods as a warehouseman, and thus terminate the transit before the goods come into the actual possession of the vendee. This constitutes a constructive delivery to the vendee, and the vendor's right of stoppage in transit is thereby lost.⁷²

68. *Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63.

69. *Wheeling, etc., R. Co. v. Koontz*, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435, affirming 5 N. P. 15, 7 O. Dec. 478.

70. **Held in warehouse for default in payment of freight.**—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Inslee v. Lane*, 57 N. H. 454.

71. *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919, 4 Am. & Eng. R. Cas., N. S., 608.

Where the consignee of a car load of lumber failed to pay the freight, and remove it from the car, within the time required by the rules of the road, and the railroad company stored the same in their sheds, where it was held for two months for freight and storage charges, at the end of which time the consignor notified the railroad not to deliver the lumber, it was not in the actual or constructive possession of the consignee, and hence the transit had not ended, and the consignor was still entitled to exercise his right of stoppage in transitu. *Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

72. *England.*—**Possession of carrier as**

agent of consignee or as warehouseman.—*Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Scott v. Pettit* (Eng.), 3 B. & P. 469; *Richardson v. Goss* (Eng.), 3 B. & P. 127; *Ex parte Barrow*, L. R. 6 Ch. Div. 783; *Bolton v. Lancashire & Y. R. Co.*, L. R. 1 C. P. 431; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *James v. Griffin*, 2 Mees. & W. 623; *Jackson v. Nichol* (Eng.), 5 Bing., N. Cas., 510; *Molloy v. Hay* (Eng.), 3 M. & R. 396; *Rowe v. Pickford* (Eng.), 1 Moore 526; *Whitehead v. Anderson*, 9 Mees. & W. 518. *Dakota.*—*Powell v. Kechnie*, 3 Dak. 319, 19 N. W. 410.

Indiana.—*Rogers v. Stneider*, 13 Ind. App. 23, 41 N. E. 71.

Iowa.—*McFetridge, etc., Co. v. Piper*, 40 Iowa 627; *Clapp Bros. & Co. v. Peck*, 55 Iowa 270, 7 N. W. 587.

Kentucky.—*Secomb, etc., Co. v. Nutt* (Ky.), 14 B. Mon. 324.

Mississippi.—*Langstaff v. Stix*, 64 Miss. 171, 1 So. 97, 28 Am. & Eng. R. Cas. 85, 60 Am. St. Rep. 49.

New Hampshire.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580; *Inslee v. Lane*, 57 N. H. 454.

New York.—*Stevens v. Wheeler* (N. Y.), 27 Barb. 658.

Ohio.—*Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in

Not Necessary That Freight Should Be Paid.—The carriers change of character into that of an agent to keep the goods for the vendee, is not inconsistent with his right to retain the goods in his custody until his lien upon them for carriage or other charges is satisfied.⁷³

Agreement with Vendee's Assignee.—Where goods are held in storage by the carrier under an agreement between it and the vendee's assignee, there is a constructive delivery, and the vendor's right of stoppage in transitu is lost.⁷⁴ A vendor's right of stoppage in transitu continues, however, until transitus is ended and goods voluntarily and actually in the hands of vendee or agent. Hence, his right is not destroyed by the carrier's uncertain response to vendee's request to hold goods a few days after goods had arrived at their destination.⁷⁵ And the mere fact that the consignee of boxes of tobacco agreed with the carrier that they be by it set aside in its depot to be sold, and the proceeds used to pay past-due freights, the balance, if any, to go to the consignee, did not show such actual delivery as to prevent a stoppage in transitu by the consignor.⁷⁶ Nor does the mere payment of the freight charges terminate the transit, as a constructive delivery will not be implied from such payment.⁷⁷

15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471; *Jordan, etc., Co. v. James*, 5 O. 88.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

After the freight on goods transported by rail had been paid by the consignee, and the goods received for, and left in the depot to be called for, the agent of the railroad company discovered, upon opening his mail, that he had instructions not to deliver them. Held, that it was too late to exercise the right of stoppage in transitu. *Langstaff v. Stix*, 64 Miss. 171, 1 So. 97, 60 Am. St. Rep. 49, 28 Am. & Eng. R. Cas. 85.

73. Not necessary that freight should be paid.—*Hall v. Dimond*, 63 N. H. 565, 3 Atl. 423; *Allen v. Gripper*, 2 C. & J. 218.

Security for freights.—A consignee of a safe, who was owing the carrier for freight on other goods, said to the carrier's agent: "I place this safe in your hands as security for what I owe." Held, inasmuch as the carrier already had a lien on the safe for freights, there was no such actual delivery to the consignee as to defeat the shipper's right of stoppage in transitu. *Farrell v. Richmond, etc., R. Co.*, 37 Am. & Eng. R. Cas. 704, 102 N. C. 390, 3 L. R. A. 647, 9 S. E. 302, 11 Am. St. Rep. 760.

In warehouse pending payment of duties and freight.—*P. & Co.*, residing at Burlington, purchased flour on credit of *G. H. & Co.* at Toronto, Canada, and ordered it shipped to their agents, *F. & H.*, at Ogdensburg, N. Y., who were in the habit of receiving *P. & Co.*'s flour, and forwarded it as directed by them. The bill of lading described *F. & H.* as consignees, but mentioned the flour as "to be forwarded to *P. & Co.*, Burlington." The flour arrived by steamer at Ogdensburg, whence there was a railroad to Burlington. Neither the freight nor

the government duties having been paid, the flour was placed, subject to the provisions of the United States warehousing system, in a warehouse belonging to the railroad company, but under the charge of the owners of the steamboat, from which warehouse it could not be moved until the freight and duties were paid, or the latter were secured according to the United States laws. Neither would the flour have been forwarded from Ogdensburg until so ordered by *F. & H. P. & Co.*, having become insolvent, *F. & H.*, having been directed by the assignees to hold said flour for them, notified the warehouseman to retain the flour until further orders. Held, that, under these circumstances, *G. H. & Co.* could not exercise the right of stoppage in transitu over the flour. *Guilford v. Smith*, 30 Vt. 49.

74. Agreement with vendee's assignee.—*Williams v. Hodges*, 113 N. C. 36, 18 S. E. 83.

75. Uncertain response of carrier.—*Stuart v. Mau & Co.*, 2 Texas App. Civ. Cas., § 784.

There is no constructive possession on the part of the vendee, unless the relation in which the carrier stood before, as a mere instrument of conveyance to an appointed place of destination, has been altered by an express or implied contract between the vendee and the carrier, that the latter should hold or keep the goods as the agent of the vendee. *Foster v. Frampton*, 6 B. & C. 107, 13 E. C. L. 111; *Whitehead v. Anderson*, 9 M. & W. 508; *Coventry v. Gladstone*, L. R., 6 Eq. 44; and *Donath v. Broomhead*, 7 Pa. 301.

76. Set aside in depot to be sold—Payment of freights.—*Macon, etc., R. Co. v. Meador Bros.*, 65 Ga. 705.

77. Payment of freight.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

§ 1698. Delivery by Carrier to Third Person in General.—As a general rule, a vendor of goods can not exercise the right of stoppage in transitu after the goods have been delivered by the carrier to a third person on the vendee's order.⁷⁸ And this is so, although they have never been delivered to the vendee at the place directed by him at the time of the purchase.⁷⁹ So, if goods are sent to a forwarding merchant, to await in his hands the instructions of the purchaser respecting any further transit, their transitus is at an end when they reach his hands, so that they can not be stopped by the vendor.⁸⁰ A delivery of property by the carrier on the order of the consignee to a third person, is not, however, a constructive delivery to the consignee against the consignor's right of stoppage, unless such person takes possession as the agent of the consignee.⁸¹

Power to Change Destination.—If a party to whom goods are delivered is clothed with a general and unlimited power to receive them and alter their destination, the transit ends when they reach his hands, as between vendor and vendee.⁸²

Purpose of Order.—It has been held that the fact that goods were received at the nearest railway depot to their place of destination by one who exhibited the bill of lading to the carrier and had an order for their delivery from the buyer does not show that the goods had ceased to be in transitu, in the absence of evidence showing the purpose for which the order for their delivery was given.⁸³

§ 1699. Delivery by Carrier to Agent, or Local Carrier for Transmission to Vendee.—In General.—In the absence of an express or implied understanding to the contrary, the employment of a carrier by a consignor of goods on credit, constitutes all middlemen into whose custody they pass agents of the consignor, for their transportation and delivery; until the complete performance of which duty the goods consigned are deemed to be in transitu.⁸⁴

78. Delivery by carrier to third person.—*Biggs v. Barry*, Fed. Cas. No. 1,402, 2 Curt. 259; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Stevens v. Wheeler* (N. Y.), 27 Barb. 658; *Schneider v. Leibs, Bros. & Co.*, 3 Texas App. Civ. Cas., § 286.

By terms of a bought and sold note, A. sold a quantity of iron to C. of B., "deliverable at E." The iron was forwarded to E., where it was loaded by C.'s agent upon a vessel chartered by him to carry the iron to B. An invoice of the iron was sent to C. and the iron was deliverable to him by the terms of the bill of lading. While the iron was at E., a bank lent C. a sum of money upon the security of a warehouse receipt issued by a warehouseman in B. to C. On receipt of the bill of lading, C. indorsed it in blank, to the warehouseman, who thereupon issued a new warehouse receipt to the bank. On the subsequent arrival of the vessel, the warehouseman acting as agent for the bank, took possession of the iron. On the day of the arrival of the vessel, C. became insolvent. Held, that A. could not subsequently stop the goods in transitu. *Brooke Iron Co. v. O'Brien*, 135 Mass. 442.

79. Delivery at different place.—*Stevens v. Wheeler* (N. Y.), 27 Barb. 658.

80. Forwarding merchant.—*Biggs v. Barry*, Fed. Cas. No. 1,402, 2 Curt. 259.

81. As agent of consignee.—*Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

82. Power to change destination.—*Pottinger v. Hecksher* (Pa.), 2 Grant Cas. 309.

83. Purpose of order.—*Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278.

Order to deliver to local carrier.—The consignee of certain goods, being indebted to a bank, authorized the cashier to pay the freight on the said goods, receive possession, and have the dray line haul the same to the consignee's store. The order given by the consignee to the cashier directed the delivery of the goods to the dray line. After presenting the order to the carrier, the cashier requested another person to see the goods delivered to the said line. Held, that this was not a delivery to the consignee; and that attachments, therefore, levied at the instance of other creditors, while the goods were at the station or on the way to the store, were ineffectual to impair the consignor's right of stoppage. *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

84. Middleman agents of consignor.—*Calahan v. Babcock*, 21 O. St. 281, 8 Am. Rep. 63.

Delivery Merely for Transmission.—If a delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a delivery to the vendee.⁸⁵ Thus, a constructive delivery of goods to an agent of the vendee, for the purpose of being transmitted to the vendee, though vesting the property in the vendee for all other purposes, will not destroy the vendor's right to stop in transitu.⁸⁶ And depositing goods at an intermediate point with the vendee's agent, to be forwarded, does not terminate the right of stoppage in transitu.⁸⁷ So, if an agent be clothed only with specific and limited authority to forward goods to a particular destination, the transitus is not at an end until the goods have reached the place named by the buyer to the seller as such destination.⁸⁸

Without Power to Change Ultimate Destination.—Where goods have been sold, and, while on their way to their final destination, come into the hands of a forwarder, who detains them in his custody, but has no power to change their ultimate destination, only holding them till he receives orders as to the time and mode of shipment, there being no proof of any intended change of place as to their destination, the right of stoppage in transitu is not ended by delivery to such forwarder.⁸⁹

Shipping Agent Appointed by Buyer—Awaiting Directions.—Nor is a seller's right of stoppage in transitu terminated by the goods coming to the hands of a shipping agent appointed by the buyer, though they are delivered to him to wait for directions in respect to the time and mode of shipment to the buyer at an ultimate destination previously fixed, and not to be affected by such subsequent directions, as the transit continues until the goods come to the possession of the buyer, or of some agent authorized to act in respect to the disposition of them otherwise than by forwarding them to the buyer.⁹⁰

Delivery by Carrier to Local Carrier in General.—It may be stated as a general rule, supported by the weight of authority, that while the goods are delivered by the carrier to a transfer company, or other local carrier merely for conveyance to the vendee, the right of stoppage is not thereby terminated.⁹¹ Thus,

85. Delivery merely for transmission.—*Connecticut.*—Aguirre v. Parmelee, 22 Conn. 473.

Minnesota.—Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096.

Oregon.—Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009, rehearing denied, 86 Pac. 791.

Pennsylvania.—Hays v. Mouille & Co., 14 Pa. 48; Cabeen v. Campbell, 30 Pa. 254.

Texas.—Halff, etc., Co. v. Allyn & Co., 60 Tex. 278; Stuart v. Mau & Co., 2 Texas App. Civ. Cas., § 784.

86. Parker v. McIver (S. C.), 1 De-saus. 274, 1 Am. Dec. 656.

87. Depositing with vendee's agent at intermediate point.—Markwald, etc., Co. v. Creditors, 7 Cal. 213; Blackman v. Pierce, 23 Cal. 509.

88. Pottinger v. Hecksher (Pa.), 2 Grant Cas. 309.

A seller consigned goods to the buyer. A third person, engaged in the warehouse and forwarding business at an intermediate point, had authority from the buyer to receive from the carrier all goods consigned to him and to forward the same to the point of destination when ordered to do so. The third person obtained possession of the goods pursu-

ant to such authority. Held, that the third person was a mere forwarding agent, and the goods were in transit while in his possession, and subject to the right of the seller to take possession thereof on the buyer becoming insolvent. Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009, rehearing denied, 86 Pac. 791.

89. Without power to change ultimate destination.—Harris v. Hart, 13 N. Y. S. 606, affirmed in 17 N. Y. 249.

90. Shipping agent appointed by buyer—Awaiting directions.—Harris v. Pratt, 17 N. Y. 249, affirming Harris v. Hart, 13 N. Y. S. 606.

91. Delivery by carrier to local carrier in general.—*United States.*—In re Burke & Co., 140 Fed. 971.

Michigan.—White v. Mitchell, 38 Mich. 390.

Minnesota.—Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096.

Missouri.—Scott Bros. v. Grimes Dry Goods Co., 48 Mo. App. 521.

New York.—Buckley v. Furniss, 15 Wend. 137.

Pennsylvania.—Hays v. Mouille & Co., 14 Pa. 48.

Texas.—Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

the delivery of goods to a drayman, for the purpose of being taken to a transportation office and then shipped to the buyer, is not such a delivery as will prevent the right of stoppage in transitu.⁹²

§ 1700. Delivery to Local Carrier Selected by Consignee.—It is immaterial in this connection that the local carrier, or other forwarding agent was selected by the consignee or purchaser.⁹³ Thus, goods purchased by one at a distance, forwarded to a point, and there taken by a carrier of the purchaser, to be transported to the residence of the purchaser, may be stopped in transitu, on the failure of the purchaser, before they reach his residence.⁹⁴ And where goods sold are shipped by rail, and a transfer company, under a previous general order of the buyer, receives the goods at the depot to convey them to the buyer's place of business, the goods are still in transitu, and the seller may still exercise his right of stoppage.⁹⁵

Logs Delivered to Booming Company.—But, where logs were to be driven by the sellers to a certain point, but before they reached it their agent in charge of driving the logs turned them over to a booming company by the purchasers' order, it was held that the receipt of the logs by the booming company amounted to an appropriation of the logs by, and transfer of possession to, the purchasers, which deprived the sellers of any right of stoppage in transitu.⁹⁶

§ 1701. Deposited by Carrier at Intermediate Point.—Possession of Warehouseman at Intermediate Point.—The right of stoppage in transitu continues while the goods remain in the hands of a warehouseman, though at the place to which they were directed to be sent, if that be an intermediate point between the place of sale and the ultimate destination of the goods.⁹⁷

92. Drayman.—*Hays v. Mouille & Co.*, 14 Pa. 48.

93. Delivery to local carrier selected by consignee.—*United States.*—In re *Burke & Co.*, 140 Fed. 971.

Missouri.—*Scott Bros. v. Grimes Dry Goods Co.*, 48 Mo. App. 521.

New York.—*Harris v. Pratt*, 17 N. Y. 249, affirming 13 N. Y. S. 606; *Buckley v. Furniss* (N. Y.), 15 Wend. 137.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Halff, etc., Co. v. Allyn & Co.*, 60 Tex. 278; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

The consignee of certain goods, being indebted to a bank, authorized the cashier to pay the freight on the said goods, receive possession, and have the dray line haul the same to the consignee's store. The order given by the consignee to the cashier directed the delivery of the goods to the dray line. After presenting the order to the carrier, the cashier requested another person to see the goods delivered to the said line. Held, that this was not a delivery to the consignee. *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

94. Buckley v. Furniss (N. Y.), 15 Wend. 137.

95. Received by transfer company under general order.—*Scott Bros. v. Grimes Dry Goods Co.*, 48 Mo. App. 521.

Goods bought, but not paid for, were shipped by the seller, addressed to the street number of the purchasers' store. On their arrival in the city, they were de-

livered by the railroad company to a local transfer company having a general order from the purchasers to receive goods in their behalf, and were taken to the store, which was found closed because of the purchasers' insolvency. An adjudication of bankruptcy followed; the goods being held in storage by the transfer company. Held that, not having reached the destination contemplated by the shipper's directions, the goods were still in transit, and subject, in the hands of the local company, to the seller's right of stoppage, as against the trustee of the bankrupts. In re *Burke & Co.*, 140 Fed. 971.

96. Logs delivered to booming company.—*Muskegon Booming Co. v. Underhill*, 43 Mich. 629, 5 N. W. 1073.

97. Possession of warehouseman at intermediate point.—*Covell v. Hitchcock* (N. Y.), 23 Wend. 611.

Goods were forwarded by railroad, and while in transitu the vendor informed the railroad company that he claimed to stop the goods. The company then delivered them to the warehousemen and forwarders, who were not authorized by the vendee to receive them, but to whom the railroad company were in the habit of delivering goods, to be forwarded or stored till called for and the freight paid; the warehousemen paying the freight in the first instance. It was held that the possession of the warehousemen was the possession of the company, and, therefore, that the delivery to them was not a delivery to the vendee and an end of the transit. *O'Neill v. Garrett*, 6 Iowa 480.

Warehouseman with Authority to Sell.—The seller has the right of stoppage in transitu as to goods sold for cash, to be paid for on receipt of the invoice, where they were warehoused by the master of the canal boat on which they were loaded, on its being stopped by ice, although the purchaser had given authority to the warehouseman to sell the goods if he could obtain a specified price.⁹⁸

§ 1702. Agent, or Local Carrier, Converted into Special Agent for Vendee.—If the goods be delivered to a carrier or agent for safe custody, or for disposal on the part of a vendee, and the middleman is, by the agreement, converted into a special agent for the buyer, the transit of the goods terminates, and with it the right of stoppage.⁹⁹ Thus, the deposit of goods, when they have reached their destination in a warehouse, subject to the order and control of the buyer, is an executed delivery, as effectual to defeat the right of stoppage in transitu as if they had been deposited in the warehouse of the buyer; and a deposit in like manner in the warehouse of the vendor divests his right to retain for the price which may be unpaid.¹ So, when goods have reached the place of their destination, and are delivered either to the vendee, or, in his absence, to a third person selected by the carrier to keep them for the vendee, the vendor's right of stoppage in transitu is at an end.² And where goods are by direction of the vendee delivered by the carrier to a particular warehouseman, the question as to whether the right of stoppage in transitu still exists depends upon the question as to the capacity in which the warehouseman received the goods, whether as the agent of the vendee or of the carrier; and this for the jury.³

Authority to Change Destination.—Where an intermediate delivery occurs before goods sold reach their ultimate destination, if the party to whom they are thus delivered has authority to receive them and give them a new destination not originally intended, the right of stoppage in transitu is gone.⁴

§ 1703. Seizure under Attachment or Execution.—See ante, "Effect of Attachment, Execution, or Other Lien against Vendee," § 1684.

§ 1704. Intercepted at Intermediate Point by Vendee or His Agent.—In General.—The vendee may take possession of the goods at an intermediate point, and thereby terminate the vendor's right of stoppage in transitu.⁵

98. Warehouseman with authority to sell.—In re Foot, Fed. Cas. No. 4,907, 11 Blatchf. 530.

99. Half, etc., Co. v. Allyn & Co., 60 Tex. 278; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Cabeen v. Campbell*, 30 Pa. 254.

1. Deposited subject to order of vendee.—*Frazer & Co. v. Hilliard* (S. C.), 2 Strob. 309.

2. Person selected by carrier to hold for vendee.—*Lane v. Robinson* (Ky.), 18 B. Mon. 623.

3. Capacity of warehouseman.—*Hoover v. Tibbits*, 13 Wis. 79.

4. Authority to change destination.—*Cabeen v. Campbell*, 30 Pa. 254.

5. In general.—*England.*—*Whitehead v. Anderson*, 9 M. & W. 518; *Jackson v. Nichol*, 5 Bing. N. Cas. 508, 35 E. C. L. 202; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; *Cork Distilleries Co. v. Great Southern R. Co.*, 7 L. R. H. L. 269; *Jones v. Jones*, 8 Mee. & W. 431.

Kentucky.—*Wood v. Yeatman* (Ky.), 15 B. Mon. 270.

Massachusetts.—*Mohr v. Boston, etc., R. Co.*, 106 Mass. 67.

Montana.—*Walsh v. Blakely*, 6 Mont. 194, 9 Pac. 809.

New York.—*Stevens v. Wheeler* (N. Y.), 27 Barb. 658; *Harris v. Pratt*, 17 N. Y. 249.

Ohio.—*Jordan, etc., Co. v. James*, 5 O. 88; *Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

Pennsylvania.—*Cabeen v. Campbell*, 30 Pa. 254.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Poole v. Houston, etc., R. Co.*, 58 Tex. 134, 9 Am. & Eng. R. Cas. 197.

Goods bought in P., to be sent to T., were attached by a general creditor at an intermediate place, to which they had been consigned. The vendee, being at the place at the time, induced Y., a third party, to release the same from attachment. Y., for indemnity, required the delivery of the goods by the original consignee to another firm of the same place, to be by them forwarded, which was done. Held, that this was sufficient possession by the vendee to bar the right

Mere Demand at Intermediate Point.—Mere demand by the vendee at an intermediate point does not, however, deprive the vendor of his right of stoppage in transitu.⁶

Termination of Voyage by Vendee.—In general, the termination of the voyage is at the place of ultimate destination, mentioned by the vendee to the vendor; but the consignee may determine the voyage and the right of stoppage in transitu, by receiving the goods, by agent, at an intermediate point,⁷ provided such receipt be not made with a view to the transmission of the goods to their original destination.⁸

Intercepted at Intermediate Point by Vendee's Agent for Reshipment to Original Destination.—The vendor's right of stoppage is not terminated by the vendee's agent taking possession of the goods at an intermediate point under orders to ship to the vendee at the original place of delivery.⁹

Change of Destination by Agent.—But where they are intercepted by an agent of the vendee having authority to change their destination;¹⁰ or to hold them for further orders, the transit is thereby terminated.¹¹

Intercepted by Vendee's Agent for Benefit of Third Parties.—The right of stoppage in transitu remains, although the vendee's agent, acting for the benefit of certain vendors of other goods accompanying those in question, intercept all the goods on their passage, take possession of them, and, erasing the vendee's name, re-mark them with a private mark, without any direction, and send them forward; the goods being now on the carriers' manifest, directed to be forwarded to the care of a third party, at a point on the actual route to their original place of destination.¹²

Part Sold While in Transit.—Nor will the mere fact that a part of the goods, by order of the purchaser, are sold on the way, prevent the vendor from exercising the right of stoppage in transitu with respect to the remainder.¹³

§ 1705. Delivery to Ship Owned or Hired by Buyer.—On Ship of Vendee.—On the question whether the delivery of the goods on board a vessel owned or chartered by the vendee is such a delivery as to defeat the right of stoppage in transitu, the American authorities do not agree; some of them holding that if goods are delivered on board the ship of the consignee or vendee, to

of stoppage. *Wood v. Yeatman* (Ky.), 15 B. Mon. 270.

Taking forcible possession at intermediate point.—Parke, B., in *Whitehead v. Anderson*, 9 M. & W. 518, said: "If the vendee take them out of the possession of the carrier into his own, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though in case of the absence of the carrier's consent it may be a wrong to him for which he will have a right of action."

6. Mere demand at intermediate point.—*Jackson v. Nichol*, 5 Bing. N. Cas., 508, 35 E. C. L. 202.

7. Termination of voyage by vendee.—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

8. Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

9. Intercepted at intermediate point by vendee's agent for reshipment to original destination.—*England*.—*Kendall v. Marshall*, 11 Q. B. Div. 364.

United States.—*In re Foot*, Fed. Cas. No. 4,907, 11 Blatchf. 530.

California.—*Markwald, etc., Co. v. Creditors*, 7 Cal. 213.

Kentucky.—*Secomb, etc., Co. v. Nutt* (Ky.), 14 B. Mon. 324.

New York.—*Harris v. Hart*, 13 N. Y. S. 606.

Pennsylvania.—*Cabeen v. Campbell*, 30 Pa. 254.

Texas.—*Poole v. Houston, etc., R. Co.*, 58 Tex. 134, 9 Am. & Eng. R. Cas. 197; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

10. Change of destination by agent.—*Dixon v. Baldwin*, 5 East 175; *Secomb, etc., Co. v. Nutt* (Ky.), 14 B. Mon. 324; *Walsh v. Blakely*, 16 Mont. 194, 9 Pac. 809; *Cabeen v. Campbell*, 30 Pa. 254.

11. Held for further orders.—*Dixon v. Baldwin* (Eng.), 5 East 175; *Secomb, etc., Co. v. Nutt* (Ky.), 14 B. Mon. 324; *Walsh v. Blakely*, 16 Mont. 194, 9 Pac. 809; *Cabeen v. Campbell*, 30 Pa. 254.

12. Intercepted by vendee's agent for benefit of third parties.—*Hays v. Mouille & Co.*, 14 Pa. 48.

13. Part sold while in transit.—*Secomb, etc., Co. v. Nutt* (Ky.), 14 B. Mon. 324.

be transported to him, the vendor has the right, where the vendee becomes insolvent, to stop the goods in transitu, at any time before they come into the actual possession of the consignee, in the same manner as if delivered on board a general ship;¹⁴ and that delivery of goods to the captain of a ship, fitted out by the purchaser solely, is not such a delivery as to take away the vendor's right to stop the goods in transitu, upon the insolvency of the purchaser,¹⁵ and there are also decisions to the effect that if goods be shipped on the credit and risk of the consignee, whether he be the owner or the hirer of the ship, and the actual possession of the consignee or his assigns, after the termination of the voyage, be provided for in the bills of lading, the consignor, after the shipment, will have a right to stop or countermand the delivery of the goods,¹⁶ and that if an actual possession of the goods by the consignee, after the termination of the voyage, be not provided for in the bills of lading, the right of stopping in transitu ceases on the shipment.¹⁷

Shipped to Foreign Market.—There are some cases holding that if the goods are not to be imported by the consignee, but are to be transported from the place of shipment to a foreign market, whether the consignee be the shipowner or not, the right of stopping in transitu ceases on the shipment, the transit being then completed, because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment.¹⁸

For Importation.—It has been held that where goods are sold on credit in a foreign port, shipped on board a vessel belonging to the vendee, consigned to be delivered to him at his port of residence, and he becomes insolvent before payment is made, the vendor may stop the goods in transitu at any time before they come to the actual possession of the vendee.¹⁹

Shipped by Vendee to Third Person.—Where goods sold, to be paid for on delivery, were put on board a vessel appointed by the vendee, not to be transported to him, or delivered for his use at a place of his appointment, but to be shipped by such vessel in his name, from his place of residence and business, to a third person, it was held there was no right of stoppage in transitu after the goods were embarked.²⁰

Importation by Several Persons on General Ship.—It has been held that where several persons import goods in a general ship on their own credit and risk, a future actual possession by them at the termination of the voyage is provided for

14. On ship of vendee.—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

Contra.—But it has been held that the right of stoppage in transitu does not exist after the goods have been delivered on board of the vendee's vessel, by which they are to be carried to another port. *Pequeno v. Taylor* (N. Y.), 38 Barb. 375; *Thompson v. Stewart* (Pa.), 7 Phila. 187.

15. Delivery to captain of vendee's ship.—*Parker v. McIver* (S. C.), 1 De-saus. 274, 1 Am. Dec. 656.

16. Subsequent possession of consignee provided for in bills of lading.—*Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

17. Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63.

18. Shipped to foreign market.—*Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Noble v. Adams* (Eng.), 7 Taunt. 59; *Rowley v. Bigelow* (Mass.), 12 Pick. 307, 23 Am. Dec. 607.

19. For importation.—*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

If goods be consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stoppage in transitu continues after shipment. *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29.

Contra.—Where goods are shipped in a foreign port on board the consignee's own ship, and the master gives a bill of lading to deliver them to the consignee, the transitus is at an end by such delivery to the master, and the consignor can not stop them on the insolvency of the consignee. *Bolin v. Huffnagle* (Pa.), 1 Rawle 9.

20. Shipped by vendee to third person.—*Rowley v. Bigelow* (Mass.), 12 Pick. 307, 23 Am. Dec. 607.

in the bills of lading; and therefore the right of stoppage in transitu remains to the consignors after shipment.²¹

For Exportation by Several Persons on General Ship.—The same authority holds, however, that if a ship sail from this county to Great Britain, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market as the mercantile adventures of different shippers, if goods be so shipped by the several consignors, there is no transit to the consignees after the shipment, and no right of stopping remains with the consignors.²²

§ 1706. Delivery to Carrier for Shipment to Third Person.—When goods are sold to one person, who, before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor can have no right of stoppage in transit.²³

§§ 1707-1708. Refusal of Buyer to Receive Goods and Reconveyance to Seller—§ 1707. Refusal of Consignee to Receive Goods.—Where the consignee refuses to receive goods, the right of stoppage continues.²⁴ Thus the right of stoppage in transitu, though adverse to that of the consignee, is not defeated by a writing from him to the consignor revoking the order for the goods, declining to receive them, and requesting the master, or any one else who has charge of them, to deliver them to the consignor.²⁵

§ 1708. Reshipment to Vendee after Refusal of Consignor to Resume Possession.—Where a consignee refuses to receive goods and they are sent back to the consignor who refuses to take them back, and they are sent again to the consignee, remaining at the station until he becomes bankrupt, the consignor

21. Importation by several persons on general ship.—*Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63.

22. For exportation by several persons on general ship.—*Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63.

23. Massachusetts.—*Rowley v. Bigelow* (Mass.), 12 Pick. 307, 23 Am. Dec. 607; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63.

Tennessee.—*Treadwell v. Aydlott, etc.*, Co., 56 Tenn. (9 Heisk.) 388.

Vermont.—*Eaton v. Cook*, 32 Vt. 58.

24. Refusal of consignee to receive goods.—*England.*—*Bolton v. Lancashire, etc.*, L. R., 1 Com. Pl. 431.

Canada.—*McLean v. Breithaupt*, 12 Ont. App. 388.

Iowa.—*Greve & Co. v. Dunham*, 60 Iowa 108, 14 N. W. 130.

Massachusetts.—*Grout v. Hill* (Mass.), 4 Gray 361; *Scholfield v. Bell*, 14 Mass. 40; *Naylor v. Dennie* (Mass.), 8 Pick. 198, 19 Am. Dec. 319.

Mississippi.—*Morris v. Shryock*, 50 Miss. 590, 599.

Nevada.—*More, etc., Co. v. Lott*, 13 Nev. 376.

New Hampshire.—*Inslee v. Lane*, 57 N. H. 454.

New York.—*Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321.

Pennsylvania.—*Jenks v. Fulmer*, 160 Pa. 527, 28 Atl. 841; *Kahnweiler v. Buck* (Pa.), 2 Leg. Gaz. 118.

Before goods sold on credit had

reached their destination, the seller, learning that the buyer had become insolvent, notified the carrier that he claimed them, and demanded their immediate return. Held, that the fact that an expressman, without any special order from the buyer or consent of the carrier, and without paying freight, took them to the buyer's store, which he found in the hands of the sheriff, whereupon the buyer refused to accept them, and, they, at his direction, were taken back to the depot by the expressman, did not constitute a delivery, nor interfere with the seller's right of stoppage in transitu, previously exercised. *Jenks v. Fulmer*, 160 Pa. 527, 28 Atl. 841.

Goods were ordered from an English house, but before the order was executed it was countermanded. A bill of lading of part of the goods was subsequently sent to and received by the buyer, and part of the goods were accordingly shipped; but on notice thereof after removal of the goods, the buyer, being insolvent, refused to receive them, and indorsed the bill of lading to a friend of the English house for their use, and requested him to receive the goods for them, which he could not obtain, because they had been attached by a creditor of the buyer. Held, that the property, not having vested in the buyer, might be reclaimed by the English house as in transitu. *Scholfield v. Bell*, 14 Mass. 40.

25. Naylor v. Dennie (Mass.), 8 Pick. 198, 19 Am. Dec. 319.

has a right of stoppage in transitu, and the company is justified in detaining the goods for him.²⁶

§ 1709. Reshipment by Buyer.—Delivery at Place of Reshipment.—The delivery of goods to the vendee, which puts an end to the state of passage, and so deprives the vendor of the right of stoppage in transitu, may be at a place where the vendee means the goods to remain until a fresh destination is given to them by orders from himself;²⁷ and the right of stoppage in transitu only extends to the original shipment, and where goods have reached their destination and have been reshipped by the consignee, the right is lost.²⁸

Right Not Revived nor Prolonged by Reshipment.—When goods have reached the destination agreed upon between buyer and seller, and are there delivered to the buyer's order, the right of stoppage is gone, and is not revived or prolonged by his ordering them to be dispatched to a further point.²⁹

Proof of Delivery.—Reselling and shipment to a new destination, with the vendor's knowledge, is such proof of delivery as to defeat the right of stoppage.³⁰

Order to Ship Goods to Another Destination.—An order for the delivery of the goods at a particular warehouse within the town originally designated as the destination is not, however, a direction to start the goods to another destination, so as to deprive the seller of his right of stoppage in transitu.³¹

§ 1710. Entry of Goods in Custom House and Retention in Bonded Warehouse.—Possession of Officers of Customs before Entry.—The possession of the goods by officers of the customs prior to complete entry in the name of the consignee is not such a possession of the consignee as to determine the transit, and defeat the consignor's right to stop them, on the insolvency of the consignees.³²

In Public Store Awaiting Completion of Entry.—Goods in a public store, awaiting the completion of their entry at the custom house by the payment of the duties, are to be deemed still in transitu; and it is well settled that as to goods thus deposited the right of a consignor to stop in transitu attaches.³³

26. Reshipment to vendee after refusal of consignor to resume possession.—*Lancashire & Y. R. Co., L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. 137, 14 W. R. 430, 13 L. T. 764.*

27. Delivery at place of reshipment.—*In re Paterson Co., 108 C. C. A. 493, 186 Fed. 629, 34 L. R. A., N. S., 31; Norfolk Hardwood Co. v. New York, etc., R. Co., 202 Mass. 160, 88 N. E. 664; Becker v. Hallgarten, 86 N. Y. 167; Hays v. Mouille & Co., 14 Pa. 48; Guilford v. Smith, 30 Vt. 49.*

Plaintiff shipped certain lumber, deliverable to its own order, and on arrival directed the railroad company to deliver it to the buyer. The railroad company, without requiring the buyer to pay the charges, made a new agreement to transport the lumber to another city, after having stored the lumber for the buyer. Held, that the original transit had terminated, and with it the plaintiff's right of stoppage in transitu. *Norfolk Hardwood Co. v. New York, etc., R. Co., 88 N. E. 664, 202 Mass. 160.*

28. Right of stoppage applies only to original shipment.—*Brooke Iron Co. v. O'Brien, 135 Mass. 442; Mollison v. Lockhart, 30 New Brun. 398.*

29. Right not revived nor prolonged by reshipment.—*Brooke Iron Co. v. O'Brien, 135 Mass. 442; Pottinger v. Hecksher (Pa.), 2 Grant Cas. 309; In re Paterson Co., 108 C. C. A. 493, 186 Fed. 629, 34 L. R. A., N. S., 31.*

30. Proof of delivery.—*Eaton v. Cook, 32 Vt. 58.*

31. Order to ship goods to another destination.—*Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096.*

32. Possession of officers of customs before entry.—*Burnham v. Winsor, Fed. Cas. No. 2,180; In re Bearn, 18 N. B. R. 500, Fed. Cas. No. 1,191; In re Talbot, 185 Fed. 986; Mottram v. Heyer (N. Y.), 5 Denio 629.*

The right of stoppage in transitu is not terminated by the entry of the goods and the payment of the duties at the customhouse of the final port of destination, unless it is a perfected entry in the name of the consignee. *Harris v. Hart, 13 N. Y. S. 606, affirmed in 17 N. Y. 249.*

33. In public store awaiting completion of entry.—*Western Transp. Co. v. Hawley (N. Y.), 1 Daly 327; Hauterman v. Bock (N. Y.), 1 Daly 366.*

Loss of Invoice.—Where a vendee, to whom the goods had been shipped, paid the freight and gave his note for the price, but in consequence of the loss of the invoice the goods, on their arrival, were stored in the customhouse, but not entered, where they remained until the note fell due, which was not paid, and the vendee became insolvent, it was held that the vendor's right of stoppage was not lost.³⁴

Entry in Bonded Warehouse.—The right of stoppage in transitu ceases when the entry of goods in a bonded warehouse is perfected in the name of the consignee.³⁵

§ 1711. Waiver or Loss of Right.—And it has been held that where goods shipped to bankrupts had been unloaded from a vessel and had been entered in the custom house through the bankrupts' broker, and remained in bonded warehouses in New York, freight paid but duties unpaid, the transitu was terminated, and the goods were not subject to stoppage in transitu by notice served on the collector of customs.³⁶ As to the effect of acceptance of bills or notes by vendor, see ante, "Acceptance of Bills or Notes," § 1667. As to whether right may be defeated by transfer of bill of lading or by attempted transfer of title to goods, see ante, "Whether Right May Be Defeated by Transfer of Bill of Lading or by Attempted Transfer of Title to Goods," §§ 1685-1691. As to loss of right of stoppage in transitu as affected by duration and termination of transit, see ante, "Duration and Termination of Transit," §§ 1692-1710.

In General.—Of course, the seller may waive his right of stoppage in transitu.³⁷ And this may be accomplished, for instance, by pursuing some other and inconsistent remedy.³⁸

Attachment.—Thus, it has been held that if the vendor of goods attach them as the property of the vendee while they are in the course of transportation, such attachment will destroy the right of the vendor to stop them in transitu.³⁹ The bringing of suit by the seller and levy of attachment to secure the price, the ground of attachment being that the sale was induced by the buyer's fraud, will not, however, preclude the right of stoppage in transitu.⁴⁰ And, while it is true if the seller attach goods in transitu for debt, his remedy by stoppage is lost, yet if he, through want of knowledge of the facts and means of knowledge attached, believed the right of stoppage in transitu was lost, and on learning his error immediately dismisses his attachment, he may still exercise his right of stoppage in transitu, if there has been no actual or constructive delivery of the goods at their place of destination.⁴¹

Unauthorized Action for Purchase Price.—The commencement of an action against the consignee by the attorney of the consignor of goods on credit, for their purchase price, without the consignor's knowledge, and before either has been apprised that their transitu has not terminated, does not constitute a waiver of the right of stoppage, if it be asserted in a reasonable time, and the action for their price be not pressed.⁴²

Negotiation of Bills or Notes.—The consignor's right of stoppage is not

34. *Loss of invoice.*—Donath v. Broomhead, 7 Pa. 301.

35. *Entry in bonded warehouse.*—Shepard v. Newhall, 4 C. C. A. 352, 54 Fed. 306; Cartwright v. Wilmerding, 24 N. Y. 521; Mottram v. Heyer (N. Y.), 5 Denio 629.

36. *Duties unpaid.*—In re Talbot, 185 Fed. 986.

37. *May waive right.*—Fox & Bro. v. Willis & Bro., 60 Tex. 373.

38. *Inconsistent remedy.*—Fox & Bro. v. Willis & Bro., 60 Tex. 373.

39. *Attachment.*—Woodruff v. Noyes, 15 Conn. 335; Ferguson v. Herring, 49 Tex.

126; Fox & Bro. v. Willis & Bro., 60 Tex. 373. But see Allyn & Co. v. Willis & Bro., 65 Tex. 65, where the correctness of this doctrine is doubted.

40. *Fraud.*—Allyn & Co. v. Willis & Bro., 65 Tex. 65.

41. *Mistake as to prior loss of right of stoppage in transitu.*—Fox & Bro. v. Willis & Bro., 60 Tex. 373.

42. *Unauthorized action for purchase price.*—Calahan v. Babcock, 21 O. St. 281, 8 Am. Rep. 63, cited in Koontz v. Wheeling, etc., R. Co., 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

abridged, or in any way affected by the fact that he has received the consignee's bills of exchange or other negotiable securities for the whole price, even though they have been negotiated and are still outstanding.⁴³

Attempted Collection of Note.—Where a consignee has given his note for the purchase price of the goods, the consignor has accepted the same and has attempted collection thereon, such acts on the consignor's part will not constitute a waiver of his right to stoppage unless the note be paid.⁴⁴

Bill of Lading Taken in Name of Vendee.—D. purchased goods of G. and directed them to be shipped in his name, as consignor, to A. D. failed, and G. replevied the goods from the carrier by whom they were shipped. It was held that this was a clear and unmistakable exercise of dominion and ownership on the part of D. In taking the bill of lading in the name of D., G. thereby recognized his right to control the goods as owner, and to consign them to and vest in A. the title as consignee.⁴⁵

Goods Warehoused by Buyer in Own Name.—Where the seller had goods on board ship, which he sold on four months' credit and took notes for the price and handed all the shipping papers to the buyer, who entered the goods and warehoused them in his own name, it was held, that the seller had thereafter no right of stoppage.⁴⁶

Goods Shipped and Warehouse Charges Paid by Vendor.—At the time of sale of a lot of whisky it was in a government bonded warehouse in Indiana. The sale was made in Boston, and the destination of the goods contemplated and provided for in the contract was Boston. The seller was by the terms of the contract, from time to time, at the buyer's request, to ship the barrels to Boston from the warehouse and pay the storehouse charges, etc., drawing on the buyer for the amounts so paid. The seller at various times shipped lots and paid the charges. While the last lot was on the way, the buyer became insolvent. It was held that the seller's right of stoppage in transit was not lost.⁴⁷

Goods Transferred upon Warehouse Record to Buyer.—Nor did the fact that the goods were transferred upon the records of the warehouse to the buyer affect the seller's right of stoppage.⁴⁸

Effect of Vendor Charging Commission.—Where goods are sold on credit at a foreign port, and shipped and consigned to the buyer, to be delivered to him at his residence, and the buyer becomes insolvent before payment is made, the seller's right to stop any goods in transitu is not divested by his charging a commission for transacting the business.⁴⁹

Waiver of Rescission.—The right to rescind a contract of sale because of fraud may be waived without affecting the right of seller of stoppage in transitu resulting from the insolvency of the buyer.⁵⁰

§ 1712. Manner of Exercise of Right.—Return of Vendee's Notes Not Condition Precedent.—The return or dishonor of a purchaser's notes is not a necessary preliminary to the exercise of the right of stoppage in transitu, on account of the buyer's insolvency.⁵¹

43. Negotiation of bills and notes.—Lake Shore, etc., R. Co. v. National Live Stock Bank, 59 Ill. App. 451; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375; Adams Exp. Co. v. Wentworth, 1 C. S. C. R. 142, 13 O. Dec. 464; Diem v. Koblitz, 49 O. St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

44. Attempted collection of note.—Adams Exp. Co. v. Wentworth, 1 C. S. C. R. 142, 13 O. Dec. 464.

45. Bill of lading taken in name of vendee.—Treadwell v. Aydlott, etc., Co., 56 Tenn. (9 Heisk.) 388.

46. Goods warehoused by buyer in own

name.—Parker v. Byrnes, Fed. Cas. No. 10,728, 1 Lowell 539.

47. Goods shipped and warehouse charges paid by vendor.—Mohr v. Boston, etc., R. Co., 106 Mass. 67.

48. Goods transferred upon warehouse records to buyer.—Mohr v. Boston, etc., R. Co., 106 Mass. 67.

49. Effect of vendor charging commission.—Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489.

50. Waiver of rescission.—Allyn & Co. v. Willis & Bro., 65 Tex. 65.

51. Return of vendee's notes not condition precedent.—Mouille v. Hays (Pa.), 4 Clark 413; S. C., 14 Pa. 48.

Whether Exercise of Right of Stoppage or Claim of Possession by Reason of Rescission of Sale.—Where goods were in the hands of a warehouseman, awaiting the buyer's order for forwarding, at the time the buyer became insolvent, and he requested the seller to take back the goods, and authorized him to demand a return from the warehouseman, and he did so, it did not amount to a claim of possession by reason of a rescission of the contract of sale, rather than under the right of stoppage in transitu.⁵²

Filing Claim in Attachment Case.—The filing by the vendors of a claim in the attachment case to the fund in court is a sufficient exercise of the right of stoppage in transitu.⁵³

Actual Seizure of Goods Not Essential.—In order to exercise the right of stoppage in transitu, no actual seizure of the goods before delivery to the vendee is essential. A demand of the carrier, notice of him to stop the goods, or a claim and endeavor to get the possession, is sufficient.⁵⁴

Right of Carrier to Notice in General.—The carrier is entitled to express notice from the consignor before he will be liable for not stopping goods in transit.⁵⁵ And to make such a notice effective it must be given at such time and under such circumstances that the carrier may, by the exercise of reasonable diligence, communicate to his servants in time to prevent the delivery of the goods to the consignee.⁵⁶ A notice from the consignor to a common carrier to stop and retain goods in transitu is sufficient, although it does not contain any statement of the reason therefor.⁵⁷

Form of Notice.—No particular form of notice is required; it being sufficient if it states the claim, and notifies the carrier not to deliver the goods to the consignee.⁵⁸

52. Whether exercise of right of stoppage or claim of possession by reason of rescission of sale.—*Frame v. Oregon Liquor Co.*, 48 Ore. 272, 85 Pac. 1009, 86 Pac. 791.

53. Filing claim in attachment case.—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Constituted stoppage in transitu.—A promissory note had been given for some rice, and the rice had been bartered for sugars by the purchaser of the rice, who failed in trade and was declared a bankrupt; but before the bankruptcy, and in contemplation thereof, he gave up the sugars to the payee of the said note, as the proceeds of the rice purchased from him, and in lieu thereof, and took back the note. It was held that the transaction could be considered in the light of a stoppage in transitu. *Byrnes v. Fuller* (S. C.), 1 Brev. 316.

54. Actual seizure of goods not essential.—*Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

55. Right of carrier to notice in general.—*Whitehead v. Anderson*, 9 M. & W. 518; *Ex parte Falke*, L. R. 14 Ch. D. 446; *Litt v. Cowley*, 7 Taunt. 169; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Mottram v. Heyer* (N. Y.), 5 Denio 629; *Bell v. Moss* (Pa.), 5 Whart. 189; *Bloomingtondale, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

56. Sufficiency of notice.—*Whitehead v. Anderson*, 9 M. & W. 518; *Ex parte Falk*,

L. R. 14 Ch. D. 446; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Mottram v. Heyer* (N. Y.), 5 Denio 629; *Bell v. Moss* (Pa.), 5 Whart. 189; *Bloomingtondale, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

57. Need not state reason.—*Allen v. Maine, etc., R. Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310, 30 Am. & Eng. R. Cas. 122.

58. Form of notice.—*England.*—*Bohtlingk v. Inglis*, 3 East 381; *Litt v. Cowley*, 7 Taunt. 169.

California.—*Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160.

Maine.—*Allen v. Maine, etc., R. Co.*, 30 Am. & Eng. R. Cas. 122, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

New Hampshire.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

Pennsylvania.—*Bell v. Moss* (Pa.), 5 Whart. 189.

Tennessee.—*Bloomingtondale, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

Texas.—*Chandler v. Fulton*, 10 Tex. 2, 6 Am. Dec. 188.

Notice by cable.—It has been held that a notice by cable is sufficient. *Ex parte Falk*, L. R. 14 Ch. D. 446.

Verbal notice.—It is not necessary that the notice to the carrier should be in writing, verbal notice being sufficient. *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580; *Faust v. Southern R. Co.*, 74 S. C. 360, 54 S. E. 566.

Express Demand for Goods.—The notice need contain no express demand for the goods.⁵⁹

Description of Goods.—The notice, however, must contain such a description of the goods as will enable the carrier to identify them.⁶⁰

To Whom Notice Must Be Given.—The notice to stop or hold the goods for the vendee must be given to the middleman, or carrier, or to the person in possession of the goods.⁶¹

Freight Agent.—It has been held that notice given to one officer in a freight depot of a railroad company not to deliver freight in transit is binding where the officer collected freight charges and gave orders to the corporation, to deliver cars at different points.⁶²

Notice to Consignee Not Sufficient.—Notice to the consignee is not sufficient to effect a constructive stoppage in transitu.⁶³

Taken Out of Carrier's Hands by Legal Process.—Notice to the carrier of goods to secure the right of stoppage in transitu is not necessary where they have been already taken out of his hands by legal process.⁶⁴

59. Express demand for goods.—*California*.—Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338.

Maine.—Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489.

New Hampshire.—Reynolds v. Boston, etc., R. Co., 43 N. H. 580.

Tennessee.—Bloomington, etc., Co. v. Memphis, etc., R. Co., 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

In exercising the right of stoppage in transitu, notice to the carrier not to deliver the goods is enough. A demand of re-delivery is not necessary. Reynolds v. Boston, etc., R. Co., 43 N. H. 580.

60. Description of goods.—Clementson v. Grand Trunk R. Co., 42 U. C. Q. B. 263.

Letter never received.—A purchaser of goods which had been shipped to him, and were in the carrier's warehouse subject to his order, finding that he was insolvent, ordered the carrier to return them to the seller. While they were being removed from the warehouse for that purpose, a sheriff took possession of them, under insolvency proceedings, as the property of the purchaser. The seller, upon hearing of the insolvency, wrote a letter for the return of the goods, which, however, was never received. Held, that there was no effectual exercise of the right of stoppage in transitu. Millard v. Webster, 54 Conn. 415, 8 Atl. 470.

61. To whom notice must be given.—Whitehead v. Anderson, 9 M. & W. 518; Mills v. Ball, 2 B. & P. 457; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; Mottram v. Heyer (N. Y.), 5 Denio 629; Bell v. Moss (Pa.), 5 Whart. 189.

Upon the question as to the proper party upon whom notice should be served, to be effective as a stoppage in transitu, the following is the general rule. "In order to make the notice effectual, it must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody, at such time and under such

circumstances that he may, with reasonable diligence, prevent the delivery of the goods to the purchaser or consignee." Pool v. Houston, etc., R. Co., 58 Tex. 134, 9 Am. & Eng. R. Cas. 197.

62. Faust v. Southern R. Co., 74 S. C. 360, 54 S. E. 566.

Freight agent.—In Poole v. Houston, etc., R. Co., 9 Am. & Eng. R. Cas. 197, 58 Tex. 134, it was held by a divided court that, in the absence of evidence showing that there was a general freight agent at the point of destination, notice to the station agent having charge of freights at such point was sufficient.

When in customs warehouse.—Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs. Held, that the notice to the company was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery. Ascher v. Grand Trunk R. Co., 36 U. C. Q. B. 609.

63. Whitehead v. Anderson, 9 M. & W. 518; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84; Mottram v. Heyer (N. Y.), 5 Denio 629.

A demand of the property from the vendee, made before its actual delivery to him, and while it is in the custody of the custom house officers, is not sufficient to enable the vendor to reclaim it. Mottram v. Heyer (N. Y.), 5 Denio 629.

Consignee's assignee.—It has been held that notice to the consignee's assignee is sufficient. Bell v. Moss (Pa.), 5 Whart. 189.

64. Taken out of carrier's hands by legal process.—Schwabacher v. Kane, 13 Mo. App. 126.

§§ 1713-1719. Rights and Liability of Carrier—§ 1713. Right of Carrier to Investigate and Require Indemnity.—In case the agent of the seller of goods notify the carrier not to deliver them, the carrier has the right to a reasonable time to ascertain the facts, and the agent to produce his authority and to furnish an indemnity.⁶⁵ And if the consignor, after stopping the goods unreasonably, refuses to furnish the carrier with any evidence of the validity of his claim, such refusal relieves the carrier of any further responsibility to the consignor, with respect to such stoppage.⁶⁶

§ 1714. Right to Bring Goods into Court.—After stoppage in transitu, the carrier acts at his peril in delivering the goods either to the consignor or consignee, and, to protect itself from liability, may, by action, bring the goods into court, and require the claimants to determine the right of possession.⁶⁷

§ 1715. Right of Carrier to Retain Goods for Charges Due by Consignee.—In General.—Notwithstanding the fact that the consignor has the right of stoppage he can not exercise such right unless he pay the expenses incurred by the consignee on account of the goods and assume those for which he is liable.⁶⁸ And it has been held that the vendor could not reclaim the goods, without paying the freight advanced by the officer who had seized them.⁶⁹ It has been held, however, that the consignor's right of stoppage is paramount to a demand for freight made by the assignee of the vessel upon which the goods were shipped, when the vessel at the time of the shipment belonged to the consignee, and by the bill of lading it was stipulated that the goods were shipped "free on owner's account."⁷⁰

For Charges upon Particular Goods Only.—It is well settled that the usage of carriers to retain goods under a lien for a general balance of account between them and the consignee can not defeat the right of the consignor to stop the goods in transitu.⁷¹

65. Carrier's right to investigate and require indemnity.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

66. *Allen v. Maine, etc., R. Co.*, 30 Am. & Eng. R. Cas. 122, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

67. Right to bring goods into court.—*Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182.

68. Georgia.—*Pennsylvania Steel Co. v. Georgia R., etc., Co.*, 94 Ga. 636, 21 S. E. 577.

Kansas.—*Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

Massachusetts.—*Potts v. New York, etc., R. Co.*, 131 Mass. 455, 3 Am. & Eng. R. Cas. 424, 41 Am. Rep. 247.

North Carolina.—*Jackson v. Nichol*, 5 Bing., N. Cas., 508.

Ohio.—*Jordan, etc., Co. v. James*, 5 O. 88.

A consignee of goods has such a property in them, by the possession of the bill of lading and having made advancements, that the consignor can not stop the goods in transitu without paying all expenses incurred on account of the goods by the consignee, or for which he is liable. *Jordan, etc., Co. v. James*, 5 O. 88.

69. Freight advanced by sheriff.—*Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84.

Delivery of part.—In *Potts v. New York, etc., R. Co.*, 131 Mass. 455, 3 Am.

& Eng. R. Cas. 424, 41 Am. Rep. 247, it was held that the carrier's lien is as good against the consignor as against the consignee, and therefore where the consignor endeavors to exercise his right of stoppage in transitu after a part delivery of the goods, he is entitled to receive the goods not delivered, only upon payment of the freight upon all the goods, including that paid by the defendant railroad to a water carrier, to whom the plaintiff first delivered the goods and from whom the defendant immediately received them.

70. Shipped "free on owner's account."—*Mercantile & Exchange Bank v. Gladstone*, L. R. 3 Exch. 233.

71. For general balance.—*Potts v. New York, etc., R. Co.*, 131 Mass. 455, 3 Am. & Eng. R. Cas. 424, 41 Am. Rep. 247; *Oppenheim v. Russell*, 3 Bos. & P. 42; *Leuckhart v. Cooper*, 3 Bing., N. Cas., 99; *Farrell v. Richmond, etc., R. Co.*, 37 Am. & Eng. R. Cas. 704, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 42 Am. & Eng. R. Cas. 357; *Condict & Co. v. Rosenfield & Son*, 36 Tex. 23.

Lien of forwarding merchant.—The lien of a forwarding merchant upon goods in his possession extends only to charges and advances made upon those particular goods, or of any particular lot of goods of which they formed a part; and he has

Effect of Stipulation in Bill of Lading.—And a stipulation in the bill of lading that the carrier shall have such a lien for all arrearages of freight and charges due by the owners or consignees, does not alter the rule.⁷²

Several Consignments Shipped under Same Contract of Sale.—It has been held, however, that where the same vendor, under a single contract of sale, shipped by rail several consignments of goods to the same vendee, each shipment embracing several car loads, the carrier had the right to retain out of any one or more of the consignments enough of the goods in value to pay the charges for freight and storage upon all, without respect to the particular consignments out of which the goods were retained.⁷³

§ 1716. Liability of Carrier for Refusal or Failure to Stop Goods in Transitu.—As to Liability of Carrier as Affected by Manner in Which Right Is Exercised.—See ante, "Manner of Exercise of Right," § 1712.

General Rule as to Carrier's Liability.—Where a common carrier delivers goods after receiving notice from the consignor to hold them, he becomes liable for the value of the goods when required to deliver possession to the consignor, when the validity of the latter's claim has been established.⁷⁴ Nor will delivery by mistake excuse the carrier.⁷⁵

Effect of Waiver of Right on Carrier's Liability.—Where a seller of goods has claimed the right of stoppage in transitu, but where the carrier has wrongfully delivered the goods, the fact that the seller has attempted to collect the price from the purchasers by legal process is not such affirmation of the sale as to relieve the carrier from liability.⁷⁶ Nor will the subsequent receipt by the

no right to retain the goods for other unsettled accounts. *Condict & Co. v. Rosenfield & Son*, 36 Tex. 23.

72. Effect of stipulation in bill of lading.—*Farrell v. Richmond, etc.*, R. Co., 37 Am. & Eng. R. Cas. 704, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 42 Am. & Eng. R. Cas. 357.

73. Several consignments shipped under same contract of sale.—*Pennsylvania Steel Co. v. Georgia R., etc., Co.*, 94 Ga. 636, 21 S. E. 577.

74. General rule. *California*.—*Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160.

Maine.—*Allen v. Maine, etc., R. Co.*, 30 Am. & Eng. R. Cas. 122, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

Maryland.—*O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

Missouri.—*Willcox v. Missouri Pac. R. Co.*, 79 Mo. App. 76.

New Hampshire.—*Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

New York.—*Foggan v. Lake Shore, etc., R. Co.*, 4 N. Y. St. Rep. 718, 61 Hun 623, 16 N. Y. S. 25; *Rosenthal v. Weir*, 66 N. Y. S. 841, 54 App. Div. 275, affirmed in 63 N. E. 65, 170 N. Y. 148, 57 L. R. A. 527.

Ohio.—*Adams Exp. Co. v. Wentworth*, 1 C. S. C. R. 142, 13 O. Dec. 464; *Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220.

Tennessee.—*Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

Virginia.—*Howatt v. Davis*, 19 Va. (5

Munf.) 34, 7 Am. Dec. 681.

It is clear that a carrier, upon notice of the exercise of this right, or demand of control of the goods by the seller, is bound not to deliver the goods to the purchaser, and will become liable, as for conversion of the goods, if he declines to deliver to the seller, or deliver to the vendee. *Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338.

If the carrier fail to withhold the goods after notice to do so, and it turn out that the consignee is in fact insolvent, the carrier will be liable to the consignor to the extent of the consignee's indebtedness for the goods at least. *Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220.

Liability under agreement to stop goods.—It has been held that an agreement of a carrier, made after goods are shipped, that, as agent of the shipper, it will use all available means to stop the goods before delivery to the consignee, and to return the same, makes it liable only for negligence in executing it. *Ryer v. Pennsylvania R. Co.*, 54 N. Y. S. 583, 25 Misc. Rep. 289, affirmed in 56 N. Y. S. 1083, 26 Misc. Rep. 715.

75. Delivery by mistake.—*Campbell v. Jones*, 9 Law Can. 10; *Foggan v. Lake Shore, etc., R. Co.*, 4 N. Y. St. Rep. 718, 61 Hun 623, 16 N. Y. S. 25.

76. Effect of waiver of right on carrier's liability.—*Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

consignor of the consignee's note, and an attempt on his part to collect it, relieve the carrier's liability unless the note be paid.⁷⁷

§ 1717. Liability for Misdelivery.—Where the carrier recognizes the right of consignor to stop the goods from being delivered to consignee, and undertakes to redeliver the same to consignor, or to some person upon his order, but fails so to do, and the goods are lost to the consignor, the carrier is liable for the value thereof, and irrespective of consignor's actual right of stoppage in transitu.⁷⁸

§ 1718. Liability of Carrier to Consignee or Purchase from Consignee.—In General.—Of course, where the carrier, is justified in obeying an order to stop the goods in transitu, he incurs no liability to the consignee in obeying the order.⁷⁹

Duty to Refuse Stoppage.—If the consignee be solvent at the time of the attempted exercise of the right of stoppage, if the carrier has knowledge of the fact it is its duty to refuse to comply with the demand.⁸⁰

Solvency at Time of Stoppage as Defense.—The objection that the purchaser was not insolvent at the time of the stoppage, can only be taken by the purchaser and not by the carrier, except that he may show as a matter of defense that the debt could have been made by due diligence.⁸¹

§ 1719. Actions against Carrier.—Presumption of Ownership.—Where the consignor, after delivery of the goods to the carrier for transportation, directs that they shall not be delivered to the consignee, the presumption no longer obtains that the consignee is the owner of the goods.⁸²

Burden of Proving Time of Insolvency.—The time to raise the question of the consignee's solvency is when the consignor demands of the carrier that the goods be stopped in transitu; the consignor, therefore, can not, in order to recover the value of goods stopped in transit, and by the carrier delivered to an unauthorized person and lost, be required to prove that the consignee was insolvent when stoppage was demanded.⁸³

Burden on Carrier of Proving Its Title by Purchase.—When it was shown that the goods are in the possession of the carrier and that there has been

77. *Adams Exp. Co. v. Wentworth*, 1 C. S. C. R. 142, 13 O. Dec. 464.

78. **Liability for misdelivery.**—*Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220.

79. **In General.**—*Johnston v. Chicago, etc., R. Co.*, 70 Neb. 364, 97 N. W. 479; *Gulf, etc., R. Co. v. Rotter Bros.* (Tex. Civ. App.), 104 S. W. 402.

Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to possession, a common carrier is not liable to the mortgagor for a diversion of the shipment of such property and delivery to the mortgagee, demanding possession while it is still in the carrier's hands. *Johnston v. Chicago, etc., R. Co.*, 97 N. W. 479, 70 Neb. 364.

A cargo of clay was shipped by H. on a schooner under a bill of lading providing for its delivery to P. Before the delivery of the clay, H. appeared, and, asserting the insolvency of the libellant and the nonpayment of the price, ordered the master not to deliver the clay to P., which direction the master obeyed. P. thereupon brought suit on the bill of lading

against the vessel to recover damages for nondelivery of cargo. Held, that the assertion of the fact of insolvency by the vender, made in good faith and believed by the master, coupled with the fact that the goods had not been paid for or the price secured, and the other fact that the stoppage was during the continuance of the transitu, justified the master in delivering the cargo to the vendor, and gave the vendee no right of action against the vessel. *The E. H. Pray*, 27 Fed. 474.

80. **Duty to refuse stoppage.**—*Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182; *Memphis, etc., R. Co. v. Freed*, 38 Ark. 614, 9 Am. & Eng. R. Cas. 212.

81. **Insolvency at time of stoppage as defense.**—*Bloomington, etc., Co. v. Memphis, etc., R. Co.*, 74 Tenn. (6 Lea) 616, 6 Am. & Eng. R. Cas. 371.

82. **Presumption of ownership.**—*Louisville, etc., R. Co. v. Hartwell*, 99 Ky. 436, 18 Ky. L. Rep. 745, 36 S. W. 183, 38 S. W. 1041.

83. **Burden of proving time of insolvency.**—*Howe v. Cincinnati, etc., R. Co.*, 18 O. C. C. 333, 10 O. C. D. 182, affirmed in 18 O. C. C. 606, 10 O. C. D. 220.

no delivery to the consignee, either actual or constructive, the carrier holding the goods under claim of purchase from the consignee, the burden of proof is upon the carrier to show that it is a bona fide purchase for value.⁸⁴

Measure of Damages.—In an action for damages for carrier's failure to stop goods in transitu on the order of the shipper, a portion of the goods having been returned, but the remainder not paid for owing to the insolvency of the consignee, the measure of damages was what plaintiff lost by reason of the delivery of the goods not returned.⁸⁵

Sale under Attachment—Laches.—A consignment, before delivery, was seized in attachment against the consignee, but had not been removed from the custody of the carrier, when the consignors gave notice of stoppage in transitu, and demanded the goods, which were refused, and the consignors informed of the attachment. Six weeks after, the consignors were informed that the goods would be delivered to them, upon their giving the carrier an indemnifying bond. Five days after, the sale took place under the attachment, and the goods were delivered to the purchaser. In an action against the carrier for their value, it was held, that plaintiffs were in laches.⁸⁶

84. Burden on carrier of proving its title by purchase.—*Koontz v. Wheeling, etc., R. Co.*, 5 N. P. 15, 7 O. Dec. 478, affirmed in 15 O. C. C. 288, 9 O. C. D. 102, 61 O. St. 551, 56 N. E. 471.

Weir, 66 N. Y. S. 841, 54 App. Div. 275, judgment affirmed 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

85. Measure of damages.—*Rosenthal v.*

86. Sale under attachment—Laches.—*Baltimore, etc., R. Co. v. Davis (Pa.)*, 9 Sad. 147, 12 Atl. 335.

CHAPTER XVIII.

DEAD BODIES.

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§ 1720. Rights, Duties and Liabilities of Carrier.—Duty to Pay or Guarantee Undertaker's Charges.—To effectuate a contract of shipment of a corpse with a common carrier, where the body is held by an undertaker for undertaker charges, the person seeking to have the body shipped must satisfy such charges, and it is not the legal duty of the carrier, in anticipation of the shipment, to itself either pay or guarantee them for the shipper.¹

Duty to Transport Where Rule of Board of Health Not Complied with.—A railroad company, as a common carrier, can not be required by an individual to transport a corpse without a substantial compliance upon his part with the regulations of the board of health.²

1. Duty to pay undertaker's charges.—*Pacific Exp. Co. v. Gathright* (Tex. Civ. App.), 130 S. W. 1035.

Contract to ship C. O. D. undertakers' charges.—The body of one dying at a hotel was turned over to undertakers, who asked an express company to arrange with decedent's wife at F. for shipment of the body, stating that there were certain stated undertakers' charges against the body. The express agent wired the agent at F. to arrange with the wife for shipment of the corpse and advise by wire. A person at F. agreed to guarantee payment at destination of the charges necessary to have the remains shipped to F., notifying the agent at that point, and the agent wired the agent where the corpse was held to "Forward corpse collect; charges guaranteed; advise me if O. K." Neither decedent's wife nor the agent at F. knew that there were undertakers' charges. The undertakers were notified of the guaranty of forwarding charges only, and refused to release the corpse. Held, that there was no contract with the express company to ship the body C. O. D. the un-

dertakers' charges. *Pacific Exp. Co. v. Gathright* (Tex. Civ. App.), 130 S. W. 1035.

2. Duty to transport where rule of board of health not complied with.—*Lake Erie, etc., R. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192.

Illustrations.—Ind. Acts 1891, § 5, p. 15, provides that the state board of health may adopt rules in relation to the public health, to prevent outbreaks and the spread of infectious diseases. Rule 5 of the board, concerning the transit of dead bodies, provides that every body must be accompanied by a person in charge, having a transit permit from the board of health, showing name of deceased, age, place of burial, cause of death, and, if of an infectious nature, the point to which it is to be shipped, medical attendant, and name of undertaker. Held, that the name of the medical attendant was a material part of the transit permit, and, where such name was not contained in a permit presented to defendant railway company, its refusal to carry the body was not wrongful. *Lake Erie, etc.,*

Use of Mileage Book of Deceased for Transportation of Corpse.—A mileage book, at the death of the one to whom it is issued, goes to her personal representatives, and can not be used by her husband to transport her remains.³

Duty to Ship by Most Direct Route.—In the shipment by an express company of a corpse for burial, the company is required to use reasonable care to ship it by the most direct route.⁴

Refusal to Deliver until Payment of Charges.—Under the rule that, in forwarding goods over its connecting lines, the initial carrier is the agent of the connecting carrier, and the connecting carrier is bound by the contract between the initial carrier and the consignor, a connecting carrier receiving a soldier's corpse, with instructions to collect from the consignee the express charges which the government had arranged to pay, was liable in damages for its refusal to deliver the corpse to the consignee until the charges were paid, although it did not know of the contract with the government.⁵

Rule Preventing Delivery from Night Trains.—A regulation of an express company, preventing the delivery of dead bodies from night trains at a small station where no night office is maintained, and providing for carriage to the next station and return the next morning to the destination, is a reasonable rule.⁶ And the company is not bound to inform the consignee of a dead body of such rule.⁷

Transfer of Corpse by Initial Carrier—Presentation of Transfer Ticket.—One, shipping a corpse under the law applicable to the transportation of passengers, can not rely on a statute exclusively applicable to connecting carriers of property; and he can not demand the transfer of the corpse by the initial carrier to the connecting carrier without tendering the transfer ticket which he holds.⁸

§§ 1721-1732. Actions—§ 1721. Form of Action.—Contract or Tort.—An action by a husband against a carrier for negligence in handling the corpse of his wife in transportation, and for exemplary damages for its wanton and willful negligence in the same, against plaintiff's objection and in disregard of his rights and feelings, is an action in tort; and reference in the petition to a contract for transportation is a mere matter of indictment.⁹

§ 1722. Who May Maintain Action.—A husband has a quasi property right to the dead body of his wife, which entitles him to its possession and control for the purpose of proper and decent burial, and he may maintain an action against a carrier for negligent and willful injury to the body while in transportation.¹⁰

R. Co. v. James, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192.

A railroad company is not liable for refusal to transfer a dead body when the transit permit fails to show the name of the medical attendant, as required by the rules of the board of health, though the certificate of the medical attendant is pasted on the box, it not appearing that the company had knowledge of this. Lake Erie, etc., R. Co. v. James, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192.

3. Use of mileage book for transportation of corpse.—Minnish v. Southern R. Co., 135 N. C. 342, 47 S. E. 432.

4. Duty to ship by most direct route.—Wells Fargo & Co.'s Exp. v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

5. Refusal to deliver until payment of charges.—Alcorn v. Adams Exp. Co., 148 Ky. 352, 146 S. W. 747.

6. Rule preventing delivery from night trains.—Adams Exp. Co. v. Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 432.

7. Duty to notify consignee.—Adams Exp. Co. v. Hibbard, 145 Ky. 818, 141 S. W. 397, 3 L. R. A., N. S., 432.

8. Transfer of corpse by initial carrier—Presentation of transfer ticket.—Wren v. Texas, etc., R. Co. (Tex. Civ. App.), 144 S. W. 682.

9. Form of action.—Wilson v. St. Louis, etc., R. Co., 160 Mo. App. 649, 142 S. W. 775.

10. Who may maintain action—Husband.—Wilson v. St. Louis, etc., R. Co., 160 Mo. App. 649, 142 S. W. 775.

An action ex delicto to recover damages for injured feelings lies at the suit of the husband against a common carrier for soiling and ruining the casket con-

A wife may maintain an action against a carrier for injury to the corpse of her deceased husband resulting from failure to protect it from the weather;¹¹ and she may maintain an action for negligent delay in transportation of the corpse.¹²

A father may maintain an action for damages caused by the delay of an express company in the shipment of his son's body for burial.¹³

A mother may recover from a carrier for its negligent handling of the corpse of her child resulting in injury to the corpse.¹⁴

A brother of a deceased person who undertakes to pay for the transportation of his body may maintain an action to recover damages for an injury to it by the negligent act of the carrier while transporting it.¹⁵

An administrator can not maintain an action for the negligent or willful mutilation of the dead body of the intestate.¹⁶

§ 1723. Pleading and Proof.—Sufficiency of Declaration.—A declaration which alleges a duty on the part of the carrier as to the transportation of a corpse and a breach thereof sets out a cause of action.¹⁷

Evidence Admissible under Pleadings.—In an action by a mother against a carrier for breach of contract in delaying the shipment of the dead body of her son, a general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrong charged;¹⁸ but to admit proof of other damages the petition must set up the particular effects claimed to have followed the injury.¹⁹ In such an action the admission of evidence

taining the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and willfully exposing it to rain. *Lindh v. Great Northern R. Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A., N. S., 1018, following *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370.

11. **Wife.**—*Louisville, etc., R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, 3 Am. & Eng. Ann. Cas. 128.

12. **Hale v. Bonner**, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850.

13. **Father.**—*Wells Fargo & Co.'s Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824.

14. **Mother.**—*Missouri, etc., R. Co. v. Hawkins*, 50 Tex. Civ. App. 128, 109 S. W. 221.

15. **Payment for transportation by brother.**—*Beam v. Cleveland, etc., R. Co.*, 97 Ill. App. 24.

16. **Administrator.**—*Griffith v. Charlotte, etc., R. Co.*, 23 S. C. 25, 55 Am. Rep. 1.

17. **Sufficiency of declaration.**—A declaration alleging that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; that the agent of the company at the initial point would only sell her transportation for the body to the junction, but told her that the company would carry the body to the place of burial, and that at the point of junction she could obtain transportation to the

destination; that she paid for such transportation to the junction, and delivered the body, with its accompanying shroud and coffin, to the company; that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would be protected from the weather; and that the coffin and shroud were damaged to a specified extent and the body was "soaked and otherwise mutilated," sets out a cause of action. *Louisville, etc., R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, 3 Am. & Eng. Ann. Cas. 128.

18. **Evidence admissible under pleadings.**—*Missouri, etc., R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942.

19. Where in an action by a mother against a railroad for breach of contract in delaying the shipment to her of the dead body of her son, the petition alleged that the delay caused plaintiff great suffering and loss of appetite for food, because of which she lost her memory and the power to sleep and rest, causing her to be sick and lose her health, and plaintiff testified over defendant's objections that her heart was affected, that she could not sleep a bit, and that sometimes her heart seemed to be turning over, and felt like it would burst out of her, there being no allegation of an injury to plaintiff's heart, or that it was affected in any way by defendant's breach of contract, and it appearing that the injuries to her heart did not naturally and necessarily result

going only to show the affection which usually exists between mother and son would be proper in the absence of any allegation in the pleadings of the existence of special love and affection. But, when it is sought to show that special love and affection existed, to authorize its admission, the pleadings should allege the fact and that the adverse party had notice of the same at the time of entering into the contract.²⁰

§§ 1724-1725. Evidence—§ 1724. Admissibility.—In an action against a carrier for mental anguish caused by delay in not carrying the dead body of plaintiff's wife on the same train that he was carried on, and in not delivering it at his destination by the time that he arrived there, testimony that while in transit the conductor told him that the body of his wife was on the same train was inadmissible.²¹

Evidence to Prove Terms of Shipment Contract.—In an action against an express company, as a connecting carrier, for refusal to deliver a soldier's corpse to his father, evidence that the telegraph agent at the destination was also the express agent, and that he had received a telegram before the arrival of the corpse, notifying the consignee that all the expenses of shipment had been paid by the government, was admissible to prove the terms of the shipment contract made by the initial carrier, and binding upon the defendant.²²

Evidence of Negligence.—In an action for delay on the part of an express company in the shipment of a corpse, evidence that the company's agent was informed, at the time the contract for shipment was made, as to the most direct route, is admissible to show negligence on its part in shipping the body by a much longer route.²³

Evidence of Custom.—In an action against a carrier on an alleged contract of shipment of a corpse C. O. D. undertaker's charges, where no such contract was proved, proof of custom as to the making of such contracts was inadmissible as immaterial.²⁴

Evidence as to Effect on Plaintiff of Delay in Shipping Corpse.—In an action by a mother against a railroad for mental suffering caused by defendant's delay in shipping her the dead body of her son, it was improper to ask plaintiff's daughter if she noticed the effect the failure to ship the remains of her brother had upon the acts and mind and conduct of her mother, the witness' testimony being admissible only as to her mother's health after the failure of shipment, and as to her manifestations of pain and mental distress and her declarations tending to show such distress.²⁵

§ 1725. Weight and Sufficiency.—The rules as to weight and sufficiency of evidence in civil actions generally apply in an action against a carrier for delay in the shipment of, or injury to a dead body.²⁶

from the injuries alleged, it was error to admit plaintiff's testimony. *Missouri, etc., R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942.

20. Affection existing between mother and son.—*Missouri, etc., R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942.

21. Admissibility of evidence.—*Missouri, etc., R. Co. v. Vandiver*, 57 Tex. Civ. App. 470, 122 S. W. 955.

22. Evidence of terms of contract.—*Alcorn v. Adams Exp. Co.*, 148 Ky. 352, 146 S. W. 747.

23. Negligence.—*Wells, Fargo & Co.'s Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824, affirmed in 93 Tex. 697, no op.

24. Custom.—*Pacific Exp. Co. v. Gothright* (Tex. Civ. App.), 130 S. W. 1035.

25. Delay in shipping body of son—Tes-

timony of daughter as to effect on mother.—*Missouri, etc., R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942.

26. Weight and sufficiency of evidence.—Evidence held insufficient to charge railroad employees with wantonness or willfulness in causing box containing corpse of plaintiff's infant to be dropped. *Illinois Cent. R. Co. v. James*, 101 Miss. 791, 58 So. 648.

Delay in transportation.—In an action against a carrier for delay in transportation of a corpse, evidence that defendant had given a transfer agent, transferring it from the depot of a connecting line, a receipt describing it and showing its destination, that it had been seen standing on a truck near the door of the express car before the train left, and that after

§§ 1726-1729. Damages—§ 1726. Nominal Damages.—Where plaintiff, in an action against a carrier for alleged negligent handling of the dead body of his wife in transportation, shows an invasion of his legal rights, he is entitled to recover nominal damages at least.²⁷ And such damages at least are recoverable in an action for delay in the transportation of a corpse where the complaint alleges a breach of the carrier's contract.²⁸

§ 1727. Expenses.—Where a dead body was delivered by a carrier in bad condition, due to its rough handling while in the baggage car, the plaintiff's compensatory damages were limited to the amount he was compelled to expend to prepare the body for burial.²⁹ Where the corpse arrived an hour before the time appointed for the funeral, but the funeral was voluntarily postponed by plaintiff, the carrier causing delay in the arrival of the corpse is not liable for the expense of reembalming the body, necessitated by postponement of the funeral.³⁰

§ 1728. Mental Suffering.—Injury to Corpse.—The right to recover for mental suffering, resulting from injury to a corpse, seems to be sustained by the weight of authority in this country.³¹ But it has been held that the parents of an infant child are not entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant.³²

Delay in Shipment of Corpse.—By the weight of authority in this country there may be a recovery against a carrier for mental suffering resulting from the delay in the shipment of a corpse.³³ But in an action for breach of a car-

the train had gone the station agent telegraphed the conductor that the corpse had been left and would be promptly forwarded, was sufficient to sustain a verdict for plaintiff for the damages suffered by such delay. *St. Louis, etc., R. Co. v. French*, 23 Tex. Civ. App. 511, 57 S. W. 56.

27. Nominal damages.—*Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

28. Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A., N. S., 564, 14 Am. & Eng. R. Cas. 462.

29. Expense of preparing for burial.—*Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

30. Unnecessary postponement of funeral — Expense of reembalming.—*Alabama, etc., R. Co. v. Brady*, 160 Ala. 615, 49 So. 351.

31. Injury to corpse.—*Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775; *Missouri, etc., R. Co. v. Hawkins*, 50 Tex. Civ. App. 128, 109 S. W. 221.

Injury to body of plaintiff's wife—Refusal of his demand to desist from throwing trunks upon coffin.—Where the body of plaintiff's wife was taken as baggage for transportation by a carrier, and plaintiff accompanied it in a baggage car, and at a stopping place the baggageman stood on the box containing the coffin and pulled heavy trunks from the top of the car and let them fall with full force on the box so that they would bound to the floor of the baggage car, the plaintiff at the time pleading with the baggageman to be careful and not to handle the body in such a rough and inhuman

manner, it was held, in plaintiff's action for damages for injury to the body, that he was entitled to recover damages for mental anguish. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

Injury to corpse of plaintiff's child—Mental anguish of his wife.—Where, in an action against a carrier for negligent handling of a corpse of plaintiff's infant, the petition alleged that plaintiff was a married man, that he purchased tickets for himself and family, that he and his wife and children became passengers, that he and his wife suffered distress, and there was no exception to the petition on the ground that no recovery could be had for the wife's suffering, and the evidence, received without objection, showed that the wife accompanied the plaintiff as a passenger, and was present at the depot when the injury to the corpse occurred, it was held that the wife sustained such relation to the transportation of the corpse that a recovery for her suffering was warranted. *Missouri, etc., R. Co. v. Hawkins*, 50 Tex. Civ. App. 128, 109 S. W. 221.

32. Long v. Chicago, etc., R. Co., 15 Okla. 512, 86 Pac. 289, 6 L. R. A., N. S., 883, 6 Am. & Eng. Ann. Cas. 1005.

33. Delay in shipment of corpse.—*Louisville, etc., R. Co. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850 (delay in transporting corpse of plaintiff's husband); *Wells, Fargo & Co.'s Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824, affirmed in 93 Tex. 697, no op. (delay in shipment of corpse of plaintiff's son).

rier's contract to transfer a corpse from its line and deliver it to a connecting carrier to be conveyed to destination, the breach consisting of the carrier's negligence in carrying the corpse beyond the connecting point, causing a delay of twenty-four hours in the funeral arrangements, it was held that no recovery for mental anguish could be had in the absence of a showing of willful misconduct on the part of the carrier or its agents.³⁴

Mental Anguish of Plaintiff's Daughter and Sister-in-Law.—In an action against a carrier for mental anguish by delay in not carrying plaintiff's wife's body on the train upon which plaintiff was carried, recovery could not be had for mental anguish sustained by plaintiff's daughter and sister-in-law as a result of the delay.³⁵

Unnecessary Postponement of Funeral by Widow.—Where the corpse arrived an hour before the time appointed for the funeral, and plaintiff, the widow of deceased, of her own accord postponed the funeral until the following day, she is not entitled to damages for mental anguish because of delay, though before the arrival of the corpse some of the friends of the family had departed.³⁶

Where Plaintiff Stranger to Contract of Carriage.—The mental suffering of a mother is not a proper element of damages in an action against a carrier for breach of its contract to ship the corpse of her child when she is not a known party to the contract and is not disclosed as a beneficiary of it.³⁷

§ 1729. Excessive Verdict.—It has been held that a verdict of five hundred dollars was not excessive for an express company's wrongful refusal to deliver the corpse of a son to the father until the charges were paid, where the father was compelled thereby to make a humiliating and fruitless effort to raise the money for the charges among his neighbors.³⁸ But a verdict for sixteen hundred and forty dollars for a delay of a few hours in the shipment of the corpse of plaintiff's wife, resulting in a delay in the interment only from one afternoon until the next morning, was held to be excessive where plaintiff was treated with proper courtesy, and there was no intimation that the condition of the corpse rendered a speedy interment necessary.³⁹ In a jurisdiction where actual damages are recoverable as compensation for mental suffering it is held that a verdict for two thousand dollars against an express company for delay in shipping the body of plaintiff's son, thereby preventing its burial from a church, and requiring the body to be buried at night, will not be disturbed as excessive.⁴⁰

34. Absence of willful misconduct.—*Beaulieu v. Great Northern R. Co.*, 103 Minn. 47, 114 N. W. 353, 19 L. R. A., N. S., 564, 14 Am. & Eng. R. Cas. 462, distinguishing *Lindh v. Great Northern R. Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A., N. S., 1018, and *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370.

35. Mental anguish of plaintiff's daughter and sister-in-law.—*Missouri, etc., R. Co. v. Vandiver*, 57 Tex. Civ. App. 470, 122 S. W. 955.

36. Unnecessary postponement of funeral by widow.—*Alabama, etc., R. Co. v. Brady*, 160 Ala. 615, 49 So. 351.

37. Where plaintiff stranger to contract of carriage.—*Wells, etc., Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412. See 93 Tex. 742, no op. (contract made by another child).

Contract made by stranger.—Where a contract to transport a corpse from the place of death to her home is entered into between the railway company and a

stranger in no way related to the family, and the existence of the parents of the dead person is not disclosed to the company, the mental anguish and suffering of the mother on account of being deprived of a sight of the corpse, owing to the railway company's delay in transporting it, can not have been reasonably in the contemplation of the company as a probable consequence of the breach of the contract, and she can not recover therefor. *Nichols v. Eddy* (Tex. Civ. App.), 24 S. W. 316.

38. Excessive verdict—Wrongful refusal to deliver corpse.—*Alcorn v. Adams Exp. Co.*, 148 Ky. 352, 146 S. W. 747.

39. Delay in interment from afternoon until morning.—*Louisville, etc., R. Co. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771.

40. Services in church prevented—Burial at night.—*Wells Fargo & Co.'s Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824.

§ 1730. Recoupment of Damages in Action for Transportation Charges.—The claim of a party for damages occasioned to the corpse of his deceased brother while it was being transported by a carrier is a proper matter of recoupment by him when he is sued by the carrier to recover for such transportation, and in such action evidence to sustain the claim is admissible.⁴¹

§ 1731. Instructions.—An instruction not conforming to the pleadings and issues is erroneous.⁴² It is error to give an instruction not supported by the evidence;⁴³ and so it is proper to refuse a requested charge not warranted by the evidence.⁴⁴ Errors in instructions may be cured by other instructions,⁴⁵ or by

41. **Recoupment of damages.**—*Beam v. Cleveland, etc., R. Co.*, 97 Ill. App. 24.

42. **Conformity to pleadings and issues.**—Where the petition in an action to recover for injury to the dead body of plaintiff's wife while in transportation alleged certain specific acts of negligence, an instruction that, if the body was in good condition when received for transportation and in bad condition when delivered, plaintiff was entitled to recover, not only for the specific negligence alleged, but for any other negligence, unless defendant showed an entire absence of negligence on its part, was erroneous. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

43. **Instructions not supported by the evidence.**—An instruction that plaintiff could recover against an express company, if it negligently permitted a box containing a dead body to remain "in the hot sun until about 11 o'clock" July 31st, was erroneous, where there was no evidence that the day was warm. *Adams Exp. Co. v. Hibbard*, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 432.

In an action against an express company for refusing to deliver a dead body at night at a station where no night office was maintained, the body being carried to the first night station and returned the next day, an instruction that if defendant's agent at the destination knew before the arrival of the body at night that it would then arrive, and plaintiff was there to receive it, and ready, and willing, and able to pay the charges, defendant was bound to deliver to him on the first arrival at the destination, was erroneous, as ignoring the validity of the company's rule preventing delivery at night at that station, and as being unsupported by evidence, there being no showing that the agent had the knowledge predicated by the instruction. *Adams Exp. Co. v. Hibbard*, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 432.

44. Where the evidence in an action for alleged willful negligence in roughly handling a dead body in transportation showed that the handling complained of was committed by defendant's baggage-man, an instruction that defendant would not be liable unless the act was shown to have been the act of its servants, acting in the scope of their employment,

was properly refused. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

45. **Error cured by other instructions.**—**Illustrations.**—Error in an instruction in an action for damages for negligence in handling the dead body of plaintiff's wife while in transportation by permitting the jury, upon proof that the body was in good condition when received and not when delivered, to find for the plaintiff, not only for specific acts of negligence alleged, but for any negligence, unless defendant showed an entire absence of negligence is cured by instructions that, unless the condition of the body when delivered was due to defendant's rough handling, nothing could be allowed as exemplary damages or for mental anguish. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

An instruction in an action for damages from alleged willful negligence in handling a dead body while in transportation, submitting as a willful tort the act of defendant in putting other baggage on the top of the box, not supported by evidence that such act was wrongful, is not prejudicial when read with defendant's instructions that the right to recover for mental anguish was conditioned upon the finding that the condition of the body was due to defendant's rough handling. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

In an action to recover for negligent rough handling of the dead body of plaintiff's wife while in transportation, an instruction that if the body was received in good condition and was delivered in bad and injured condition, plaintiff was entitled to recover, unless defendant showed entire absence of negligence, though failing to state what plaintiff was entitled to recover for, when read with instructions that plaintiff could recover only such sum as would compensate him for damage to the box, and what he was compelled to expend to prepare the body for burial, unless defendant's alleged negligent acts were willful, fairly submitted the question of damage from mere negligence, and was unobjectionable. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

the verdict.⁴⁶

Harmless Error.—An instruction in an action for damages for alleged willful negligence in handling the dead body of plaintiff's wife, permitting a finding for the plaintiff without defining the elements of damage that the jury might consider, or limiting them to the evidence to determine the amount, was not reversible error.⁴⁷ And error in an instruction given in such an action, not limiting the plaintiff's damages for injury to the body to the amount which he was entitled to recover, was not reversible error where defendant did not ask to have the instruction limit the amount of recovery.⁴⁸

§ 1732. Questions for Jury.—In an action against a carrier for delay in the transportation of a dead body, the question whether the carrier, in selecting a roundabout route, was negligent, is for the jury.⁴⁹ And whether the carrier used due diligence in clearing its track of a wreck, so as to transport a corpse with sufficient promptness, is a question for the jury.⁵⁰

46. Error cured by verdict.—Where plaintiff, in an action for willfully negligent handling of the dead body of his wife while in transportation, claimed compensatory damages of \$3,750, including expenses, humiliation, and mental anguish, an instruction permitting him to recover that amount for mental anguish alone, in view of a verdict for mental anguish of \$500, was not reversible error. *Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

47. Harmless error.—*Wilson v. St.*

Louis, etc., R. Co., 160 Mo. App. 649, 142 S. W. 775.

48. Absence of request to limit recovery.—*Wilson v. St. Louis, etc., R. Co.*, 160 Mo. App. 649, 142 S. W. 775.

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PART III

CARRIERS OF LIVE STOCK

CHAPTER XIX.

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- h. Enforcement, §§ 2043-2051.
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 - (c) Replication or Reply, § 2046.
 - (3) Burden of Proof, § 2047.
 - (4) Admissibility and Competency, § 2048.
 - (5) Weight and Sufficiency, § 2049.
 - (6) Question for Jury, § 2050.
 - (7) Appeal and Error, § 2051.
- D. Time When Suit Must Be Brought, § 2052.
- E. Limiting Loss to Carrier's Own Line, § 2053.
- F. Limiting Liability to That of Forwarder, § 2054.

§ 1733. Nature of Liability.—Formerly there was some doubt as to whether carriers of live stock were common carriers,¹ as the transportation of live stock over land was unknown to the common law.² It is, however, well settled now that a carrier which transports live stock as freight is a common carrier as to such freight,³ becoming an insurer of its safe delivery except where

1. *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Baker v. Louisville, etc., R. Co.*, 78 Tenn. (10 Lea) 304.

Carriers of animals were, at one time, held to be merely private carriers, subject only to such liabilities as were imposed on such bailees, or as were fixed by contract of parties, but this has ceased to be the law. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

2. *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75.

3. *Myrick v. Michigan, etc., R. Co.*, 107 U. S. 102, 107, 27 L. Ed. 325, 1 S. Ct. 425; *North Penn. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461; *Summerlin v. Seaboard, etc., Railway*, 56 Fla. 687, 47 So. 557, 19 L. R. A., N. S., 191; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Central R. Co. v. Bryant*, 73 Ga. 722; *Kansas Pac. R. Co. v. Nichols, etc., Co.*, 9 Kan. 235, 12 Am. Rep. 494; *Har-*

den v. Chesapeake, etc., R. Co., 157 N. C. 238, 72 S. E. 1042; *Wilson v. Hamilton*, 4 O. 722; *Brown v. Oregon-Washington R., etc., Co. (Ore.)*, 128 Pac. 38; *Ritz v. Pennsylvania R. Co. (Pa.)*, 3 Phila. 82; *Railroad v. Dies*, 91 Tenn. (7 Pickle) 177, 18 S. W. 266; *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257; *Missouri Pac. R. Co. v. Graves*, 2 Texas App. Civ. Cas., § 676; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 322.

The liability of a railway company in the transportation of animals is the same as that of a common carrier respecting other property, except as to injuries resulting from the natural propensities of the animal. *Keyes-Marshall Bros. Liv- erty Co. v. St. Louis, etc., R. Co.*, 80 S. W. 53, 105 Mo. App. 556; *Otrich v. St. Louis, etc., R. Co.*, 164 Mo. App. 444, 144 S. W. 1199, adopting opinion 134 S. W. 665, 154 Mo. App. 420.

Carriers by water.—The owner of a steamboat, who receives horses to be carried for hire, is responsible for the safekeeping, at least, to the same extent as an inkeeper, and is, therefore, liable if the horse escape from his fastenings

loss results from an act of God, the public enemy, or the nature of the animals themselves,⁴ and the fact that the shipment is interstate,⁵ or that it is made in cars which are the private property of the stock owner does not affect this liability.⁶

Injuries Resulting from Inherent Viciousness.—There are, however, certain inherent differences between live stock and inanimate property offered for transportation. To apply the same rigid rules to animate property, possessing the power and oftentimes the will to cause injuries and losses in consequence of its own vitality, would be extending the rule beyond reason and justice. At common law the only exceptions to the liability of the common carrier for losses were where they occurred by the act of God or the public enemy. But to these have since been added cases where the goods were lost by their own decay, from an inherent infirmity or by the fault of the owner himself. And still later, and from the necessity and justice of the case another exception has been introduced in favor of the carrier of live stock, of accountability for its loss or injury resulting from its own uncontrollable vicious propensities, and the damages incident to its carriage from its inherent natural character,⁷ and which could not

and be lost overboard. *Porterfield v. Humphreys*, 27 Tenn. (8 Humph.) 497.

A ferryman who undertakes the transportation of domestic animals takes upon himself the obligation to deliver them safely against all contingencies, except such as would excuse for the nondelivery of other property. *Wilson v. Hamilton*, 4 O. 722. See post, "Carriers by Water," Part VII.

Michigan rule contra.—*Heller v. Chicago, etc., R. Co.*, 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541.

Duty under charter.—A charter granted to a railroad company before the prevalence of the custom of carrying live stock by rail does not impose the duty of transporting cattle. The necessity of special arrangements for their protection in transit excepts their transportation from the reasons of the common-law rule imposing upon the carrier the care of other property, and making him an insurer against loss or injury. *Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

4. Carrier an insurer.—*Chesapeake, etc., R. Co. v. Magowan*, 147 Ky. 422, 144 S. W. 80; *Louisville, etc., R. Co. v. Pedigo*, 129 Ky. 661, 113 S. W. 116; *Church v. Chicago, etc., R. Co.*, 81 Neb. 615, 116 N. W. 520; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 88 S. W. 379, affirmed in 101 Tex. 649, no op.

Where a carrier contracted to transport plaintiff's horses and other property between certain points for the usual consideration, the carrier was an insurer against all damage to or loss of the property, except such as might arise from acts of God, public enemies, or acts of the owner himself, subject to some restrictions arising out of the instincts, habits, propensities, wants, necessities, vices, or locomotion of the animals. *Schroeder*

Lumber Co. v. Chicago, etc., R. Co., 135 Wis. 575, 116 N. W. 179.

5. Interstate shipments.—The common-law liabilities imposed on common carriers are applicable to interstate shipments of live stock. *Ficklin v. Wabash R. Co.*, 93 S. W. 847, 117 Mo. App. 221.

6. Use of private cars.—A railroad company in drawing a car load of live stock is liable as a common carrier, though the car is the private property of the stock owner. *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961.

In the case of *Louisville, etc., R. Co. v. Katzenberger*, 84 Tenn. (16 Lea) 380, the railway company was held liable for the loss by a passenger of his hand baggage, while riding in a sleeping car under the special care of the servants of an independent sleeping-car company. That the car made a part of the train of the railway company fixed its responsibility as a carrier. The rule applicable to the carriage of passengers in the cars of an independent company applies with full force to the carriage of stock in special cars owned by an independent company. *Railroad v. Dies*, 91 Tenn. (7 Pickle) 177, 18 S. W. 266.

7. Injuries resulting from inherent viciousness.—*Central, etc., R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 42 L. R. A., N. S., 898, 110 Am. St. Rep. 170; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Gilbert Bros. v. Chicago, etc., R. Co. (Iowa)*, 136 N. W. 911; *Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Block v. Merchants' Despatch Transp. Co.*, 86 Tenn. (2 Pickle) 392, 6 S. W. 881; *Adams Exp. Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666; *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri Pac. R. Co. v. Cornwell*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc.,*

have been prevented by foresight, vigilance, and care.⁸

Limitation of Liability.—The liability of the carrier may, however, be limited by special contract, where not prohibited by statute.⁹

§ 1734. Duty to Receive and Carry.—See ante, "Duty to Receive and Carry," chapter 4.

§§ 1735-1758. Duties in Respect to Transportation—§§ 1735-1739. Degree of Care Required—§ 1735. In General.—In the absence of statutory provisions or special contract, carriers of live stock incur the same liability as carriers of other property, the common-law rule as to the duty of common carriers during the transportation being imported into and becoming a part of the contract. But the carrier is only required to exercise the reasonable care of an ordinarily prudent man to prevent injuries arising from the peculiar nature or vicious propensities of the animals themselves,¹⁰ and the

R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567; Gulf, etc., R. Co. v. Baird, 75 Tex. 356, 12 S. W. 530.

The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. North Penn. R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

8. Penn. v. Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. St. Rep. 748.

While railways are common carriers, with respect to live stock, they do not assume the same measure of responsibility which attends the carriage of inanimate freight, being liable only for the exercise of ordinary care in operating the cars to avoid injury to the live stock, and for such injuries as proximately result from such failure. Missouri, etc., R. Co. v. Lewellen Bros. (Tex. Civ. App.), 111 S. W. 773.

9. Limitation of liability by contract.—Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214; Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Cooper v. Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240; Central R. Co. v. Bryant, 73 Ga. 722; Missouri Pac. R. Co. v. Graves, 2 Texas App. Civ. Cas., § 676; Texas Cent. R. Co. v. Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; Missouri, etc., R. Co. v. Russell, 40 Tex. Civ. App. 114, 88 S. W. 379, affirmed in 101 Tex. 649, no op.

A carrier accepting live stock for transportation, without issuing a bill of lading, thereby assumes, as to such shipment, the common-law liabilities of a common carrier. Northern Alabama R. Co. v. Bidgood, 5 Ala. App. 658, 59 So.

680. See post, "Limitation of Liability of Carriers of Live Stock," §§ 1872-2054.

10. Indiana.—Judgment (App.) 82 N. E. 1134, reversed. Chicago, etc., R. Co. v. Hostetter, 171 Ind. 465, 84 N. E. 534.

Iowa.—Wilke v. Illinois Cent. R. Co., 153 Iowa 695, 133 N. W. 746, Ann. Cas. 1913E, 308.

New York.—Olds v. New York, etc., R. Co., 94 N. Y. S. 924, 107 App. Div. 26.

Tennessee.—Railroad v. Dies, 91 Tenn. (7 Pickle) 177, 18 S. W. 266; Baker v. Louisville, etc., R. Co., 78 Tenn. (10 Lea) 304.

Texas.—Texas, etc., R. Co. v. Stewart, 52 Tex. Civ. App. 514, 114 S. W. 413; Waggoner v. Missouri, etc., R. Co. (Tex. Civ. App.), 92 S. W. 1028; Missouri, etc., R. Co. v. Kyser, 43 Tex. Civ. App. 322, 95 S. W. 747.

Defendant railroad, when its agent saw that a jack shipped by plaintiff was so frightened by a train as to throw him into an uncontrollable fit of terror, causing him to fall down in his crate, so that he could not get up, was bound to use ordinary care to protect the jack from further injury, and if to do so required him to be unloaded and recrated, or otherwise given attention, it should have been done at the first stopping place affording reasonable facilities for that purpose. Kelly v. Adams Exp. Co. (Ky. App.), 119 S. W. 747.

Negligent tying of horses.—In an action against a common carrier for injuries to horses while in transit, evidence that the horses, after being unloaded and fed, were improperly tied by the carrier's employees upon reloading them, whereby the horses were injured, is sufficient evidence of the carrier's negligence to support a verdict for damages. Louisville, etc., R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866.

Care of person of ordinary prudence under same or similar condition required.—A charge holding the carrier liable for the damages unless the injuries to the horses were occasioned, "by the act of God, a public enemy, negligence of the shipper, or some vicious propensity of

rule governing the carriers' liability is applicable alike to carriers by water as well as carriers by land.¹¹ Where the shipper by special contract has assumed this duty the carrier is relieved but must furnish him reasonable opportunity to perform it.¹²

Where Shipper Accompanies Shipment.—The degree of care, in the absence of special contract is the same whether the shipper accompanies the shipment or not. Since cattle shipped over a railroad are in possession of the railroad company, the company can not avoid liability for negligence in caring for them, so far as such care depends on the manner of operating the train, on the ground that the shipper was in charge of the stock,¹³ but the carrier is not bound to furnish an attendant where the shipper does not accompany the shipment, where such service is not reasonably necessary,¹⁴ and though a contract with a live-stock carrier binds the shipper to go along and look after his stock, yet if the carrier, notified that no one will go in charge, nevertheless undertakes to carry the stock, its duty is the same as if the shipper had not agreed to accompany it.¹⁵

§ 1736. Management of Train.—It is the duty of a railroad in transporting cattle to so manage its cars as to protect them, as far as this can be done by use of proper care—e. g., to stop and start without violent jerks calculated to throw them down.¹⁶

the animals themselves," was erroneous in exacting too high a degree of care, since the carrier was only required to use such care to avoid injury to the horses as a person of ordinary prudence and care would use under the same or similar circumstances. *Ft. Worth, etc., R. Co. v. Lock*, 30 Tex. Civ. App. 426, 70 S. W. 450.

11. Carriers by water.—Owners of a steamboat are liable for loss of animals which, at difficult point of navigation, they sent on shore, to lighten the boat, and which strayed away through negligence of those in charge of the boat. *Pitre v. Offutt*, 21 La. Ann. 679, 99 Am. Dec. 749.

The owners of a steamboat, who receive horses to be conveyed from one point to another, are responsible for losses, to the same extent as innkeepers; and where a horse escapes from his fastenings on a boat, and is lost in the river, this is prima facie negligence for which the owners of the boat will be held responsible. *Porterfield v. Humphreys*, 27 Tenn. (8 Humph.) 497. See post, "Carriers by Water," Part VII.

12. If the owner takes upon himself the care of his property while in transit, and it is lost by his carelessness, the carrier is not responsible. *Wilson v. Hamilton*, 4 O. 722. See post, "Limitation of Liability of Carriers of Live Stock," §§ 1872-2054.

13. Atchinson, etc., R. Co. v. Ditmars, 3 Kan. App. 459, 43 Pac. 833.

Where owner accompanies shipment.—Where a stipulation in a contract contemplated that the shipper, or his agent, should accompany the stock, and contained a provision that, in case of accident or delay, the shipper or agent should take care of the stock, the court should

have charged that it was the duty of the plaintiff, or one of his agents, to accompany this stock; and, if the damage was the result of his not accompanying the stock, then he could not recover. *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

A carrier of live stock accompanied by the shipper is not bound to use the highest degree of care to avoid injury to the stock through freezing; ordinary care being sufficient. *Colsch v. Chicago, etc., R. Co.*, 149 Iowa 176, 127 N. W. 198, 34 L. R. A., N. S., 1013, Ann. Cas. 1912C, 915, reversing judgment 117 N. W. 281, on rehearing.

The fact that a servant of plaintiff accompanied cattle shipped by him over defendant's road, and that the servant rode on a free pass, did not exempt defendant from liability for injuries to the cattle caused by the want of proper care on the part of defendant's agents, there being no express contract to that effect. *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. L. 451, 20 Atl. 33; *T. & H. R. Co. v. Montgomery*, 4 Texas App. Civ. Cas., § 238, 16 S. W. 178. See post, "Where Shipper Has Assumed Duty," §§ 1755-1758; "Limitation of Liability of Carriers of Live Stock," §§ 1872-2054.

14. Furnishing attendant.—Where an attendant was not reasonably necessary for the safe transportation of a mare, a carrier was not guilty of negligence in failing to provide one. *Ames v. Fargo*, 99 N. Y. S. 994, 114 App. Div. 666.

15. Louisville, etc., R. Co. v. Spalding, etc., Co., 8 Ky. L. Rep. 355.

16. Management of train.—*Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

§ 1737. Sprinkling Hogs.—A carrier accepting hogs for shipment is bound to use reasonable care in handling and caring for them on the journey according to the usual course of business in such shipment, and if it is necessary to sprinkle them with water to protect them from overheating its failure to do so renders it liable for any loss or damage sustained thereby.¹⁷

§ 1738. Degree of Care Measurable by Character of Property.—The degree of duty and care charged to the carrier in safely transporting and handling a shipment of live stock is to some extent measurable by the character of the property shipped, and its condition at the time.¹⁸ It is the duty of the owner delivering an animal to a carrier, which he knows requires peculiar care in its safe transportation, to make known the necessity, in order that the proper precaution may be used.¹⁹

§ 1739. Care during Delay in Transportation.—The degree of care required of a carrier who has accepted a shipment of live stock is the same where the shipment has been unavoidably detained or delayed during the period of delay as during transportation. The mere fact of delay does not relieve the carrier of its duty to use reasonable care to protect the stock.²⁰

§§ 1740-1746. Duty as to Cars—§ 1740. Duty to Furnish Cars in General.—A carrier engaged in the transportation of live stock, and accustomed to furnish suitable cars therefor, upon reasonable notice, and holding itself out to the public generally as a common carrier, is a common carrier of live stock, with such restrictions on its common-law liabilities as are embodied in special contracts, and is therefore bound to furnish suitable cars for such stock on reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier.²¹ It is not

17. Sprinkling hogs.—Illinois Cent. R. Co. v. Holt, 29 Ky. L. Rep. 135, 92 S. W. 540.

Where a carrier receives a car of hogs for shipment, it is his duty to use due care and reasonable means to protect them from overheating, notwithstanding the fact that the car was overcrowded in loading. In such a case if the carrier fails to properly drench or sprinkle the hogs, he will be liable for injuries sustained by them. Lake Shore, etc., R. Co. v. Gibson, 8 O. C. C., N. S., 345, 18-28 O. C. D. 538.

18. Nature of property.—Georgia, etc., R. Co. v. Greer, 2 Ga. App. 516, 68 S. E. 782.

If mares with foal, were shipped and this fact was not known to the carrier, and it could not have been ascertained or discovered by the exercise of reasonable diligence at the time of the contract of shipment, or before they received the injuries complained of, and such condition would, in order to preserve the stock from injury, require of the carrier a degree of caution and care greater than ordinarily exercised in the shipment of horses or mares not with foal, the carrier should not, under such circumstances, be held liable for depreciation in value of the animals that resulted from the loss of the foal. In the absence of notice or of facts sufficient to charge the carrier with the knowledge that the animals shipped were with foal, such con-

dition should be regarded as a hidden or concealed defect, and the carrier, in handling such shipment, should not be charged with a degree of care or duty greater than that ordinarily exercised in handling mares without foal. Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887, 888.

19. Notice of necessity for peculiar care.—Wilson v. Hamilton, 4 O. 722.

20. Duty to care for stock during delay in transportation.—Where cattle were placed in the hands of the common carrier to be transported to their destination, it was responsible for their safe delivery, and, if the rush of business was such that the cattle were unavoidably detained, it was certain its duty to properly care for them during the detention. 2 Harris, Dam. Corp., p. 919, § 800. International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323. See post, "Liability for Delay in Transportation or Delivery."

21. Duty to furnish cars in general.—St. Louis, etc., R. Co. v. Jones, 93 Ark. 357, 125 S. W. 1025; Harden v. Chesapeake, etc., R. Co., 157 N. C. 238, 72 S. E. 1042; Ayers v. Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

A railroad company acts in the capacity of a common carrier of live stock which it receives for transportation; and, as such carrier, it is bound to provide cars fit and suitable under existing con-

required to keep engines and cars at stations at all times to move cattle offered for shipment, but performs its whole duty by using reasonable care to furnish transportation after the cattle are delivered.²² Where it has agreed to furnish cars at a specified time and place, it can not defend itself from liability for failure to do so on the ground that its line was congested with business and that it could not furnish the cars.²³ And in Michigan it was held that, though they were not common carriers, their obligation to furnish cars would be the same, and their charter provisions against partiality would apply.²⁴

§ 1741. Sufficient Number of Cars.—Where the carrier contracts for shipment of cattle it is required to furnish a sufficient number of cars to properly care for the shipment, and it is liable for damages resulting from its failure to do so.²⁵

§§ 1742-1744. Cars Must Be Suitable—§ 1742. In General.—It is the duty of a common carrier, engaged in the business of carrying live stock, to furnish reasonably safe and suitable cars, free from substantial defects, in view of the kind, character and nature of the stock to be transported.²⁶ The obligation of a railroad company to provide suitable and safe cars is as great in respect to carriage of live stock as of merchandise,²⁷ and it has been held that this duty can not be limited or avoided by contract.²⁸

ditions, and exercise due care to carry safely. *Chicago, etc., R. Co. v. Williams*, 85 N. W. 832, 61 Neb. 608, 55 L. R. A. 289.

22. *St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 238, 113 S. W. 1035.

23. *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

Rush of business as excuse.—A common carrier, who agrees to furnish at a certain time and place, if they can be gotten, cars for the transportation of live stock, and who has the cars applied for on hand at the time and place specified, is not relieved from liability for damages for refusing to receive and ship the stock, after tender of the same by the person making application, because of an unusual and unprecedented accumulation of live stock at such time and place, received in transitu from connecting carriers and local shippers. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846.

A rush of business is no defense for failure of a carrier to transport freight or cattle with reasonable care and diligence, such failure being excused only by the act of God or other vis major. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

24. Where railroad companies were in the habit of transporting live stock, the holding themselves out to the public as doing this kind of business for all alike, on the same special terms, as to the care and risks (different from those of common carriers), would not make them common carriers as to such care and risk, though in other respects, their liability should be the same as in the case of other property generally, and their obligation to furnish proper cars and properly to make up and run their trains would be the same, and the provisions

of their charter against partiality would apply. *Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

25. Must furnish sufficient number of cars.—Under contract for shipment of cattle whereby shippers agrees to load and unload them, it is the duty of the railroad to furnish sufficient cars to carry them, and the railroad is liable for damages, resulting from failure to furnish sufficient cars. *International, etc., R. Co. v. Pool*, 24 Tex. Civ. App. 575, 59 S. W. 911.

26. Suitability of cars—*Iowa*.—*Blair v. Wells Fargo & Co.*, 155 Iowa 190, 135 N. W. 615.

South Dakota.—*Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

Texas.—*Missouri Pac. R. Co. v. Kingsbury* (Tex. Civ. App.), 25 S. W. 322; *Missouri Pac. R. Co. v. Nicholson*, 2 Texas App. Civ. Cas., § 168.

Virginia.—*Moore v. Baltimore, etc., R. Co.*, 103 Va. 189, 48 S. E. 887.

It is not necessary to plead or prove the defendant's negligence in an action against a carrier for injuries to a shipment of stock, caused by its failure to provide proper cars, since it is responsible for such injuries, without regard to the question of negligence. *International, etc., R. Co. v. Pool*, 59 S. W. 911, 24 Tex. Civ. App. 575.

27. *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504.

28. Can not avoid duty by contract.—*Gulf, etc., R. Co. v. Wilhelm*, 3 Texas App. Civ. Cas., § 458.

A stipulation in the bill of lading that a shipper of cattle accepts the cars furnished can not prevent his showing that the cars were not suitable, as this would be an attempt to limit the carrier's duty. *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

Presence of Owner.—Nor will the mere presence of the owner lessen this responsibility, if he had no power over the train, nor right to make any change in the disposition of the cars, which were necessarily under the control of the agents of the carrier.²⁹ But where the owner of cattle to be transported makes his own selection from the vehicles of the carrier, under circumstances charging him with knowledge of their capabilities and defects, the carrier is not responsible for any injury which results exclusively from those defects. But, as the owner may assume that there will be no improper detention, the carrier will be responsible if damage result from cars ill adapted to the purpose in case of detention.³⁰ While the cars must be of sufficient strength to resist the struggles of the animals naturally to be expected from their nature,³¹ they need not be of the safest and best approved style and make, the law requiring only that they be reasonably safe and suitable for the purposes for which they are to be used.³² Thus, the shipper can not demand that the carrier furnish stable cars unless it is shown that no other cars would be proper or suitable for such freight as he desired to ship,³³ or that stable cars were contemplated by the parties to the contract.³⁴ In respect to the adequacy of carriage, a railroad

29. Presence of owner.—*Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222, 79 Am. Dec. 578.

A common carrier can not be charged with negligence in transporting a horse in a car the door of which was insecurely fastened, where the agent of the carrier endeavored to make the door secure by driving nails about halfway into it and bending them over, in the presence of the owner, without objection. *Geyer v. United States Exp. Co.*, 50 Pa. Super. Ct. 301, 306.

30. Cars selected by shipper.—*Harris v. Northern Indiana R. Co.*, 20 N. Y. 232.

31. A car furnished by a railroad company for the transportation of horses and mules, which is liable to be broken from slight kicks by the animals, is not reasonably safe, and the shipper may recover for injuries to the animals caused by the car being so broken. *Betts v. Chicago, etc., R. Co.*, 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558.

A carrier is not responsible for injuries to a race horse by its kicking down a reasonably safe stall because of fright. *Southern Exp. Co. v. Fox (Ky.)*, 115 S. W. 184; *S. C.*, 117 S. W. 270.

A railroad company transporting live animals for hire is bound to furnish cars sufficiently strong to resist their struggles, and is liable for injuries occasioned by its neglect in this particular, though the animals were vicious and unruly, but not if the injury results from the conduct of the animals alone, if it appear that the company provided suitable cars and exercised due care. *Smith v. New Haven, etc., R. Co. (Mass.)*, 12 Allen 531, 90 Am. Dec. 166.

A railroad company is not bound to provide cars strong enough to safely transport animals that are "vicious" and unruly, but only such as are ordinarily unruly. *Selby v. Wilmington, etc., R. Co.*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635.

32. A shipper of live stock can not demand of the railroad company more than suitable, safe, and sufficient cars, motive power, and appliance, can not demand the use of the "safest and best approved motive power, with the best appliances in use." *Illinois Cent. R. Co. v. Haynes*, 63 Miss. 485.

33. Right to demand special cars.—To charge a railroad company with negligence because of the omission of some peculiar, adventitious and temporary preparation, the necessity or propriety must be shown by extraneous evidence. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

While statutes requires railway companies to furnish suitable cars for transportation of sheep, goats, hogs, and calves, it is not required, by statute or otherwise, that stable cars shall be furnished for shipment of such freight. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 26 S. W. 233; *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.

34. Duty to furnish stable cars where contemplated by parties.—Where the evidence showed that stable cars were the only cars used by a carrier suitable for certain stock, and that no effort was made furnished and other kind of cars, and the pleadings, evidence, and general charge presented as questions for the jury authorizing recovery failure to furnish suitable cars at the time and place agreed on, and failure to furnish cars within suitable time after tender of stock for shipment, special charges to find for such carrier if stable cars were ordered on a certain date, and it promised to make an effort to get them, and a reasonable effort was made, and the cars procured on or about such date, and to so find if the order was for stable cars, and the carrier did not agree to furnish them on a particular day, were properly refused, since, though stable cars were

company meets its duty and obligation, when it furnishes such as is most in use, and is approved by persons skilled and experienced in the business, as necessary and proper for safe transportation, having in view the kind and nature of the freight; and the omission of any part or appliance, permanent or usual in the construction or preparation of a car, and which is necessary and proper to its adequacy for the general uses and purposes of railroad transportation, is *prima facie* negligence.³⁵ Cars which have become infected with contagious cattle diseases,³⁶ or which were too small to properly accommodate number of cattle shipped,³⁷ or which were improperly constructed to carry the particular kind of cattle offered,³⁸ or which were insufficiently ventilated,³⁹ or left with dangerous projecting bolts,⁴⁰ have been held to be not safe or suitable cars for the shipment of live stock and the carrier could not defend itself from liability for injuries resulting from such causes, but the shipper can not recover damages for injuries resulting from latent defects, which were undiscoverable by reasonable precautions on the part of the carrier.⁴¹

Character of Car Regulated by Statute.—In Missouri the character of cars to be furnished for the shipment of live stock is partly regulated by statute.⁴²

§ 1743. Bedding.—A common carrier being required to furnish reasonably safe and suitable cars for the transportation of live stock tendered for shipment, when a car offered a shipper can only be made thus safe and suitable by the use of bedding, it is the duty of the carrier to furnish it. It can not be affirmed as a matter of law in the absence of special contract, that the fail-

not mentioned by name, if contemplated in the order it was the carrier's duty to furnish them, and such charges would have prevented recovery for failure to furnish cars in reasonable time after tender of the stock. *International, etc., R. Co. v. True*, 57 S. W. 977, 23 Tex. Civ. App. 523.

35. East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489.

36. Infected cars.—It is the duty of a railroad company to furnish shippers of cattle with cars free from contagious cattle diseases, and, if it fails to do so, it is liable for loss of cattle caused thereby. *Judgment* 48 Ill. App. 462, affirmed. *Illinois Cent. R. Co. v. Harris*, 56 N. E. 316, 184 Ill. 57, 48 L. R. A. 175.

37. Cars too small for cattle.—Plaintiff had shipped some stock safely in a car, and, on arriving at a certain point, re-shipped them to their destination over defendant's road. Defendant, notwithstanding plaintiff's protest, furnished a smaller car than the one the stock had been before shipped in, in consequence of which the stock injured each other. Held, that defendant, having had the means of furnishing a larger car when demanded, and shown its necessity, was negligent in not doing so, and liable therefor. *Missouri Pac. R. Co. v. Graves*, 2 Texas App. Civ. Cas. § 676.

38. Low racks injuring cattle.—Where a calf was injured in the racks of pens provided by a carrier, during transportation, through the negligence of the carrier in making the racks so low that the calf could get into them by its own voluntary action, the carrier is not re-

lieved from liability. *Gulf, etc., R. Co. v. Dunman* (Tex. Civ. App.), 81 S. W. 789.

39. Where a carrier contracted to transport certain horses for plaintiff, the carrier was bound to furnish suitable cars, provided with sufficient facilities for ventilation. *Schroeder Lumber Co. v. Chicago, etc., R. Co.*, 135 Wis. 575, 116 N. W. 179.

40. Protruding bolt.—Where one of the plaintiffs on application was tendered a single car in which to transport his mules, and this he merely "bedded down," and nailed planks around to prevent the mules from getting their feet through the openings, he did not thereby relieve the carrier from liability for injuries to one of the mules by reason of its negligence in permitting a bolt to protrude within the car. *St. Louis, etc., R. Co. v. Brosius*, 105 S. W. 1131, 47 Tex. Civ. App. 647.

41. Latent defects.—A railroad company is not liable for damages to horses caused by the breaking of a wheel under a freight car, causing its derailment, if the track was in good condition, and the wheel was comparatively new and showed no defect or flaw upon inspection after the accident, and no other negligence on the part of the company is shown. *Morrison v. Phillips, etc., Constr. Co.*, 44 Wis. 405, 28 Am. Rep. 599.

42. Statutory regulations.—The state may require carriers to furnish cars of a certain kind to alleviate the sufferings of live stock in transit. *George v. Chicago, etc., R. Co.*, 113 S. W. 1099, 214 Mo. 551.

ure to "bed" a car for the transportation of live stock with sand, straw or other material, is negligence per se, but if it is shown that such a course is usual and customary, and is such a precaution as a prudent, competent, and faithful man, experienced in the business, would take, the company will be responsible for any injury caused by its omission in this regard,⁴³ and it must exercise reasonable care to see that they are properly bedded.⁴⁴ A carrier is not relieved of its duty to furnish the bedding required to make a car reasonably safe and suitable by an agreement of the shipper to load and unload his stock, and to feed, water, and care for it in transit.⁴⁵ Relief from such liability may be specifically provided for by special contract,⁴⁶ or the shipper may assent to the manner and sufficiency of bedding as provided by the carrier and in such case relieve the carrier of responsibility for improperly bedded cars.⁴⁷

§ 1744. Using Cars the Property of Others than Carrier.—The fact that the cars used by the carrier for transporting live stock were the property of another will not relieve it from its duty to furnish safe and suitable cars and

43. Bedding.—*East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Allen v. Chicago, etc., R. Co.*, 82 Neb. 726, 118 N. W. 655, 23 L. R. A., N. S., 278.

Cars for the transportation of horses or mules should be bedded. *Chicago, etc., R. Co. v. Clements*, 53 Tex. Civ. App. 143, 115 S. W. 664.

44. Reasonable care.—After a valuable horse was placed in a railroad car, the owner asked for tan for bedding. The agent told him he could not get tan, but directed the owner where he might get straw. The straw was obtained and put into the car, in the presence of the agent and without objection. It took fire from the sparks of the engine, and badly injured the horse. Held, that the company was liable. *Powell v. Pennsylvania R. Co.*, 32 Pa. 414, 75 Am. Dec. 564.

A carrier of live stock, having undertaken to bed the cars, whether bound to or not, must exercise at least ordinary care to see that they are properly bedded. *Houston, etc., R. Co. v. Mayes*, 97 S. W. 318, 44 Tex. Civ. App. 31.

45. *Allen v. Chicago, etc., R. Co.*, 82 Neb. 726, 118 N. W. 655, 23 L. R. A., N. S., 278.

Where a railroad company undertook to transport a lot of cattle, to be cared for by their owner, but placed them in a car having a defective "journal," whereby, being changed to another car, and the owner unable to provide them with bedding therein, some of them were injured, it was held that the company was liable for all the damages resulting to the owner therefrom. *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412.

A carrier is bound to furnish a safe and suitable car for the transportation of live stock and is not relieved from liability for not doing so, though the shipper examined the car and did not object to its fitness. *Gulf, etc., R. Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767.

46. Where a shipper of cattle contracts with a railroad company for the use of a car for the transportation of cattle, having reference to the cars in use on the defendant's road, in the absence of any stipulation for any particular kind of car, the extent of the company's obligation is to furnish a safe, serviceable and adequate car, adapted to the use intended; and the shipper retaining control and charge of the cattle, and assuming the risk and responsibility of loading, his understanding of the contract may be inferred from the fact, that he had provided material for bedding the car; and the company will not be held liable for any loss or injury arising from his fault or neglect in this regard. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

47. Under a contract for the transportation of horses, which is silent as to the fitness of the cars to be furnished by the company, the obligation of the company to furnish suitable cars is absolute on the reception of the property, without reference to the fitness or fidelity of the agents of the company, unless it appears that the other parties, with proper opportunities of observation, and with notice of their actual condition, assented to the use of the cars on which the horses were shipped. *Great Western R. Co. v. Hawkins*, 18 Mich. 427.

Shipper expressing satisfaction with bedded car.—In an action against a railroad company for damages to cattle shipped over its road, resulting from alleged negligence in failing to properly bed the cars, the defendant alleged that plaintiff was present when the cars were bedded, and expressed his satisfaction therewith, and thereupon the defendant ceased to bed the cars, and they were turned over to him to be loaded. Held, that such facts, if found, constituted a defense. *Texas Cent. R. Co. v. O'Laughlin* (Tex. Civ. App.), 72 S. W. 610.

it can not escape its liability for injuries resulting from defects on that ground.⁴⁸

§ 1745. Cars Must Be Furnished within Reasonable Time.—While it is the duty of a common carrier engaged in the business of carrying live stock to furnish suitable and safe cars and facilities therefor, it is entitled to a reasonable time within which to furnish cars.⁴⁹ In some states this duty is imposed and regulated by statute.⁵⁰ What constitutes a reasonable time, in the absence of special contract, is a question of fact for the jury and depends upon all the circumstances, such as the place and character of the shipment, the amount of freight being then offered and on hand for transportation at that and other points on the line, etc.⁵¹

48. Cars belonging to others than carrier.—The fact that a horse is shipped in a palace horse car owned by an independent company, which is paid for its use by the shipper, will not exempt the railroad company which ran the car, and with which the contract of shipment was made, from liability for injuries sustained from a defect in the car, as a carrier cannot escape responsibility by carrying its freight in cars furnished or owned by another company. *Louisville, etc., R. Co. v. Dies*, 91 Tenn. (7 Pickle) 177, 18 S. W. 266, 30 Am. St. Rep. 871.

49. Cars must be furnished within reasonable time.—*Moore v. Baltimore, etc., R. Co.*, 103 Va. 189, 48 S. E. 887.

50. Under Texas statute.—Under arts. 4494, 4496, Rev. Stat., as soon as reasonable time elapses after cattle are offered for transportation, it becomes the duty of a railroad company to furnish adequate accommodation for such purpose, and for failure to perform this duty it is liable in damages. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008.

Shipper can sue for breach of contract.—But the act of legislature prescribing penalty for carrier's failure to furnish freight-cars after demand, does not estop shipper from suing for breach of contract to furnish cars for transportation of beef cattle. *Missouri Pac. R. Co. v. Harmonson*, 4 Texas App. Civ. Cas., § 91, 16 S. W. 539. See post, "Duties as to Transportation beyond Own Line," III, G.

Statute strictly construed.—But such statute being penal, will be strictly construed. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

Provision as to penalty void as to interstate shipment.—Rev. St. 1895, arts. 4497, 4499, imposing a penalty on carriers for delay in furnishing cars for shipments, are invalid under the federal constitution, as an interference with interstate commerce. *Texas, etc., R. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 621, 99 S. W. 1166, reversing 36 Tex. Civ. App. 606, 83 S. W. 53, affirmed in 98 Tex. 620, no op.

Application for cars must be in writing.—Where the shipper brought an action

for statutory penalty for breach of an agreement to furnish cars at a certain time, although the demand was not in writing as required by the statute, such demand may be pleaded as a basis for the recovery of damages in delay in making the shipment. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 85 S. W. 44.

Must specify time cars are desired.—An application for cars for the shipment of cattle specifying that they should be furnished "as soon as possible," specifies no time whatever and is not a sufficient compliance with Rev. Stat., art. 4498, providing for the recovery of the penalty and damages by the shipper, as such statute is penal, and the rule applies, that he who seeks a recovery and penalty under such a statute must bring himself strictly within the provisions of the law. *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 536, 91 S. W. 567; *Texas, etc., R. Co. v. Shipman* (Tex. Civ. App.), 98 S. W. 449.

To whom application must be made.—The local station agent in charge of the railroad's transportation may be considered as "the superintendent or person in charge of transportation," upon whom demand for stock cars may be made under the statute. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 26 S. W. 233.

51. What constitutes reasonable time.—A railroad company was not liable for failure to furnish stock cars at P. on the same day they were ordered, where it appeared that none were available, notwithstanding four days previously the shippers "informed" the agent at A., a station four miles distant, that they would want two cars to ship live stock from "A. and P.," it appearing that the agent at A. had no authority to order cars from A. to P. *Lake Shore, etc., R. Co. v. Anderson*, 39 Ind. App. 112, 79 N. E. 381.

Instruction that weather and rush of business could be taken into consideration not injurious to defendant.—In an action against a carrier for delay in furnishing cars for shipment of live stock an instruction that, in determining what would be a reasonable time, the jury might take into consideration the weather and the unusual rush of business, if there were such, could not be complained of by de-

§ 1746. Duty to Place in Particular Position in Train.—A carrier is not required to place cattle cars in any particular position in its train provided it has used due care in placing the car so as to avoid damage or injury liable to occur because of the peculiar nature of the shipment.⁵²

§§ 1747-1749. Duty to Provide Stock Pens.—See post, "Duty as to Loading and Unloading," §§ 1750-1752. As to duty to provide pens when unloading to feed, water and rest, see post, "Duty to Feed, Water and Rest," §§ 1754-1758.

§ 1747. In General.—The carrier holding itself out as a carrier of live stock, is under a legal obligation arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its lines, as well as for discharging such stock after it reaches the place to which it is consigned.⁵³ And where it is necessary

defendant. *Pecos, etc., R. Co. v. Evans-Snider-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, judgment affirmed, 100 Tex. 190, 97 S. W. 466.

Instruction assuming time between shipper's request and tender of cattle was reasonable time.—In an action for damages to cattle by failure of defendant railway company to furnish cars within a reasonable time after they were ordered, the court charged that if defendant failed to furnish cars in a reasonable time, and plaintiff tendered his cattle on a certain day, and defendant refused to receive them because not having cars, thereby compelling plaintiff to hold them, to their injury, plaintiff could recover. Another charge stated that, if defendant was not negligent in failing to furnish cars at the time plaintiff tendered the cattle, the verdict should be for defendant. Held that, construing the instructions together, the first was not erroneous, as assuming that the time between plaintiff's request for the cars and the tendering of the cattle was a reasonable time in which to obtain the cars. *Texas, etc., R. Co. v. Powell*, 79 S. W. 86, 34 Tex. Civ. App. 575.

Charge assuming delay in furnishing for nine days as unreasonable.—In an action of damages for failure to furnish cars to a shipper within a reasonable time it was not error for the charge to assume that a failure to furnish the cars for nine days after order made for them was negligence, since the statute makes a failure to furnish them for six days ground for the statutory penalty in such case. *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

Furnishing cars to another whose order had been overlooked.—In an action for damages to cattle, alleged to have been caused by defendant railroad company's negligent failure to furnish cars within a reasonable time after request, the evidence showed that the cars were on hand when plaintiff's cattle were tendered for shipment, but were furnished to another

shipper, whose prior order had been overlooked, and that no effort was made to obtain cars for plaintiff till about the time the cars mentioned were turned over to the other shipper. Held, that a requested charge that, if defendant used ordinary care and diligence, it was not liable, was not required by the evidence. *Texas, etc., R. Co. v. Powell*, 79 S. W. 86, 34 Tex. Civ. App. 575; *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008; *Pecos, etc., R. Co. v. Evans-Snider-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190.

Where no opportunity was given to the carrier to furnish a suitable car, and no order or request beforehand was made that one should be furnished, it was held, that the carrier was not responsible for the damages to the goods transported, because of the failure to furnish a suitable car. *Moore v. Baltimore, etc., R. Co.*, 103 Va. 189, 48 S. E. 887.

52. Duty to place in particular position in train.—A carrier is not bound to furnish a stock shipper with a caboose with a platform nor to place the shipper's stock cars next to the caboose or in any particular position in the train. *Receivers v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

53. Duty to provide stockyards.—*Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 99, 44 L. Ed. 84, 20 S. Ct. 33.

When animals are offered to a carrier of live stock to be transported, it is its duty to receive them; and that duty can not be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery can not be safely or effectively made except in or through in-

to unload stock while en route, the carrier must furnish safe and suitable yards or pens for the detention and protection of the stock.⁵⁴ Nor can it evade or shift this responsibility by delivery in pens provided by a stockyards company,⁵⁵ unless the contract of shipment provided for such delivery.⁵⁶ This duty is regulated in some states by statute.⁵⁷

Sufficient Number of Pens.—A railroad company, in providing pens for delivering cattle at a certain point, is only required to have such a number of pens as, according to the business of the carrier at that point, is sufficient for the ordinary and usual volume of business, the extent of this duty varying with the necessities of the various localities to or from which live stock is shipped, the carrier being required to furnish such yards or pens as are rea-

closed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

Railroad companies which become carriers of live stock must provide accommodations whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment. *Myrick v. Michigan Cent. R. Co.*, Fed. Cas. No. 10,001, 9 Biss. 44, reversed in 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

A railroad company holding itself out as a carrier of live stock is under legal obligation to provide proper facilities, such as stock yards, for receiving live stock offered to it for shipment. *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54; *Colorado, etc., R. Co. v. Breniman*, 125 Pac. 855, 22 Colo. App. 1.

54. Unloading en route.—A heavy snow-storm caused the stoppage of defendant's train at a station, and plaintiff's cattle, which had just been placed on board the train for shipment, were unloaded and put in cattle sheds, where they were injured by cold and exposure. Defendant had horse stables which were substantially built and covered, and which could have been used as a temporary shelter for the cattle. The weather was not unusual for the time of year. Held, that the damage was not due to inevitable accident, but to the want of proper care on the part of defendant. *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. L. 451, 20 Atl. 33.

In an action for damage to a shipment of horses by rail, it appeared that they were unloaded at one of defendant's yards en route, that they escaped from the pen in which defendant had placed them, and were damaged while at large. Held, that defendant was an insurer of the horses against damage from such a cause, and

hence plaintiff need not show negligence on the part of defendant. *Texas, etc., R. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643.

A carrier must furnish reasonably safe pens for cattle unloaded en route, especially where a delay is caused by its failure to make connections. *International, etc., R. Co. v. McCullough* (Tex. Civ. App.), 118 S. W. 558.

55. Delivery to stockyards company.—*Texas, etc., R. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

56. A carrier contracting to transport and deliver live stock at the stockyards at the point of destination is not subject to the liability imposed by *Sayles' Ann. Civ. St.* 1897, art. 4519, for failing to establish cattle pens at such point, since if it had provided pens there and had unloaded the stock its contract would not have been performed until a delivery in the stockyards. *Texas, etc., R. Co. v. Isenhower* (Tex. Civ. App.), 131 S. W. 297.

57. Statutory regulation.—Under Pub. St. 1901, c. 160, § 1, requiring railroads to furnish all persons reasonable facilities for transportation of property over their roads, and for the use of depots, buildings, and grounds in connection with such transportation, it is the duty of a railroad company to furnish cattle yards to restrain cattle offered for transportation prior to their being loaded. *Flint v. Boston, etc., Railroad*, 59 Atl. 938, 73 N. H. 141.

Revised Statute, art. 4519, requires a railway company to erect at each of their depot stations or places established by such company for the reception and delivery of freight, suitable buildings and inclosures to protect produce, goods, wares, and merchandise, and freight of every description from damages. It was held that, under the designation of inclosures, stock pens for the reception of cattle tendered for shipment are included, and that such pens must be sufficiently safe for the purpose indicated. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

sonably sufficient at the particular points for receiving or delivering shipments. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public,⁵⁸ and the extent of the business of other carriers and the facilities provided by them at any one point is immaterial in determining the sufficiency of the pens of the particular carriers.⁵⁹

§ 1748. Character of Yards or Pens Required.—The carrier is not required to furnish any particular kind or character of pen or enclosure for the reception of such live stock as may be tendered it for shipment, the general duty to furnish reasonably safe and suitable means and facilities for the transportation of live stock including the duty to furnish reasonably safe and suitable stock-yards or pens as well as cars and other necessary means of transportation. They must use ordinary care in constructing them so as to render them reasonably safe for the purposes for which they are intended,⁶⁰ and the duty does

58. Sufficiency of pens.—Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461; Casey v. St. Louis, etc., R. Co., 83 S. W. 20, 37 Tex. Civ. App. 49.

Plaintiff in an action for injuries to cattle during their transportation over defendant's railway having shown that when the cattle were presented for shipment the pens were not sufficient to accommodate them, it was not error to instruct that it was defendant's duty to furnish stock pens sufficient to accommodate ordinary shipments. Texas, etc., R. Co. v. Fambrough (Tex. Civ. App.), 55 S. W. 188.

Negligence in unloading in crowded pens.—A carrier is only liable for such damages as were occasioned by its negligence in unloading them in crowded or otherwise improper pens, or delaying unnecessarily to tender them to the connecting carrier, and only then of course where there is proper predicate in the pleading. Texas, etc., R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530.

Liable for shrinkage from failure of duty.—A railroad company agreeing to transport cattle on a certain day is liable for loss by shrinkage resulting from its failure to provide sufficient stock pens for loading the cattle within a reasonable time after they were at the place of shipment. Missouri, etc., R. Co. v. Woods (Tex. Civ. App.), 31 S. W. 237.

59. Casey v. St. Louis, etc., R. Co., 83 S. W. 20, 37 Tex. Civ. App. 49.

60. Character of yards or pens required.—Louisville, etc., R. Co. v. Thompson, 144 Ky. 765, 139 S. W. 939; Mason v. Missouri Pac. R. Co., 25 Mo. App. 473; Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.; Texas, etc., R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; Ft. Worth, etc., R. Co. v. Galton, 45 Tex. Civ. App. 67, 100 S. W. 166; Gal-

veston, etc., R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255.

A calf escaped and was killed after being unloaded at a depot, instead of at a stock pen, which was about three hundred feet from the depot, and on another track. The depot platform was level with the car floor, and the freight room in which the animal was placed was as safe and convenient as the stock pen. Held, that the carrier was not negligent. Chicago, etc., R. Co. v. Owen, 21 Ill. App. 339.

Rotten fences.—Where a railroad company permits the fences of its stock sheds to become so rotten and out of repair that cattle placed in them for shipment get out, and are stampeded and injured, the company is liable to the owners. Cooke v. Kansas City, etc., R. Co., 57 Mo. App. 471.

Pens need not be covered.—Rev. St. 1895, art. 4519, provides that a railroad must erect at every station buildings or inclosures to protect merchandise and freight of every description from damage by exposure to the weather, stock, or otherwise. In an action against a railroad by a shipper of cattle, the court instructed that every railroad is required to erect at every station suitable pens and inclosures to protect such cattle as may be delivered from exposure to the weather, stock, or otherwise. Held, that the instruction was erroneous, since, even if the statute requires railroads to keep pens for cattle, the instruction would have warranted the jury in believing that it was the duty of the railroad to provide covered pens, if not warm stalls. Ft. Worth, etc., R. Co. v. Cage Cattle Co. (Tex. Civ. App.), 95 S. W. 705.

Negligence in allowing stock to drink salt water.—But where a contract by which lambs were shipped provided that the company should not be liable for injury to the stock until they were "loaded into the car, and the car door fastened by the conductor," it was held, that this did not exempt the carrier from injury caused by its negligence in allowing the lambs to

not devolve upon the shipper to avoid the consequences growing out of improper conditions at the pens after the delivery of the cattle there, it being the place selected by the company to make delivery, it is under the obligation of exercising ordinary care to maintain it in a suitable condition for such purposes.⁶¹

§ 1749. Extra Charge for Use of Stockyards.—A carrier can neither charge for the use of its stockyards in loading or unloading live stock, nor authorize another company to charge consignees or shippers for the use of such yard.⁶²

§§ 1750-1752. Duty as to Loading and Unloading—§ 1750. In General.⁶³—The duty to load live stock in the absence of a special contract or special circumstances, rests primarily on the carrier.⁶⁴ This duty, however, may be assumed by the shipper or provided for by special contract and in the case of live stock it seems to be customary for the shipper to load and unload the stock,⁶⁵ but where by special contract the duty is on the carrier, it will not be relieved therefrom, though the custom may be for the shipper to unload at certain points and the existence of this custom was known to the shipper,⁶⁶ but even though this responsibility rests upon the shipper, the carrier must su-

drink salt water before they got on the car. *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855.

61. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

62. **Charge for use of stockyards.**—A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stockyards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stockyards which itself owns, maintains or controls, it can not invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461. See ante, "Charges and Liens," chapter 15.

63. **Duty as to loading and unloading.**—As to duty to unload for purposes of food, water and rest, see post, "Duty to Feed, Water and Rest," §§ 1754-1758.

64. *Indiana Union Tract. Co. v. Benadum*, 42 Ind. App. 121, 83 N. E. 261; *London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

65. **Duty assumed by shipper—Custom.**—*London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

Plaintiff shipped cattle under an agreement whereby he assumed all risk, and was to unload the cattle at his own risk, but with the assistance of the carrier if it was required. A snowstorm occasioned a delay of three days, during which the cattle remained in the cars, in consequence of the carrier's refusal to build a platform for the purpose of unloading them. In an action to recover for injury to the cattle, held, that defendant was not liable, as the provision for unloading referred to unloading at the end of the journey. *Penn. v. Buffalo, etc., R. Co.*, 49 N. Y. 204, 10 Am. Rep. 355, reversing 3 Lans. 443.

66. Under a contract for the transportation and delivery of live stock, providing that live animals will only be taken at owner's risk of injury "during the course of transportation, loading and unloading," unless otherwise specially agreed, the carrier is bound to unload the animals, although at owner's risk; and a custom of the carrier's agent at destination to require the consignee or owner to unload live stock, though known to the owner, will not affect the contract. *Benson v. Gray*, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262.

Where carriers assumed the duty of unloading cattle at the place of destination, they are liable for any damage resulting from their failure to do so in a proper manner. *Mexican Nat. R. Co. v. Savage* (Tex. Civ. App.), 41 S. W. 663.

perintend the loading and is responsible for damages arising from improper or negligent loading,⁶⁷ except in cases where it is relieved from this duty by contract,⁶⁸ and where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in performance of the act, notwithstanding a stipulation in the contract requiring the loading to be done by the shipper.⁶⁹ Where the duty to load is on the shipper he must exercise reasonable care in performing it in a proper manner and where agents of the shipper insist on loading as they deem best and refuse to allow the carrier to supervise the loading,⁷⁰ or permit the train to start before they have finished loading and closed the car doors⁷¹ and injury results they can not hold the carrier responsible.

Delay in Loading.—Where the ways and means for loading cattle to be shipped are in proper condition, and the duty of loading is upon the shipper, it is his duty to have the car loaded so that the train which is to move it may not be unreasonably delayed,⁷² but where the delay is caused by the carrier it will be liable for damages arising therefrom.⁷³

Knowledge of Carrier of Defective Loading.—Even though the shipper has loaded in a negligent manner if the carrier knowing the facts starts his train he is responsible for injuries caused thereby.⁷⁴

Accepting Stock Loaded by Shipper.—Where there is no misrepresentation or deceit on the part of a shipper of live stock, a common carrier waives all exceptions to defects in loading by accepting stock so loaded for transportation, and assumes all the liabilities of a common carrier with reference to the property.⁷⁵

67. Carriers of live stock are bound to superintend the loading of it; and if the carrier's agent stands by and permits inexperienced drovers to overload the cars, and the stock is injured in consequence, the carrier is liable for its agent's negligence. *Ritz v. Pennsylvania R. Co. (Pa.)*, 3 Phila. 82.

68. Where the shipper of an animal furnishes his own car, and loads it for shipment, the carrier is not liable for an injury to the animal because of the negligent manner in which the loading was done, though it was the duty of the carrier's officers to see that the car was properly loaded. *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961.

69. *Chicago, etc., R. Co. v. Pollock*, 16 Wyo. 321, 93 Pac. 847.

70. **Fault of shipper.**—Where property to be transported consists of race horses, accompanied by the agent of the owner, assisted by other persons in the employment of the owner, three of whom are race riders for the horses, and who travel with and take care of them, and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading it as he thought best, after having been requested by the railroad employees to place the horse under their control, the owner would not be entitled to recover for an injury to the horse sustained under such circumstances. *Bowie v. Baltimore, etc., R. Co. (8 D. C.)*, 1 MacArthur 94.

71. It was agreed that a shipper of stock should load it on the cars. His men permitted the train to start before

there was time for them to close the door, and a steer jumped out, and was killed. Held, that the railroad company was not liable. *Newby v. Chicago, etc., R. Co.*, 19 Mo. App. 391.

72. **Delay in loading.**—*Louisville, etc., R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163.

73. Where a carrier, after it has contracted to furnish cars at a certain time for the shipment of cattle, and after the shipper has prepared to deliver them, having them inspected as fast as they can be loaded, stops the loading, and gives the cars to another shipper, who has already had his cattle inspected, it is liable to the first shipper for the damages caused by the delay, and is not relieved from liability by Cr. Code, art. 784, making it a misdemeanor for a railroad agent to receive for shipment cattle that have not been inspected; nor by Rev. St., arts. 4628, 4630, 4651, requiring an inspection certificate and a bill of sale before the shipment of cattle. *Receivers v. Wright*, 2 Tex. Civ. App. 198, 21 S. W. 56.

74. **Carriers knowledge of defective loading.**—Though the shipper agrees to load, and does load, a horse on a car, and negligently leaves him untied, still, where the carrier moves the car while the horse is loose, and he is injured thereby, the carrier is liable, provided the injury be one likely to result from its action under the circumstances. *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408.

75. **Accepting shipper's loading.**—*Kinick v. Chicago, etc., R. Co.*, 69 Iowa 665, 29 N. W. 772.

Packing Fowls.—Where because of the nature of the live stock it is naturally to be expected that the shipper's knowledge of loading and packing them is greater and of a more expert nature than that of the carrier, the shipper can not hold the carrier responsible in case of improper loading. Thus, it has been held that, where chickens were overcrowded in crates, the fault was the shipper's and not the carrier's.⁷⁶

§ 1751. Duty to Designate Proper Cars for Loading.—It is the duty of a carrier when offered live stock to be loaded and shipped in its cars to designate the cars in which the stock is to be loaded, and if, when asked by the shipper to designate the cars, it designates the wrong car, it is liable for such damages as naturally result from the removal made necessary by the improper directions, where such removal is required by the carrier,⁷⁷ and the carrier is not relieved from the consequences of a failure to perform this duty by the exercise of ordinary care.⁷⁸ The shipper, however, must use reasonable care to ascertain which cars he must load, as well as reasonable care in loading or unloading them, and if he loads his stock in the wrong car without inquiry from the carrier, he assumes the risk.⁷⁹

§ 1752. Duty to Furnish Safe and Suitable Facilities.—A carrier of live stock must furnish safe and suitable facilities for loading and unloading stock when received at the point of destination,⁸⁰ and at such points as it may be found necessary to unload stock for the purposes of food, water and rest,⁸¹ and it is immaterial whether the duty to load or unload is on the shipper or carrier,⁸² or that the contract provided that the stock should be unloaded at a

76. Overpacked chickens.—A carrier is not negligent in receiving for shipment overpacked crates of fowl for shipment; the shippers, but not the carrier's servants, being expected to be expert on the question of how many fowls could be safely packed in a crate. *Cohn v. Platt*, 95 N. Y. S. 535, 48 Misc. Rep. 378.

77. Duty to designate proper loss for loading.—Where a shipper is directed by a carrier's agent to load hogs in the wrong car, the carrier is responsible for such damages as naturally result from removal of the hogs required by the carrier. *Weisinger v. Southern R. Co.*, 112 S. W. 660, 33 Ky. L. Rep. 1038.

78. A carrier's duty to designate the car in which hogs offered for shipment shall be loaded is not sufficiently performed by the exercise of ordinary care. *Weisinger v. Southern R. Co.*, 112 S. W. 660, 33 Ky. L. Rep. 1038.

79. Where plaintiff's hog, intended for shipment, was loaded in the wrong car, as plaintiffs alleged by misdirection of defendant's agent, and the hog died as the alleged result of plaintiffs being compelled to transfer him to another car, the court, in an action for the death of the hog, should have charged that if he was in such condition that he would have died, notwithstanding the removal, or if defendant's agent offered to let the hog remain until he could be safely removed, or if plaintiffs were themselves negligent in not loading him into the car designated or if his death resulted from the careless manner in which he was removed and thereafter handled, plaintiffs

could not recover. *Weisinger v. Southern R. Co.*, 112 S. W. 660, 33 Ky. L. Rep. 1038.

80. Duty to furnish safe and suitable facilities.—*Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

Under the law, it is the duty of a carrier of live stock to provide safe and proper facilities and a safe and proper place for unloading the stock from its cars at the point of destination, and the carrier is liable for injuries sustained by the animals while being unloaded, in consequence of insufficient facilities used or furnished by it for unloading stock. *Brannon v. Atlanta, etc., R. Co.*, 4 Ga. App. 749, 62 S. E. 468.

Railroad companies must carry live stock, and, as an incident, furnish reasonably sufficient facilities for loading and unloading. *Chicago, etc., R. Co. v. Baugh (Ind.)*, 94 N. E. 571.

81. See post, "Duty to Feed, Water and Rest," §§ 1754-1758.

82. It does not make any difference whether the shipper or the carrier was to unload the stock. In either event it was the duty of the railroad company to have a safe place at which to unload the stock, whether the unloading was done by the defendant or by the shipper, unless condition of the place was known to shipper and he nevertheless undertook to unload his stock at that place, taking the risk of their being injured on account of its unsafe condition. *Brannon v. Atlanta, etc., R. Co.*, 4 Ga. App. 749, 62 S. E. 468.

point where there were insufficient facilities.⁸³

Defective Appliances.—The carrier must exercise due diligence in inspecting its facilities for loading and unloading live stock, and is liable for injuries caused by defective appliances even though it was ignorant of such defect, if by the use of proper care and diligence it would have discovered such defect,⁸⁴ and it has been held that, though the wildness or viciousness of the stock contributed to the injury, the carrier is nevertheless liable where the means for unloading were insufficient or defective.⁸⁵

§ 1753. Duty to Ship by Particular Route.—See post, "Connecting Carriers," Part V. See, also, post, "Liability of Carrier for Loss or Injury," §§ 1827-1871. A carrier is bound to ship over a particular route if it is possible when requested to do so,⁸⁶ and where a bill of lading specifies a particular route, a shipper accompanying his shipment has a right to rely on the route so specified,⁸⁷ but where no particular route is specified the shipper can not claim rights as to delivery or feeding and watering at points not on the route selected by the carrier.⁸⁸

Where Specified Route Becomes Impracticable.—Where a bill of lading for the transportation of live stock specifies a definite route, the carrier is not bound to forward by a different route, on transportation by the specified route becoming impracticable, as where a quarantine is encountered, but should the carrier send the stock by another route when that specified has become impracticable, it can not be held guilty of negligence for so doing.⁸⁹

§§ 1754-1758. Duty to Feed, Water and Rest—§ 1754. In General.—A carrier of live stock is required to exercise proper care for the preservation of the stock, its general duty to properly care for stock during transportation including the duty to feed, water and rest them as reasonable necessity

83. If a carrier's agent ordered plaintiff to unload a horse at a place where no proper facilities were provided for unloading, it was immaterial, upon plaintiff's right to recover for injuries caused by unloading it there, whether the carrier's contract was to unload the horse at that point or another point. *Louisville, etc., R. Co. v. Gormley* (Ky. App.), 121 S. W. 965.

84. **Injuries caused by defective appliances.**—In *East Tenn., etc., R. Co. v. Herrman*, 92 Ga. 384, 17 S. E. 344, the supreme court said, even if a defect in a platform from which a railroad company is unloading a horse upon a car would, under any circumstances, excuse the company for injuring the horse by reason of such defect, it certainly would not do so in the absence of full diligence to discover the defect before exposing the horse to the risk of injury. *Brannon v. Atlanta, etc., R. Co.*, 4 Ga. App. 749, 62 S. E. 468.

85. **Wildness of stock contributing to injury.**—Where the means furnished by a railroad company for unloading a horse which it has undertaken to carry are insufficient and unsuitable, the company is liable for resulting damages, even though the wildness or viciousness of the horse may have contributed to its injury, and though the shipper may have been ap-

prised of the danger. *Louisville, etc., R. Co. v. Owen*, 12 Ky. L. Rep. 716.

86. **Duty to ship by particular route.**—Where plaintiffs requested defendant railroad to ship cattle over a certain route, and defendant, without any excuse, refused so to do, it became liable for all losses accruing to plaintiffs by reason of the shipment of the cattle over a longer route. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

87. *Hanley v. Chicago, etc., R. Co.*, 154 Iowa 60, 134 N. W. 417.

88. An express company, which carried horses under a bill of lading which specified no particular route, held not liable to the consignee for depriving him of the right to accept delivery at a point at which he requested that his horses be watered, fed, and unloaded, by not sending them by way of such point. *Edwards v. American Exp. Co.*, 84 Atl. 987, 109 Me. 444, 42 L. R. A., N. S., 705.

89. Where a flood is unexpected and of an unprecedented character a railroad company may not, under the circumstances of the case, be chargeable with negligence in sending cattle trains by another route or for failing to move the cattle from the stockyards before the climax of the flood. *Empire State Cattle Co. v. Archison, etc., R. Co.*, 210 U. S. 1, 52 L. Ed. 931, 28 S. Ct. 607, 15 Am. & Eng. Ann. Cas. 70.

may require,⁹⁰ and the carrier is not relieved of this duty by custom,⁹¹ but by special contract it may impose this duty on the shipper.⁹² However, even in cases where the duty has been assumed by the shipper, if the carrier prevents the proper performance of this duty,⁹³ or assumes and undertakes itself the duty of unloading and loading for food and water,⁹⁴ or accepts pay from the shipper for the promised performance of the duty,⁹⁵ or if the shipper fails to accompany the stock or abandons it in transitu and the carrier has knowledge of such failure,⁹⁶ it is the duty of the carrier to look after and care for them as if there were no contract with the shipper, but in such case the carrier will be entitled to recover for any reasonable amount expended by it for food and

90. Duty to feed, water and rest.—*Alabama*.—Southern R. Co. v. Proctor, 3 Ala. App. 413, 57 So. 513.

Kentucky.—Louisville, etc., R. Co. v. Stiles, 133 Ky. 786, 119 S. W. 786.

Tennessee.—Louisville, etc., R. Co. v. Trent, 79 Tenn. (11 Lea) 82.

A carrier is liable for failure to furnish food and water to horses shipped where the car was delayed by the refusal of a railroad company to take it on the train by which it was expected to go, and on this account it lost its connection. *Brockway v. American Exp. Co.*, 168 Mass. 257, 47 N. E. 87.

A carrier is bound to feed and water cattle shipped over its lines, and the shipper is under no obligation to incur expense in that behalf, especially where the cattle are being unlawfully held at destination by the carrier. *Southern Kansas R. Co. v. Burgess Co.* (Tex. Civ. App.), 90 S. W. 189.

A carrier, accepting sheep for transportation from Idaho to Nebraska, must stop at reasonable intervals, and provide reasonable facilities for resting, feeding, and watering the sheep, and this duty is not discharged by stopping at places where there are no such facilities, or where neither food nor water is obtainable. *Groot v. Oregon, etc., R. Co.*, 96 Pac. 1019, 34 Utah 152.

Where a carrier accepted sheep for transportation, and was unavoidably delayed, it was required to make reasonable efforts to carry the sheep to some point where reasonable facilities to feed existed, and where food and water were obtainable. *Groot v. Oregon, etc., R. Co.*, 96 Pac. 1019, 34 Utah 152.

If a carrier negligently kept animals in a car during transit so long that their vitality was so lowered as to render them susceptible to disease, and while in that condition they were unwittingly exposed to disease by the owners in an endeavor to restore them to a normal condition, and died because of their weakened condition, the carrier's negligence would be so far a proximate cause of the injury as to make it liable. *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999.

91. Custom as varying rule.—Custom can not require owner to accompany stock during shipment and to feed and water them at his risk and expense, since the

law imposes the duty on the carrier. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776. *

92. See post, "Where Shipper Has Assumed Duty," §§ 1755-1758.

93. Where a duty is imposed by law on a railroad company to water and feed stock in transit, it is not relieved from liability by showing that the shipper had undertaken that duty, if it appears that by its acts it prevented the shipper from performing it. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

94. In an action for injury to a shipment of live stock, a provision in the shipping contract that plaintiff should load, unload, and reload the stock at his own risk is no defense, where the unloading and loading of the cars at the various feeding and watering points en route were assumed by the employees of the carrier. *Missouri Pac. R. Co. v. Kingsbury* (Tex. Civ. App.), 25 S. W. 322.

95. Where during a delay in the transportation of plaintiff's horses at a junction, the carrier's agent accepted compensation from plaintiff to pay for necessary food and water for them, the carrier was responsible for its failure to perform such service, whether the delay was negligent or unavoidable, and notwithstanding the transportation contract provided that plaintiff assumed the risk and expense of feeding, water, etc. *Gilbert v. Chicago, etc., R. Co.*, 112 S. W. 1002, 132 Mo. App. 697.

96. Where a carrier was aware that no one representing the shipper was traveling with certain stock as required by the shipping contract, it was the carrier's duty to feed, water, and exercise necessary care for them. *Louisville, etc., R. Co. v. Smitha*, 40 So. 117, 145 Ala. 686.

The provisions of a bill of lading of live stock that the shipper is to feed and water them is waived by the carrier when he writes across the face of the bill of lading: "To be fed and watered at the expense of the shippers. No one in charge." Besides, when the carrier knows that no one accompanies the stock, it is his duty to look after and care for them as if there were no contract with the shipper. *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

care.⁹⁷ If, however, the carrier has no notice of the failure of the shipper to fulfill his part of the contract, it can not be held liable for damages arising therefrom.⁹⁸ The carrier is not required under its duty to feed, water and rest stock, to unload it at unreasonable or unnecessary times or places, being governed in its performance of its duty by the exigencies and necessities existing at the time.⁹⁹ Thus, it need not permit the shipper to unload his stock for two weeks for purposes of improving it for market,¹ but it may insist on unloading and feeding stock where to keep them longer unfed would have been in violation of law, even though the shipper objected.²

Sprinkling Stock.—The duty of showering stock to keep down the temperature during warm weather rests upon the carrier which has control of the facilities, and all that can be exacted of the shipper accompanying his stock is that he keep the employees of the carrier advised of the condition of the stock that they may apply water as necessary, but, where the carrier's employees know the state of the weather and that hogs in transit are suffering from heat, the shipper is not required to call attention to the conditions with which they are acquainted, but may rely upon them to discharge their plain duty of showering as the condition of the stock requires.³

97. A carrier, accepting sheep for transportation from Idaho to Nebraska, must, on the shipper failing to feed and water the sheep, do so, though the shipper contracted to do so, and it has a claim on the sheep for any reasonable amount expended for food and care. *Groot v. Oregon, etc., R. Co.*, 96 Pac. 1019, 34 Utah 152.

98. *Southern R. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798.

Where the owner of live stock, in contracting with a carrier, agrees to go in charge, and starts on the train on which the stock is carried, and abandons it, without notice to any of the carrier's servants, it can not be claimed that the carrier waived the shipper's agreement to go, and it being his duty, under the contract, to water and attend to the stock, he can not recover of the carrier for injury resulting from his failure to do so. *Louisville, etc., R. Co. v. Martin*, 8 Ky. L. Rep. 432.

99. While the shipper can not arbitrarily require a carrier of live stock to unload it at any particular town or place for rest, etc., if the carrier has established a usage of unloading for care at a particular place, the shipper, in absence of notice to the contrary, may expect that such usage will be observed and hold the carrier responsible for any loss from its nonobservance. *St. Louis, etc., R. Co. v. Mitchell*, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

Where a railroad company makes a contract to convey cattle, providing that two men in charge of the cattle may pass free of charge on the train, there being no express stipulation that the cattle shall not be unloaded on the way, the cattle may be unloaded, and the men in charge have no right to decide when. *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351.

Carrier need not unload under all cir-

cumstances.—Railroad companies are not under the absolute duty of unloading a shipper's stock for rest, feed and water upon his request. Their duties in this respect are well defined by the decisions. They should afford proper facilities and reasonable opportunities for rest, feed and water, but are not required to supply these upon a mere request of the shipper without regard to the reasonableness or necessity of the demand. *Missouri, etc., R. Co. v. Clark*, 35 Tex. Civ. App. 189, 79 S. W. 327; *Sayles' Civ. Stats.*, art. 326; *U. S. Comp. Stats.*, § 4386; *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, reversing 27 S. W. 186; *International, etc., R. Co. v. McRea*, 82 Tex. 614, 615, 18 S. W. 672, 27 Am. St. Rep. 926; *International, etc., R. Co. v. Lewis* (Tex. Civ. App.), 23 S. W. 323; *Texas, etc., R. Co. v. Byers Bros.* (Tex. Civ. App.), 73 S. W. 427; *Texas, etc., R. Co. v. Stribling* (Tex. Civ. App.), 34 S. W. 1002.

1. A carrier of live stock, required by contract or by common law to exercise proper care for the preservation of live stock in transportation, need not permit the shipper to unload the stock for two weeks, to improve the stock and make it more suitable for market; and the right of a shipper to such a privilege must be expressed in his contract of shipment. *Banks v. Chicago, etc., R. Co.* (Mo. App.), 134 S. W. 1071.

2. A carrier transporting horses under a special contract that they shall be unloaded for the purpose of feeding by the shipper, has the right to unload and feed the horses, even against the shipper's protest, where, unless so unloaded and fed, the horses would have been kept in the cars unfed for a longer period than allowed by law. *Nashville, etc., R. Co. v. Parker*, 27 So. 323, 123 Ala. 683.

3. **Sprinkling stock.**—*Peck v. Chicago, etc., R. Co.*, 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883.

Live Birds.—In the absence of an express agreement it has been held that a carrier is not required to feed and water live birds.⁴

Intermingling Stock.—In unloading and loading live stock for food, water and rest the carrier must maintain the separation of the stock according to its various owners,⁵ but it has been held that in the absence of a special stipulation in the contract a carrier is not responsible for intermingling and changing the grading and classification of stock as originally loaded by the shipper.⁶

Statutory Regulation.—In many states the transportation of live stock between points within the state is regulated by statute and interstate shipments are governed by the United States statute.⁷

§§ 1755-1758. Where Shipper Has Assumed Duty—§ 1755. In General.—A shipper of live stock may agree with the carrier, by special contract, to load, unload, feed and water his stock, relieving the carrier of all duty in such regard, except that it must afford the shipper reasonable opportunity and facilities to unload, feed and water such stock,⁸ and the shipper can not es-

4. Live birds.—In the absence of an express agreement, an express company, in transporting live pigeons, is not required to feed and water the birds. *American Merchants' Union Exp. Co. v. Phillips*, 29 Mich. 515.

5. Intermingling stock.—Where employees of a railroad in unloading cattle to be fed intermingled those of two shippers in violation of directions, the carrier is liable for injuries resulting in separating them. *Hanson v. Atchison, etc., R. Co.*, 128 Pac. 184, 88 Kan. 313.

6. A shipper of live stock who intends to charge the carrier with the duty of carrying and delivering the stock graded and classified in the manner in which he loaded them on the cars, must require the insertion of such a stipulation in the contract, and where there is no such a stipulation and it was not omitted by fraud or mistake, the carrier need not, in transporting, reloading, and delivering the stock, maintain the grading and classification made by the shipper in loading them. *Baltimore, etc., R. Co. v. Clift*, 134 S. W. 917, 142 Ky. 573.

7. Statutory regulation.—See post, "Interstate and International Commerce," Part VI.

Pub. St., c. 207, § 55, which provides that railroad companies shall not confine animals in cars for more than twenty-eight consecutive hours, is not superseded by an order of the board of cattle commissioners, forbidding a railroad from unloading any near cattle for any purpose whatever, except upon written permit from the board, at any place except certain designated quarantine stations. *Hendrick v. Boston, etc., R. Co.*, 48 N. E. 835, 170 Mass. 44.

Under Pen. Code, § 663, providing that a railway corporation which confines cattle in cars in the course of transportation for a longer period twenty-four consecutive hours, without unloading for rest, water, and feeding, during ten consecutive hours, unless prevented by storm or inevitable accident, is guilty of a misde-

meanor, defendant's liability was established by proof that the cattle, which were confined in the car without unloading during the 35 hours of transportation, were injured by such criminal cruelty not embraced within either clause of the contract. *Galloway v. Erie R. Co.*, 95 N. Y. S. 17, 107 App. Div. 210, 17 N. Y. Ann. Cas. 209.

8. Where shipper has assumed duty.—*Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

A railroad company received a car load of mules, to be delivered at A. It was agreed that the company was not to feed or water the mules, but that the shipper was to be afforded facilities for this. The company negligently carried the mules to D., 40 miles beyond A., and they stood there in cars two days, without food, water, or care. Held, that the company was liable for the damage done. *Bryant v. Southwestern R. Co.*, 68 Ga. 805.

Where a railroad company, under a special contract, furnishes an entire car, in which stock may be fed and watered, to a shipper, who loads it with "emigrant movables" and several horses, the contract requiring that he load the car and accompany it, and feed, water, and care for the stock at his own risk and expense, and exempting the company from liability for delays, and there is no agreement as to any lay-out along the route, the shipper does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out so that he may rest his horses, and thus save them from suffering and death, but can only secure such delay by abandoning the contract, or by contracting anew for the use of car for a longer time. *Illinois Cent. R. Co. v. Peterson*, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550.

Where a shipper of live stock agrees with the carrier, by special contract, to load, unload, feed, and water his stock, the carrier owes the shipper no duty in such regard, if it afford him an opportu-

cape the burden so assumed because the carrier consumed more time than necessary during transportation when the injury resulting from the delay could be almost entirely averted by his continuing to attend to them,⁹ and it has been held that though the shipper's agent abandoned his master's service and accepted employment with the carrier it would not relieve the shipper of the duty to feed and water.¹⁰ Such a stipulation, in a contract for shipment of live stock is only reasonable and valid so long as the carrier furnishes reasonable facilities for so doing, and where no reasonable facilities are furnished at a place the provision is void as to that place, and the carrier must feed and water the stock, and it is liable for its failure so to do.¹¹ But contracts providing that the shipper shall care for his stock during transportation will not be construed so as to exempt the carrier from liability for the gross negligence of its employees.¹²

nity to so unload, feed, and water such stock. *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

Must stop train if necessary to give shipper opportunity.—Where, by the contract of shipment, it is plaintiff's duty to feed and water his stock in transit, defendant company is bound to give him the opportunity of so doing, and, if necessary, to stop the train for that purpose. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

Exclusion of contract not error where carrier afforded no opportunity for performance by shipper.—In an action against a railroad company for injuries to a shipment of horses by rough handling and failure to feed and water, the exclusion of a portion of the contract which required the shipper to feed and water the stock was not error, where the evidence showed that no opportunity was afforded him to do so. *Gulf, etc., R. Co. v. Dunn* (Tex. Civ. App.), 78 S. W. 1080.

Where a carrier received a stock car of horses from a connecting carrier after they had been in the car ten hours, and, without unloading them, carried them to their destination, keeping them in the car over forty-five hours without food, and part of them without water, though requests were made to the trainmen and of train dispatchers and station agent at different points that the car be sent to the stockyards, so that the animals could be cared for, the carrier was negligent independent of the federal statute forbidding the confinement of animals in ordinary stock cars longer than twenty-eight consecutive hours without unloading for rest, water, and feeding. *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999.

9. The shipper of live stock by railway, under a special contract in which he agrees that, "in case of accidents to or delays of train from any cause whatever," he "is to feed, water, and take proper care of stock at his own expense," can not recover damages resulting from his own failure to perform his part of the contract, although the company may have consumed more time than necessary in

effecting the transportation. *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711.

Where cattle are shipped under a contract whereby the shipper agrees to feed and water them, the fact that it is necessary to unload the cattle two hours after shipment, owing to a wreck on the road caused by the carrier's negligence, thereby causing a delay of twenty hours, does not authorize the shipper to rescind the special shipment contract, and abandon the cattle, and so cast the duty of feeding and watering the same on the carrier, when the injury resulting from the delay could be almost entirely averted by his continuing to attend to them. *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, reversing 27 S. W. 186.

10. The agent in charge of a shipment of cattle, by abandoning his master's employment, and becoming the agent of the carrier, does not relieve the shipper of the duty to feed and water the cattle imposed by the federal statute or by a special shipment contract. *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525.

11. *Gulf, etc., R. Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767. See post, "Duty to Provide Suitable Places and Facilities for Feeding and Watering," § 1757.

12. In an action against a carrier for damages caused by its negligence in failing to pour water on a car load of live hogs, it appeared that the bill of lading provided that the hogs were to be taken care of by the owner, but that defendant's conductor was requested to apply water to the hogs to prevent them from heating and dying on the route, at points where means of procuring water were readily at hand and under defendant's control, and that he refused to do so. Held that, if the stipulation in the bill of lading should be construed as exempting defendant from liability for the gross negligence of its agents and servants it would so far void as against good morals and public policy. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85.

Free Transportation for Shipper.—The matter of granting free transportation to the shipper or his agent who accompanies a shipment of stock is largely a matter of contract between the parties, though in some states it is required by statute.¹³

§ 1756. **Notice of Desire to Feed and Water.**—A shipper having assumed the duty of feeding, watering and caring for his stock during transportation must give notice to the agents of the carrier of his desire to feed and water his stock, the carrier having a right to rely upon the proper discharge of the duty of caring for the stock by the shipper,¹⁴ and if the carrier fails or refuses to provide proper facilities for the care of the stock it will be liable for injury resulting therefrom.¹⁵ The carrier is not required, however, to comply with whatever request the shipper may make—the demand must be reasonable in order to bind the carrier for damages resulting from refusal;¹⁶ but where the carrier has knowledge of the necessity for caring for stock, it must under its duty provide sufficient facilities, do so, even though the shipper has not been diligent in requesting them,¹⁷ and the request need be only such as to put the carrier on notice, a written request being unnecessary unless provided for in the contract,¹⁸ and in Texas it has been held that such a stipulation is unreasonable

13. **Free transportation.**—Laws 1897, c. 167, requiring railroad companies "doing business within the limits" of Kansas to furnish free transportation to shippers of live stock in certain cases, applies only to traffic within the state. *State v. Otis*, 56 Pac. 14, 60 Kan. 248.

14. **Notice of desire to feed and water.**—Where a carrier transporting live stock had not contracted to feed and water the stock, and it was accompanied by a caretaker, the carrier was not chargeable with neglect to afford an opportunity to feed and water them until it was requested by the caretaker to do so and had refused. *McKenzie v. Michigan Cent. R. Co.*, 100 N. W. 260, 137 Mich. 112.

Where a carrier furnishes a shipper of live stock with free transportation for a caretaker who accompanies the stock during the shipment, the carrier may rely upon the caretaker to notify its agents whenever he thinks it necessary to unload or feed and water such stock. *Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

15. *Missouri, etc., R. Co. v. Leibold* (Tex. Civ. App.), 55 S. W. 368.

Where plaintiff's agent, during the transportation of certain stock, informed the conductor that the animals were greatly frightened, and in danger of being hurt or killed by further transportation, and asked to have his car set out at an intermediate station, it was the duty of defendant to comply, if it could reasonably do so, and a neglect to so comply was negligence. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Refusal of a conductor of a train transporting hogs, on notice of the owner that they are dying from overheating, and on his request, to throw water over them while at a station at which water is at hand, and solely under the control of the

railroad, constitutes gross negligence, which will render the company liable for death of the hogs resulting from overheating, though the conductor testifies that the request was made too late for him to comply with it at that station without getting behind time, and it appears that he did at a station further on, at the direction of the station agent, to whom the owner applied, throw water over them. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85.

Where a carrier negligently refuses a shipper an opportunity to feed and water live stock at places of delay, when such opportunity might be allowed, and injury results therefrom, the shipper is entitled to damages. *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

As a train is in the charge and control of a railroad company's agents, the company is responsible, if their refusal to allow cattle to be taken out and watered during a detention result in damage, although the owner's drovers accompany the cattle. *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232.

16. *Missouri, etc., R. Co. v. Clark*, 35 Tex. Civ. App. 189, 79 S. W. 827.

17. The fact that a shipper's servant in charge of horses shipped on defendant's railroad was not sufficiently diligent in urging the railroad employees for permission to unload the horses for the purpose of feeding and watering them does not relieve the company from liability for injury to the horses caused by failure to properly care for them, where, by statute and the contract of shipment, it was made the company's duty to afford facilities for feeding and watering. *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

18. **Written request.**—The refusal of a carrier to unload live stock for water and feed on the oral request of the shipper,

and unenforceable.¹⁹

Must Provide Agent to Whom Request Can Be Made.—A carrier of live stock must have some agent at its office with authority to transact business with reference to the handling of live stock, and a carrier employing an agent for that purpose must, where the agent is absent, substitute another agent in his place, to whom information may be given that the stock is suffering from want of attention, and that the cars must be transferred to a suitable place for unloading.²⁰

§ 1757. Duty to Provide Suitable Places and Facilities for Feeding and Watering.—It is incumbent upon the carrier of live stock to furnish necessary yards, platforms, chutes, and other facilities for the care of stock shipped over its line, so that they may be unloaded if necessary for food, water and rest, and the fact that the shipper accompanies and agrees to feed, water and care for the stock does not absolve the carrier from this duty,²¹ and this

where based upon the ground that the freight thereon had not been paid, waived a strict compliance with the clause of the contract requiring a written request. *St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

19. Under the law the carrier is required to provide facilities for feeding and watering said stock, and to give opportunity to the shipper to thus feed and water them, when requested. It can not limit its liability in this respect, by requiring that the request to do so by the shipper should be in writing; and, notwithstanding the fact that this stipulation appears in the contract, the stipulation is unreasonable and should not be enforced. A verbal request on the part of the shipper is sufficient and a failure to grant such request when made, damage being shown to have resulted therefrom, is sufficient upon which to predicate a cause of action. *Gulf, etc., R. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 234.

20. **Must provide agent to whom request can be made.**—Where a passenger ticket agent at a station acted with the assent of the carrier in transacting business with reference to freight, and the evidence showed that it was the custom to notify him, or whoever was in charge of the passenger depot, that freight cars should be placed on a transfer track, notice to the agent to transfer cars to a suitable place for the unloading of live stock, was sufficient to charge the carrier with the duty of transferring the cars to a proper place, though the carrier employed another agent at the station who had charge of the freight business. *Westphalen v. Atlantic, etc., R. Co.*, 152 Iowa 232, 132 N. W. 57.

21. *Arkansas.*—*Missouri, etc., R. Co. v. Pullen*, 90 Ark. 182, 118 S. W. 702.

Illinois.—*Wabash, etc., R. Co. v. Pratt*, 15 Ill. App. 177.

Kansas.—*Atchison, etc., R. Co. v. Allen*, 88 Pac. 966, 75 Kan. 190, 10 L. R. A., N. S., 576.

North Carolina.—*Harden v. Chesapeake*, etc., R. Co., 157 N. C. 238, 72 S. E. 1042.

Texas.—*Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525; *Texas, etc., R. Co. v. Byers Bros.* (Tex. Civ. App.), 84 S. W. 1087.

Although the shipper by rail of live stock under a special written contract was by its terms bound, in case of accident or delay from any cause whatever, to feed, water, and take proper care of the stock at his own expense, yet where such agreement further stipulated that the carrier's employees should provide the owner or person in charge of the stock all proper facilities on train and at stations for taking care of the same, if injuries to the stock resulted from want of food, water, and attention, because of the carrier's failure to furnish such facilities at the proper time upon the arrival of the stock at destination, the carrier would be liable for such injuries. *Comer v. Stewart*, 97 Ga. 403, 24 S. E. 845.

A railroad, having accepted horses for shipment under a contract requiring the shipper to load and unload, feed, water, and care for them while in transit, is bound to furnish the shipper opportunity to care for them; and this though it be not a common carrier in the matter, but merely a bailee for hire, having control of the car. *Smith v. Michigan Cent. R. Co.*, 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440.

A carrier of live stock which does not stop at reasonable intervals, and allow the shipper an opportunity to feed and water his stock, can not defend an action for damages to the stock caused by their not being fed and watered during an entire trip of fifty-six or fifty-eight hours, on the ground that under the written contract the shipper, and not the carrier, was bound to feed and water the stock. *Lowenstein v. Wabash R. Co.*, 63 Mo. App. 68.

According to the rule in Georgia, under a bill of lading by which a shipper contracts that he will load and unload stock at his own risk, and feed, water, and attend them at his own expense and risk while in the yards awaiting shipment, and on the cars, or at feeding or transfer

duty has been held to extend to caretakers accompanying stock as well as to the stock itself.²² However, the carrier is not required to provide these facilities at all points that shippers may demand; so long as they are sufficient it must be left to the carrier to decide at what points they will be placed,²³ and it has been held that where through the carrier's negligence a train is placed in such a position that it can not be moved to a point where facilities for unloading exists, it can not escape liability for failure to provide the necessary means for unloading stock.²⁴

Custom or Usage.—Where a contract for the shipment of live stock is silent as to the places where they are to be fed and watered, an oral agreement between the agent and the shipper that they shall be fed and watered at a certain place, and a custom or usage of the carrier to stop and feed and water at that place, are binding upon the carrier.²⁵

Unusual Demands.—In case of unusual demands at points where there are no such facilities the shipper can not hold the carrier responsible if he refuses to accept the carrier's offer to move the stock to nearby chutes though such removal involved considerable delay.²⁶

Furnishing Facilities Other than Its Own.—Where a carrier is required to unload stock for food and rest during transportation, it may provide a yard

points, or where unloaded for any purpose, he can not hold the carrier liable for injuries resulting from failure to properly load and unload, or for lack of feed, water, or attention. It is the shipper's duty to load and unload and to supply food, water, and attention, but it is the carrier's duty to supply a proper place to unload and to have proper protection for the stock and if injured because unloaded at some place provided by defendant, unsuitable and unfit therefor, the carrier will be responsible for injury resulting from their being unloaded there; that being as much in its control as the running of its trains. *Gilliland v. Southern Railway*, 67 S. E. 20, 85 S. C. 26.

Where, by the contract of shipment, it is plaintiff's duty to feed and water his stock in transit, defendant company is bound to give him the opportunity of so doing, and, if necessary, to stop the train for that purpose. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

Shipper must be informed in reasonable way and time where facilities exist.—A stipulation in a contract between a carrier and shipper of live stock that the former agreed to stop its cars at any of its stations for watering and feeding, where it had facilities, whenever requested to do so in writing by the owner, in so far as it placed the initiative upon the company or owner to have the stock unloaded should be construed as meaning that the company must make known to the shipper in a reasonable way and time where such facilities are to be had, that he may unload his cattle at such places if he desires. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, judgment affirmed in 97 S. W. 466.

22. It is the duty of a railway company to keep yards provided for the care of stock, and in which stock in transit may be unloaded for rest, feed, and water, with

their approaches and walks, in a reasonably safe condition, not only for the stock placed therein, but also for persons who accompany the stock as caretakers, and who, in the performance of their duties, may find it necessary to go into or through the yards. *Atchison, etc., R. Co. v. Allen*, 88 Pac. 966, 75 Kan. 190, 10 L. R. A., N. S., 576.

23. A carrier of live stock must furnish all necessary facilities for their rest, exercise, and refreshment, though the time and place thereof must be left to its own judgment. *St. Louis, etc., R. Co. v. Mitchell*, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

24. Though, under the shipment contract, defendant was not required to unload the cattle when the train was stopped by a flood, yet if its agent was negligent in running the train into the flood, and thereby disabling it, defendant is liable for damage to the cattle, caused by the failure to place the cars where plaintiff could unload them, though such failure was due to a want of motive power. *Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

25. Custom or usage.—*Lowenstein v. Wabash R. Co.*, 63 Mo. App. 68.

26. Unusual demands.—Two out of a car load of horses, shipped by express, having become frightened and unmanageable, their owner desired to unload them, but, there being no chute near by, he was told that he might have the car side-tracked, and pulled to a neighboring stock-yard, where there was a chute, in which case the car would have to wait to be taken up twelve hours later. Held, that the express company was not negligent in failure to have a chute at the station, or in refusing to delay the train while the two horses were unloaded at the stock yard. *Regan v. Adams Exp. Co.*, 22 So. 835, 49 La. Ann. 1579.

other than the stockyard, if reasonably convenient and without expense to the shipper; he being entitled to attend to the feeding and watering himself,²⁷ but where a carrier desires to furnish a yard away from its tracks, it assumes the duty to make the transfer from the cars to the yard, and is liable for any loss or damage while so doing.²⁸

§ 1758. Duty to Furnish Water.—It is the duty of railway employees in charge of a train in which live stock is being transported to provide water at suitable points on the line of its road for the use of the stock, and the company is liable for their failure to do so, resulting in damage or loss to the owner of the stock.²⁹ If it permits its pump to remain out of repair,³⁰ or if knowing that water is scarce and it fails to notify the shipper before accepting his shipment,³¹ it will be liable for injuries resulting from its failure to furnish water.

Duty to Furnish Suitable and Wholesome Water.—It is the duty of a carrier of live stock to furnish suitable and wholesome water for the stock, and it is not relieved from liability by showing that unwholesome water furnished was the water afforded by that section, where water for the people at that place was hauled there so that it was not impossible by reasonable effort to have furnished wholesome water for the stock.³²

§§ 1759-1770. Special Contracts for Transportation—§ 1759. In General.—See ante, "Bills of Lading," chapter 6, post, "Limitation of Liability of Carriers of Live Stock," §§ 1872-2054.

Parol Contract—Bill Unnecessary.—Though the mere delivery and acceptance of live stock for shipment will place upon the carrier certain duties in regard to its transportation, the carrier and shipper may enter into a special contract prescribing particular duties, obligations and restrictions not covered by the implied contract resulting from the delivery and acceptance of stock for shipment. Though usual, the special contract need not be in writing, a verbal contract being sufficient.³³

§§ 1760-1763. Validity of Special Contracts—§ 1760. In General.—In order to be binding, a special contract for the shipment of live stock must, like other contracts, contain the element of mutuality. It must be shown that the shipper accepted the contract and understood and assented to the restrict-

27. Furnishing facilities other than its own.—*Drake v. Great Northern R. Co.*, 24 S. Dak. 19, 123 N. W. 82.

28. *Drake v. Great Northern R. Co.*, 24 S. Dak. 19, 123 N. W. 82.

29. Duty to furnish water.—*Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393.

Injury by giving too much water.—In an action against a railroad company for injuries to a shipment of horses by failure to feed and water, the admission of evidence that the stock were injured by drinking too much water at a certain station was proper, there being other evidence that this was caused by failure to properly feed and water before arrival at this place. *Gulf, etc., R. Co. v. Dunn* (Tex. Civ. App.), 78 S. W. 1080.

30. For a railroad company to permit the pump at a station to be out of repair, so that water can not be provided for live hogs on its train, is prima facie negligence. *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434.

31. If water is scarce on the line of a railroad, so that it can not be provided for the purpose of applying to live hogs

shipped in its cars, when necessary, the company ought to inform shippers of the fact before they ship; and if such information is withheld, and hogs are shipped, and die on the route for want of water, the company will be liable. *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434.

32. Duty to furnish suitable and wholesome water.—*Chicago, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 85 S. W. 286.

Prima facie negligent to give cattle alkaline water.—It is prima facie negligence for a carrier of live stock to give the stock alkaline water injurious in its effect, and it does not devolve on the shipper to show that the carrier did not know that the cattle were not accustomed to such water, where the carrier, from the contract of shipment, must have known that the stock came from a place outside of the alkaline region. *Chicago, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 85 S. W. 286.

33. Verbal contract.—*Texas, etc., Co. v. Nicholson*, 61 Tex. 491. See post, "Modification or Merger," §§ 1767-1769.

ive provisions thereof.³⁴ Thus, a written contract made subsequently to a valid oral contract is without effect where it is so intended by the parties thereto.³⁵

Failure to Read Contract before Signing.—If a shipper signs a contract for the shipment of live stock without reading it, he is bound by its terms, provided it is not illegal because against public policy,³⁶ and where he is not given sufficient opportunity to read the contract he should refuse to sign it if he does not wish to be bound by the terms it may contain.³⁷

34. Validity of special contracts.—Cleveland, etc., R. Co. v. Patton, 104 Ill. App. 555, judgment affirmed 67 N. E. 804, 203 Ill. 376.

Under the rules of the Railroad Commission prescribing a maximum valuation on a shipment of horses and mules at \$75 each for a certain released rate, with an increase of fifty per cent in rate for every increase of 100 per cent, or fraction thereof in valuation, the shipper has the option to ship at his own or the carrier's risk, and he will not be bound in the limit of his recovery by payment of the released rate, unless it appear that he knew such rate was a released rate, and that there was a fair meeting of the minds of the shipper and carrier that, by payment thereof, the shipper's recovery would be limited to a certain maximum sum clearly agreed upon. Atlantic, etc., R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

Evidence that cattle were consigned to a point to which defendant had a continuous line of railroad from the point of shipment, that there was a shorter and usual route by another way, that no direction was given by the shipper as to which route should be taken, that the shipper expressed a desire that the cattle should be at their destination that evening, and the carrier's agent answered that they would be there, was sufficient to warrant a finding of a special contract for the safe delivery of the cattle to the consignees at their destination. Petition for rehearing 72 N. E. 558, 164 Ind. 360, overruled. Chicago, etc., R. Co. v. Woodward, 73 N. E. 810, 164 Ind. 360.

Where a shipper of live stock applied to a carrier's station agent for cars to be furnished at a specified time and place for the transportation of stock and the agent promised to furnish the cars, there was an implied enforceable engagement on the part of the shipper to furnish stock to ship in the cars, so that the carrier's agreement was not void for want of mutuality. Judgment 100 N. Y. S. 1110, 114 App. Div. 908, affirmed. Clark v. Ulster, etc., R. Co., 81 N. E. 766, 189 N. Y. 93, 13 L. R. A., N. S., 164, 12 Am. & Eng. Ann. Cas. 883.

Where it was agreed that defendant should carry cattle through to destination at \$96.90 per car, with privilege of shipper to fatten the cattle at two designated points en route, and, when the cattle were ready for shipment from the feeding

pens, defendant agreed that if plaintiff would ship in 10 car lots, which was contrary to plaintiff's intention, and less advantageous to him than a shipment of 5 car lots, defendant would carry the cattle through to destination in 33 hours, such subsequent agreement constituted a complete contract based on a sufficient consideration. St. Louis, etc., R. Co. v. Barnes (Tex. Civ. App.), 72 S. W. 1041.

35. A carrier was liable at common law for its failure to promptly deliver mules to a destination orally agreed upon, though the parties, as a mere matter of form, without intending it to have any effect, entered into a written contract, naming another and fictitious destination. Deierling v. Wabash R. Co., 146 S. W. 814, 163 Mo. App. 292.

36. Failure to read contract.—H. delivered a car load of cows to defendant, as a common carrier, for shipment, without any special parol contract. He signed a written contract which contained nothing contrary to public policy. Held, that he could not defend upon the ground that the written contract was signed in haste and without reading. Hengstler v. Flint, etc., R. Co., 84 N. W. 1067, 125 Mich. 530.

Where plaintiff executed a written contract for the transportation of a mare, he was bound by its terms, though he failed to read it. Ames v. Fargo, 99 N. Y. S. 994, 114 App. Div. 666.

37. Where a shipper simply orders cars to be placed at a loading chute, two miles distant from any station of the railroad company, loads such cars with cattle, and, without any contract as to the shipment, except such as the law implies, accompanies the cattle, which are hauled in the train, to the railroad station of the company, and there calls upon the station agent to prepare a contract for the shipment, which is done, and the shipper signs the contract, receives a copy thereof, proceeds on his journey, and uses the contract to pay his transportation, without making any objection thereto, the shipment is made under the written contract, although the shipper neither read nor had an opportunity to read the contract before entering upon the train. Hayes v. Missouri, etc., R. Co., 113 Pac. 421, 84 Kan. 1.

If a shipper did not know the contents of a contract for transportation, and if the time intervening between the loading of the live stock and the starting of the

Shipment Across Quarantine Line.—A valid contract may be made for shipment of live stock across a quarantine line, the contract contemplating conformance to the rules establishing the quarantine.³⁸

Carriage beyond Own Line.—Carriers are not bound to contract or carry beyond their own line of road, or within any particular time or in any special manner, but they have the power to enter into such a contract; and when such is the case, they are as much bound as if the contract of carriage was limited to its own line.³⁹

Shipper Violating Interstate Commerce Act.—The contract of a carrier is not rendered invalid because the shipper has entered into a contract with stock dealers at an intermediate point which is in violation of the interstate commerce act, the carrier not being a party thereto.⁴⁰

Consignor's Authority to Bind Consignee.—A live stock consignor is presumptively authorized to bind the consignee by the shipment contract.⁴¹

§ 1761. Fraud.—Where a shipper is led into a contract by fraud or misrepresentation on the part of an agent of the carrier, he can hold the carrier responsible for any damage caused thereby.⁴²

§ 1762. Terms and Mode of Transportation.—A carrier may legally make special contracts providing for special modes and means of transportation, such as solid trains,⁴³ or cars at certain specified times and places.⁴⁴

train was so short as not to afford him a reasonable opportunity to read the contract and acquaint himself with its contents, he should have rejected and refused to sign it, and, if he elected to sign it, he can not be permitted to evade its terms on the ground that he did not know its contents. *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406. See post, "Modification as Merger," §§ 1767-1769.

38. Contract to ship across quarantine line.—A contract to carry cattle, which the carrier breached by failing to furnish facilities for loading, will not be presumed invalid, because providing for shipment across the quarantine line; the proclamation which established the line authorizing the shipment provided an inspection was made and a certificate obtained, to be presented to the carrier when the shipment was accepted; there being nothing to show that such certificate could not have been presented. *Texas Cent. R. Co. v. Pittman* (Tex. Civ. App.), 79 S. W. 847.

39. *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391, affirmed in 93 Tex. 684, no op.; *Gulf, etc., R. Co. v. Jackson* (Tex. Civ. App.), 86 S. W. 47, reversed, on another point, in 99 Tex. 343, 89 S. W. 968.

40. Shipper violating interstate commerce act.—A contract for the carriage of stock provided that the stock should be unloaded at an intermediate point, and the shipper had a contract with live stock dealers at this intermediate point to sell the stock there and substitute other stock in the same cars for transportation to the point of destination; the original shipper receiving compensation for the use of his cars. Held that, as the railroad company was not a party to this agreement, it did not, even if in violation of the interstate

commerce act, render the railroad's contract for the carriage of the stock invalid. *Southern Kansas R. Co. v. Cox*, 95 S. W. 1124, 43 Tex. Civ. App. 79.

41. Consignor's authority to bind consignee.—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce's (25 Del.) 274, 78 Atl. 1085.

42. Fraud.—Where a shipper of live stock was led into the execution of a contract for the shipment which fixed the route, by means of false information by the agent of the carrier, the shipper was entitled to recover for damages resulting by reason of that route being longer than another route which he had demanded. *Houston, etc., R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199.

43. Mode of transportation.—A railroad company may lawfully contract to furnish a shipper solid trains for the transportation of cattle unmixed with other freight, to use one engine only for such transportation, and to deliver a shipment at a certain time. *Gulf, etc., R. Co. v. Jackson* (Tex. Civ. App.), 86 S. W. 47, judgment reversed 89 S. W. 968.

44. To furnish cars at specified time and place.—There is no law prohibiting carrier from contracting with cattle owners to furnish stock cars at an agreed time and place for the use of such owners. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846.

Furnishing cars on another line.—Notwithstanding the fact that a place is not on a carrier's line of railway, but is on the line of another railway with which the road connected, and over which the cattle were shipped, it is competent for the carrier to bind itself by contract to furnish cars at that place. *Missouri, etc., R. Co. v. Kyser*, 38 Tex. Civ. App. 355, 87 S. W. 389, affirmed in 101 Tex. 649, no op.

§ 1763. **Partial Invalidity.**—Special contracts for the shipment of live stock may be divisible, and where one provision is invalid for any reason the other or others may still be enforced.⁴⁵

§§ 1764-1766. **Authority of Agents to Make Special Contracts—**

§ 1764. **In General.**—Local agents of a carrier have ostensible authority to make special contracts for the shipment of live stock, and contracts made by them within the scope of their apparent authority will bind the principal, in the absence of knowledge of the shipper of any limitation on the agent's authority.⁴⁶ This authority may be exercised by others than local agents, such as special live stock agents, and where there is nothing to put the shipper on notice of any limitation of authority, contracts made by them will be binding on the carrier.⁴⁷

45. **Partial invalidity.**—A contract between a shipper and a carrier providing for the transportation of live stock, and also fixing its value in case of loss or damage, is divisible; and the lack of consideration for the agreement fixing the value eliminates it, but leaves the agreement for transportation in full force and effect, so that the shipper may bring his action on the written contract of shipment without thereby adopting the independent clause limiting the value. *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022.

A contract for shipment of horses, and a contract on the back of the same for transportation of a person to accompany the horses, each separately signed, are separate contracts, so that provision of the latter that any question arising under "this contract" shall be determined by the law of a certain state does not govern the former. *Brockway v. American Exp. Co.*, 50 N. E. 626, 171 Mass. 158.

A contract for the shipment of cattle in the company of a caretaker, exempting the carrier from liability in excess of an agreed valuation for damage to the cattle, whether caused by negligence or otherwise, and exempting it from any liability for injury to the caretaker, is, if not altogether good, divisible in its provisions as to the cattle and the caretaker, and if one of such provisions is good it may be sustained, although the other is condemned as illegal. *Sprigg v. Rutland P. Co.*, 60 Atl. 143, 77 Vt. 347.

46. **Agent's authority to make special contracts.**—*St. Louis, etc., R. Co. v. Taylor*, 87 Ark. 331, 112 S. W. 745; *Meriwether v. Quincy, etc., R. Co.*, 128 Mo. App. 647, 107 S. W. 434; *Clark v. Ulster, etc., R. Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. N. S., 164, 12 Am. & Eng. Ann. Cas. 883.

A local station agent of a railroad company has ostensible authority to contract to furnish cars for a shipment of cattle to a destination beyond the railroad's line, and where a shipper has no notice to the contrary, and relies upon the appearance of authority, the contract made with the agent is binding on the company. *San*

Antonio, etc., R. Co. v. Timon (Tex. Civ. App.), 110 S. W. 82.

For special train.—A contract that cattle were to be shipped in solid trains without mixing other freight with them, and also that each train should be drawn by a single engine, is unauthorized and not binding upon the railroad company for the same reasons which deny to the local agent the authority to contract to furnish cars at another station. The character of the trains which are to be run in the transportation of cattle and the number of engines to be used are matters under the charge and control of entirely different departments from that in which the live-stock agent or the local agent of the railroad company is engaged. It is not necessary, to enable either of the agents to execute the power of receiving and shipping the cattle, that those cars should be hauled in solid trains without other cars; nor is it necessary to the performance of this duty that the number of engines to be used should be restricted as was done by the contract. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47.

47. **Live-stock agent making contract.**—The testimony of the live-stock agent of a railroad company that he had authority to contract for cars to ship cattle was sufficient to show him a general agent who could bind the carrier by a contract to furnish cars. *Missouri, etc., R. Co. v. Kyser*, 87 S. W. 389, 38 Tex. Civ. App. 355.

Where there was evidence that plaintiffs contracted with a live-stock agent of defendant railway for the shipment of cattle, and the cattle were delivered at the station, and the station agent knew of the contract between plaintiffs and the live-stock agent, and the evidence was sufficient to create in him as great an authority as that apparently exercised by a station agent with whom the public must contract for shipment, and the plaintiffs had no knowledge of any limitations on his power, they were warranted in believing that he had authority equal to that which could be exercised by the station agent. *Gulf, etc., R. Co. v. Jackson* (Tex. Civ. App.), 86 S. W. 47, judgment reversed 89 S. W. 968.

Shipper's Knowledge of Limitation of Authority in Former Written Contracts.—And it has been held that knowledge on the part of the shipper of limitations contained in former written contracts does not charge him with notice that the agent had no power to make the oral contract.⁴⁸

Ratification of Unauthorized Verbal Agreement.—An authorized agent of a railroad, who receives cattle for shipment without objection under a parol agreement made by an unauthorized agent, binds the company by his authority, notwithstanding the want of authority of the agent who made the contract.⁴⁹

§ 1765. To Furnish Cars at Specified Time and Place.—The local agent of a railway company has authority, presumptively, to make contracts for cars; and if he does make such a contract, and receives notice as to when the cars were desired, and agrees to furnish them on that date, the railroad company will be liable for a failure to do so, even though reasonable time was not given to have them on hand.⁵⁰ And where one represents a railroad company as station agent, and makes all contracts for shipment of live stock, but is not authorized to agree to provide cars at specified times, and in fact has instructions forbidding him to do so, a contract for this purpose is nevertheless binding upon the company as within the apparent scope of authority, unless the shipper knows of the limitation.⁵¹

48. Shipper knowing previous written contracts contained negation of agent's authority to make verbal contract.—Where a shipper made an oral contract with a carrier's agent to furnish cattle cars on a specified date, the fact that the shipper knew that he would be required to sign a written contract before the cattle were shipped, and that similar written contracts previously signed contained a negation of the agent's power to agree to furnish cars to be loaded with live stock at any specified time, did not charge the shipper with notice that the agent had no power to make the oral contract. *San Antonio, etc., R. Co. v. Timon*, 99 S. W. 418, 45 Tex. Civ. App. 47.

49. Ratification of unauthorized contract.—*Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing judgment 86 S. W. 47; *Gulf, etc., R. Co. v. Brown*, 99 Tex. 349, 89 S. W. 971; reversing judgment 86 S. W. 54, 99 Tex. 343.

50. To furnish cars at specified time and place.—*Clark v. Ulster, etc., R. Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A., N. S., 164, 12 Am. & Eng. Ann. Cas. 883; *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 44 S. W. 8; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418.

In an action for the failure of a carrier to furnish cars for the shipment of live stock, the court properly confined the issue to damages growing out of the carrier's failure to furnish transportation in accordance with an agreement made by plaintiff with a station agent; he having authority to receive and ship freight, and therefore implied authority to agree to furnish cars for such purpose on a certain day. *St. Louis, etc., R. Co. v. Taylor*, 87 Ark. 331, 112 S. W. 745.

A station agent appearing to be clothed with the usual powers of such agent may

make a valid contract with a shipper to furnish stock cars at a stated time, in the absence of knowledge of the shipper of any limitations on the agent's authority, and in view of the fact that the course of dealing between the same parties recognized such contracts as valid. *Meriwether v. Quincy, etc., R. Co.*, 107 S. W. 434, 128 Mo. App. 647.

51. Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.), 37 S. W. 234; *Merriman v. Fulton, etc., Co.*, 29 Tex. 97; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Gulf, etc., R. Co. v. Jackson* (Tex. Civ. App.), 86 S. W. 47, reversed on another point in 99 Tex. 343, 89 S. W. 968.

Clause in contract prohibiting agreement for delivery in specified time.—A clause in a bill of lading reciting that agents of the carrier were "not authorized to agree to forward live stock to be delivered at a specified time, nor for any particular market," is not a limitation of the power of a station agent to agree to furnish cars and receive freight for shipment on a particular date, but is merely notice to the shipper that the agent had no power to bind the carrier absolutely to deliver a car load of stock on a particular date. *Meriwether v. Quincy, etc., R. Co.*, 107 S. W. 434, 128 Mo. App. 647.

Printed rule on contract as notice.—The printing of the rule that the agent has no authority to make contracts for cars at a specified time on the contracts could not be notice to the shipper, for the reason that such contracts in the natural course of things would not be known to the shipper until after the contract for cars had been made. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

Furnishing Cars at Another Station.—But it has also been held that the local agent of a railroad company has no authority to contract for the furnishing of cars at a station other than his own nor to make any contracts which will bind the company with reference to freight to be received at a different station.⁵²

§ 1766. For Rates.—Station agents are presumed to have authority to make contracts for the transportation of cattle, and in the absence of any adequate notice to the public of any limitation upon their authority in that respect, the railway company will be bound thereby, both as to the rates and as to the expedition of transportation and delivery.⁵³

§§ 1767-1769. Modification or Merger—§ 1767. In General.—Where a verbal agreement is made between a shipper and a carrier for transportation of live stock, and a written contract is executed while the oral contract is unbreached and still executory, the verbal agreement is merged in the written contract in the absence of fraud, compulsion or want of time to read the written contracts.⁵⁴ But a waybill describing a shipment as a through shipment,⁵⁵ a shipping report signed by the agent of plaintiff and a connecting line,⁵⁶ and signing of a new contract at an intermediate point,⁵⁷ have been held not to change or merge the original written contracts for shipment.

52. Furnishing cars at another station.—*Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; *Southern Kansas R. Co. v. Cox*, 47 Tex. Civ. App. 84, 103 S. W. 1122; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353. See, also, *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518; *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

53. Wood's Railway Law, p. 450. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583. See ante, "Charges and Liens," Chapter 15.

54. Meriwether v. Quincy, etc., R. Co., 107 S. W. 434, 128 Mo. App. 647.

A shipper contracted with a carrier orally for a car for his cattle on a certain day. The parties then reduced the contract to writing, in which it was provided that the shipment was not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market, and also that the shipper released any cause of action for damages which might accrue to him by any previous contract. Held, that the written contract superseded the oral one. *Helm v. Missouri Pac. R. Co.*, 72 S. W. 148, 98 Mo. App. 419.

Where the contracts sued on were duly executed by the shipper's direction in order to secure transportation for his helpers, it was binding upon the shipper and superseded a previous verbal contract. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

Written contract signed by shipper's daughter.—Where a carrier made an oral agreement with plaintiff for the transportation of a mare which his daughter gave him, it was not relieved from the duty of performing it by inducing the daughter, who was not the father's agent,

to sign a contract for transportation of the mare. *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202.

Verbal contract to furnish cars unaffected by written contract limiting agent's authority.—A written contract for the shipment of cattle, limiting the authority of the carrier's agent to make a verbal contract, does not merge a previous verbal contract made by the agent with the shipper, in which the agent agreed to furnish cars ready to receive the cattle on a certain day. *Gulf, etc., R. Co. v. Combes* (Tex. Civ. App.), 80 S. W. 1045.

55. Waybill describing shipment as through one.—In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the waybill issued by defendant described the shipment as a through one, held not to change written contracts for the shipment. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

56. Shipping report not merging contract.—In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the shipping report, signed by agent of plaintiff and the connecting lines, held not to change written contracts for shipment between plaintiff and defendant. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

57. Abandonment of contract by signing of new contract at intermediate point.—Instance of facts held sufficient to sustain finding against plea that a live stock shipping contract from Texas to Chicago had been abandoned by shipper signing another such contract upon leaving Kansas City for Chicago. *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391, affirmed in 93 Tex. 684, no op.

Written Contract Executed Subsequent to Breach of Verbal Contract.

—Where a common carrier violates its verbal contract to ship cattle at a certain time, a transportation of such cattle under a written contract made subsequent to the breach of the verbal contract does not release the damages for such breach, in the absence of a stipulation so providing.⁵⁸

§ 1768. **Duress.**—While a written contract signed under duress will not ordinarily supersede a previous valid verbal contract, a shipper can not hold the carrier to the terms of a parol contract when he had knowledge of a rule providing that all shipments must be under written contracts.⁵⁹

§ 1769. **Want of Time to Read Contracts.**—A carrier can not bind shipper to the terms of a written contract for the transportation of live stock, where the stock has been received and shipment begun under a valid parol contract, and the written contract is not presented to the shipper until the last moment and he has not sufficient time to properly read and understand it.⁶⁰

§ 1770. **Construction of Contract.**—The rules of construction for the interpretation of contracts for the shipment of live stock are the same as those for any other contract, the intention of the parties being the governing principle in all constructions.⁶¹

58. Written contract subsequent to breach of verbal contract.—*Gann v. Chicago, etc., R. Co.*, 72 Mo. App. 34.

Where a carrier undertook, through a station agent, to furnish cars for a shipment of live stock at a specified time and station, the contract was not void nor superseded by a written contract for the transportation of the live stock signed by the shipper subsequent to the breach of the oral contract, in the absence of some consideration in the written contract moving to the shipper as compensation for damages already incurred by him. Judgment, 100 N. Y. S. 1110, 114 App. Div. 908, affirmed. *Clark v. Ulster, etc., R. Co.*, 81 N. E. 766, 189 N. Y. 93, 13 L. R. A., N. S., 164, 12 Am. & Eng. Ann. Cas. 883.

59. Where, in an action for damages to cattle shipped on defendant's railway, plaintiff alleged that the shipment was under an oral contract with defendant's agent, and that the written contract afterwards signed by him, limiting defendant's liability to its own line, was executed under circumstances constituting duress, but it appeared that at the time of the alleged oral contract he had knowledge of a rule of defendant requiring all its shipments to be made under written contract, he was not entitled to recover on the oral contract. *Texas Mex. R. Co. v. Gallagher* (Tex. Civ. App.), 70 S. W. 97.

60. Where a railroad company received a shipment of live stock under a parol contract, and, after the animals were in the car, and the train was about to start, the shipper, on demand of the agent, signed a written contract, which was materially variant from the parol contract, without time to read the writing, and without any statement as to what it contained, the written contract was void, and

the shipper may recover for a breach of the parol contract without first suing in equity to have the written contract reformed. *Louisville, etc., R. Co. v. Cooper*, 56 S. W. 144, 21 Ky. L. Rep. 1644.

Where plaintiff sued for breach of a contract for the through shipment of cattle, and defendant, by its answer, relied on a written contract, by which it undertook merely to deliver the cattle to a connecting line at an intermediate point, in reply to which plaintiff pleaded that he signed the written contract, after the cattle had been shipped, on defendant's representation that it was the same as the verbal contract, the court erred in overruling plaintiff's motion to require defendant to file the written contract. *Caldwell v. Felton*, 51 S. W. 575, 21 Ky. L. Rep. 397.

Where plaintiff verbally contracted with a railroad for the carriage of stock, and subsequently, when the stock had been loaded, the railroad's agent presented several contracts to plaintiff for his signature, stating they were vouchers to be shown the conductors, and plaintiff signed them without examination, having no opportunity to do so, the terms of the verbal contract, and not those of the written ones, controlled the carriage. *Southern Pac. Co. v. Anderson*, 63 S. W. 1023, 26 Tex. Civ. App. 518.

Where plaintiff made a verbal contract for the shipment of cattle, and paid the freight, and signed a written contract after the shipment had started, without reading it, the verbal contract will control. *Galveston, etc., R. Co. v. Botts*, 53 S. W. 514, 22 Tex. Civ. App. 609.

61. Showering hogs.—A freight contract for the shipment of hogs, providing that the animals are to be watered, fed, and cared for by the shipper or his agent

Printed Rules, Tariffs, Waybills, etc.—Printed rules and regulations at the top of the sheets of paper on which the contract is written or indorsed on the back of a contract for the transportation of live stock under head of "Special Notice to Agents" are not part of the contract, and not binding on the shipper in the absence of some evidence of his assent thereto;⁶² nor are the carrier's published tariffs, classifications and circulars, though a provision in the contract provides that they shall constitute a part thereof;⁶³ but where, when the shipper signed the contract for the carriage of stock, the bill clerk showed him the waybill, which stated that the stock would go on a certain train, the waybill was a part of the contract, and hence could be considered in connection with the other evidence to show that the stock was to be carried on a certain train.⁶⁴

in charge, means no more than that the shipper shall see that the stock is furnished with such feed and water as is required for consumption, and has no connection with the general treatment of stock essential to safe transportation; and hence does not impose on the shipper the duty of showering the hogs to keep down their temperature. *Peck v. Chicago, etc., R. Co.*, 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883.

Former contracts of similar nature.—Plaintiff ordered two cars from defendant for shipping hogs. The first part of the route was over narrow gauge, which required cars of only half the capacity of the standard gauge. In former transactions plaintiff's orders were construed as for standard gauge, which required twice as many narrow gauge, and the agent of defendant had instructed him to so order. Held, that plaintiff's order called for four narrow-gauge cars. *Weida v. Chicago, etc., R. Co.*, 75 N. W. 121, 72 Minn. 102.

Time of delivery.—A case was tried on the theory that a railroad company had agreed with a shipper to have cars ready at a certain hour to receive his cattle to be shipped so as to reach a certain day's market. The cars were not ready at the hour specified, but were at a later hour, which would still have brought them to the market in time. Held, that the element of time was essential only as to the time of arrival, and therefore the shipper could not refuse to ship at the later hour, and recover from the carrier for a breach of the contract. *Currell v. Hannibal, etc., R. Co.*, 71 S. W. 113, 97 Mo. App. 93.

Place of destination.—By a written contract between a shipper and carrier, the carrier agreed to forward cattle from a certain place, but at the head of the paper preceding the agreement, it appeared that the shipper offered the cattle for shipment to a certain place, and the back of the contract was indorsed showing the point of shipment and destination. Held, that the contract called for the destination specified in the head and in the indorsement. *Lee v. Wabash R. Co.*, 94 S. W. 991, 118 Mo. App. 476.

Shipment on particular train.—Plaintiff contracted with defendant to ship certain hogs by a certain train, and delivered them to defendant in a crate, and there-

after took the crate containing them to the place at which they were to be left. Defendant shipped them by an earlier train, and, no one being present to receive them, they were returned to the place of shipment. The crate was locked, and plaintiff telephoned to the place of shipment to have them forwarded. One of them died from excessive confinement. Held, that defendant was liable for breach of contract to ship on a particular train. *Harrison v. Weir*, 69 N. Y. S. 957, 34 Misc. Rep. 519, motion to dismiss appeal denied 73 N. Y. S. 1119, 68 App. Div. 25.

Time of furnishing car.—A railroad depot agent verbally agreed with a shipper, who desired a poultry car on a stated day, "that he thought he could get the car, and would do the best he could towards getting it, but did not make any absolute promise to get the car." The car was not furnished at the date asked by the shipper. Held, that the contract imposed on the carrier no liability to furnish a car absolutely, and, as the shipper's action was based on contract, there could be no recovery. *St. Louis, etc., R. Co. v. Cannington (Tex. Civ. App.)*, 110 S. W. 965.

⁶² *St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

Where a railroad company prints rules and regulations for the transportation of live stock at the top of a sheet of paper on which is printed the live-stock contract, and in the contract refers to the rules and regulations as follows: "That whereas, the said St. Louis & San Francisco Ry. Co., as aforesaid, transports live stock only as per above rules and regulations," held, that the rules and regulations form no part of the contract. *St. Louis, etc., R. Co. v. Tribbey*, 50 Pac. 458, 6 Kan. App. 467.

⁶³ A contract provision that the rules, regulations, and conditions prescribed by a carrier of live stock, as evidenced by its published tariffs, classifications, and circulars, were binding on the shipper, and that his signature of the contract was conclusive evidence of his knowledge of and assent to the conditions thereof, has been held to be void. *Houtz v. Union Pac. R. Co.*, 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

⁶⁴ *Kirby v. Chicago, etc., R. Co.*, 90 N. E. 252, 242 Ill. 418.

§ 1771. When Liability Commences.—See ante, "When Liability Commences," chapter 5.

§§ 1772-1781. Delivery by Carrier—§ 1772. In General.—Notwithstanding the difference in duties and responsibilities between a carrier of live stock and a carrier of goods, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods.⁶⁵ A carrier is only required to deliver to the consignee or some one showing a right to receive the property.⁶⁶ Where animals, which a railroad corporation is transporting, are killed by an accident, for the damages from which the corporation is not liable, it is not bound to deliver their carcasses at the place of their destination.⁶⁷

Excuses for Refusal to Deliver.—There is no conversion by a carrier in refusing to deliver stock to one not showing a right to receive it,⁶⁸ nor is a common carrier liable for failure to deliver cattle shipped from one to another state in violation of the quarantine laws of the latter state, the shipper knowing existence of such laws at time of shipment.⁶⁹

§ 1773. Time of Delivery.—The carrier is bound to tender the cattle within a reasonable time and within reasonable hours,⁷⁰ and it is a question of fact whether the cattle were tendered within reasonable hours, and whether the consignee should, under the circumstances, have received them.⁷¹

§ 1774. Necessity for Personal Delivery.—A railroad corporation, a common carrier of cattle, performs its duty when it has unloaded the cattle at

65. Obligation similar to that of carrier of goods.—*Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73; *North Penn. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

Generally, as to delivery of goods by carrier, see ante, "Transportation and Delivery by Carrier," Chap. X.

66. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

67. Necessity for delivery of carcasses where animals killed.—*Lee v. Marsh* (N. Y.), 43 Barb. 102, 28 How. Prac. 275.

68. Excuses for failure to deliver.—*Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

Refusal to deliver to person not showing right as conversion.—In conversion it appeared that defendant carrier received a horse consigned to "T. & W.," and transported it to the point of destination; that plaintiff claimed the shipment was to himself, and demanded possession of the horse; that defendant refused to deliver it till it had some evidence of plaintiff's right to receive the horse, and used all reasonable efforts to ascertain who was the proper consignee; that plaintiff never furnished any evidence; and that when it was finally determined to whom the horse should be delivered, he refused to accept the horse, and pay the charges, whereupon defendant sold it at public auction. Held, that there was no conversion by defendant. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

69. Shipment in violation of quarantine law.—*St. Louis, etc., R. Co. v. Smith*, 20

Tex. Civ. App. 451, 49 S. W. 627, affirmed in 93 Tex. 670, no op.

70. Tender must be within reasonable hours.—*Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398; *Morgan v. Dibble*, 29 Tex. 107, 94 Am. Dec. 264; *Hutch. on Carr.*, § 340; 5 Am. and Eng. Enc. of Law, 2 Ed., 217, 225.

Sufficiency of delivery at 2:20 p. m. for market of that day.—Delivery by a carrier of live stock at the stockyards at 2:20 p. m., is sufficiently early to permit the cattle being placed on the market at the yards before the close of the market at 3 p. m. *Chicago, etc., R. Co. v. Young* (Tex. Civ. App.), 107 S. W. 127.

Delivery at midnight.—Where defendant had transported cattle and tendered them to the consignee at 12 o'clock on a cold, wet night, demanding the freight, which was a considerable sum, and the consignee had not the money with him at that time, and being a stranger in the city, knew not where to take the cattle, and declined to receive them, and defendant placed them in its stock pens, there was not such a tender at reasonable hours as exempted defendant from liability for the escape of the cattle from the pens that night. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.

71. Question of fact.—*Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.

their place of destination. It is not bound to deliver them to the consignee.⁷² Where a shipper of live stock agrees with the company's agent that on reaching its destination the car shall be backed down to a cattle chute, which is in fact done, for the purpose of delivery, it constitutes a delivery, though there is no formal turning over of the car by the conductor to the shipper.⁷³

§ 1775. Notice to Consignee.—It is not the duty of a common carrier to give notice of the arrival of stock at the place of destination, it being the duty of the consignors to take notice of the time when the stock shipped by them would reach its destination and to be there to receive it, or to give notice to their consignee to do so.⁷⁴

§ 1776. Place of Delivery.—A carrier of live stock discharges its duty by delivering the stock at its own stockyards, and is not required to deliver at any other stockyard.⁷⁵ Where a railroad can not comply with its contract to deliver a shipment of cattle to a connecting road for through transportation, except by a delivery at certain stockyards used jointly by it and another road, the shipper can not insist on such delivery at the initial carrier's own stockyards.⁷⁶ A shipper of stock is not required to receive it before arrival at the destination, on being notified that some of the animals are sick.⁷⁷

As to Providing Suitable Place.—It is the duty of a carrier of live stock to provide suitable pens for the delivery of cattle,⁷⁸ convenient to the place of unloading,⁷⁹ whether delivery is made to the owner or to a connecting carrier, and it can not shift its responsibility by showing delivery in pens provided by a stockyards company.⁸⁰

Delivery at Stockyards Not Belonging to Carrier.—A railroad company accustomed to deliver cars of cattle at stockyards off its line, by transporting them over a line belonging to the stockyards company, for which it pays a fixed sum per car, is under no obligation to consignees whose business is located at the stockyards to supply unloading facilities at its own station in a different part of the city, and hence is not bound, in default thereof, to deliver at the stockyards, without a separate charge. On the contrary, it may, on posting schedules to that effect, as required by the interstate commerce law, make a

72. Necessity for personal delivery.—Chicago, etc., R. Co. v. Pratt, 13 Ill. App. 477.

73. Brown v. Pontiac, etc., R. Co., 94 N. W. 1050, 133 Mich. 371.

74. Chicago, etc., R. Co. v. Pratt, 13 Ill. App. 477.

Where shipper accompanies cattle.—A shipper who is to accompany and unload his cattle at his own risk is bound to take notice of their arrival at destination, and hence can not recover for the carrier's failure to notify him thereof. Steiger v. Erie R. Co. (N. Y.), 5 Hun 345.

75. Delivery at own stockyard sufficient.—Central Stock Yards Co. v. Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

The requirement of the constitution of Kentucky that a railroad shall deliver, transfer and transport freight to any point where there is a physical connection between its track and that of another railroad, refers to cases where the freight is destined to some further point by transportation over a connecting line, and a railroad company having a stockyard of its own at a city, is not required to de-

liver live stock at a yard on another railroad, merely because there is a physical connection between the tracks of the two roads nearer the stockyard of the latter road. Central Stock Yards Co. v. Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

76. Inconsistent demands for delivery.—Texas, etc., R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530.

77. Shipper need not accept at intermediate point.—Houston, etc., R. Co. v. Burns, 90 S. W. 688, 41 Tex. Civ. App. 83.

78. As to providing suitable pens.—Texas.—Texas, etc., R. Co. v. Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

Washington.—Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883.

As to duty generally to provide stock pens, see ante, "Duty to Provide Stock Pens," §§ 1747-1749.

79. Convenience.—Reynolds v. Great Northern R. Co., 82 Pac. 161, 40 Wash. 163, 111 Am. St. Rep. 883.

80. Delivery in pens of stockyards company.—Texas, etc., R. Co. v. Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

charge for freight to the city, and a separate terminal charge, of a fixed sum per car, for delivery at the stockyards.⁸¹

Contract by Carrier with Stockyard Company as to Use of Yard.—A contract of a carrier with a stockyard company to send all stock arriving at a city, for or by its road, to the yards of the company, except where especially ordered elsewhere by the shippers, requires the carrier to deliver at the yards of the company all stock, brought to the city and not specially ordered elsewhere, that it is possible for it to deliver there, and a failure to do so renders them liable in damages.⁸² But a carrier of live stock can not make a valid agreement to receive and deliver all stock consigned to it exclusively at and through the stockyards of another corporation, and to charge the shipper or consignee, for the benefit of such corporation, a certain amount for the use of its yards, in addition to charges for transportation.⁸³

Right to Demand Delivery at Connecting Point.—The consignor of a stallion shipped from one point to another which will necessitate shipment over connecting carriers on the arrival of the stallion at the connecting point may decline to ship farther, and, on payment of the charges of the first carrier, demand a redelivery; and in such case it is the carrier's duty to redeliver the stallion without unreasonable delay.⁸⁴

Evidence of Delivery at Point Selected by Carrier.—In an action against carriers to recover for injuries to a shipment of cattle, the testimony of a person who accompanied the cattle that he did not authorize delivery at the stockyards where delivery was made is admissible, as tending to show that delivery was at a point selected by the initial carrier.⁸⁵

§ 1777. To Whom Delivery May Be Made.—Cattle shipped were delivered to the consignee when they were receipted for and taken charge of by its agent, so that the carrier would not thereafter be responsible for them,⁸⁶ and where they are the property of a third person who is entitled to the possession of them, and while in the custody of the carrier such owner should demand possession, the carrier would be justified in making delivery to him.⁸⁷

§ 1778. Care of Stock Where Consignee Is Absent.—When the consignee is absent or can not after reasonable inquiries be found, and no one appears to represent him, the carrier can not relieve himself from responsibility by turning the animals loose, but must place them in some suitable quarters

81. Custom to make delivery at stockyard.—*Walker v. Keenan*, 73 Fed. 755, 19 C. C. A. 668, reversing 64 Fed. 992, distinguishing *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73.

Where cattle were shipped to the Union Stockyards in Chicago, a delivery at the unloading platforms in the yards constituted a full performance of the carrier's contract as to delivery, and relieved it from responsibility for damages subsequently accruing. *Ratliff Bros. v. Quincy, etc.*, R. Co., 110 S. W. 606, 131 Mo. App. 118.

82. Contract by carrier with stockyard company as to use of yard.—*Terre Haute, etc., R. Co. v. Struble*, 109 U. S. 381, 27 L. Ed. 970, 3 S. Ct. 270.

83. Exclusive contract with stockyards corporation.—*Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73.

84. Right to demand delivery at connecting point.—*Judgment*, 112 N. W. 300,

reversed on rehearing. *Wente v. Chicago, etc., R. Co.*, 79 Neb. 179, 115 N. W. 859, 15 L. R. A., N. S., 756.

85. Evidence of delivery at point selected by carrier.—*Texas, etc., R. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

86. Delivery to agent.—*Edwards v. Lee* (Mo. App.), 126 S. W. 194.

87. Delivery to person entitled to possession.—*Johnston v. Chicago, etc., R. Co.*, 97 N. W. 479, 70 Neb. 364.

Delivery to mortgagee.—Where a chattel mortgagee stopped a shipment of cattle shipped by the mortgagor in violation of the mortgage contract and consigned it to a commission firm to protect the payment of his mortgage debt, and on payment thereof directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for nondelivery to the party designated by the mortgagor. *Johnston v. Chicago, etc., R. Co.*, 70 Neb. 364, 97 N. W. 479.

where they can be properly fed and sheltered, under the charge of a competent person as his agent, or for account and at the expense of the owner.⁸⁸

§ 1779. Misdelivery.—Where a consignor directed the agent of a railway company in writing to ship hogs to consignees named, and a bill of lading was furnished to the consignor, naming the persons designated by the consignor as consignees, and there was no change in the contract, but the hogs were not delivered to the consignees, but to third parties, the carrier is liable for their value.⁸⁹ When a railroad company delivers stock received for shipment to a stockyard company, in whose hands it escapes, instead of delivering to a connecting carrier the shipper is not bound to attempt to recover it, nor to receive it, after recovery by the stock yards company, burdened with charges for feed, etc.⁹⁰

Defenses.—Failure of a shipper to accompany his hogs and unload them on arrival at destination, as provided by the contract of affreightment, did not relieve the carrier from liability for misdelivery,⁹¹ nor does the fact that the carrier is entitled to retain them until the freight is paid.⁹²

§ 1780. Goods Shipped C. O. D.—Effect of Compromise between Consignor and Consignee on Liability of Carrier for Delivery without Collecting Price.—There can be no recovery against a carrier for breach of contract in delivering cattle to the consignees without collecting the price, where the consignors after the delivery compromised with the consignees, and accepted from them an amount less than that claimed, as the settlement would either preclude the carrier from recovering against the consignees in the event of judgment against it, or would greatly obstruct it in its effort to do so.⁹³

§ 1781. Damages for Wrongful Delivery.—The general method employed in arriving at the amount of damages to which the shipper is entitled is to determine the difference between the value of the animals under the circumstances of the case and what their value would have been had they been delivered at the place of their destination in due time, which rule applies where delivery is made of stock other than those shipped,⁹⁴ or at a place other than the

88. Care of stock where consignee is absent.—North Penn. R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

89. Delivery to third person.—Southern R. Co. *v.* Webb, 41 So. 420, 148 Ala. 661.

Plaintiff having directed defendant's agent as to the consignees of certain hogs, a contract of affreightment was executed naming such persons as consignees. Plaintiff directed his servant to drive the hogs to the place of shipment and put them into the car, which had been previously ordered, and such servant, without any authority directed the words "Union Stockyards" to be written on the waybill in pencil under the names of the consignees, whereupon the hogs were delivered to the stockyards company. Held, that defendant was not authorized to make such delivery, and that the same constituted a conversion of the hogs. Southern R. Co. *v.* Webb, 39 So. 262, 143 Ala. 304, 111 Am. St. Rep. 45, 5 Am. & Eng. Ann. Cas. 97.

90. Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

91. Failure of shipper to accompany and unload.—Southern R. Co. *v.* Webb, 39 So.

262, 143 Ala. 304, 111 Am. St. Rep. 45, 5 Am. & Eng. Ann. Cas. 97.

92. Effect of lien for freight charges.—Where a carrier instead of delivering certain hogs to the consignees, delivered them to a stockyards company, and thereby converted them, it was immaterial to the carrier's liability that it was entitled to retain the hogs until the freight was paid. Southern R. Co. *v.* Webb, 39 So. 262, 143 Ala. 304, 111 Am. St. Rep. 45, 5 Am. & Eng. Ann. Cas. 97.

93. Compromise between consignor and consignee.—Louisville, etc., R. Co. *v.* Arnold, 56 S. W. 809, 22 Ky. L. Rep. 199.

94. Delivery of wrong stock.—Galveston, etc., R. Co. *v.* Borden (Tex. Civ. App.), 29 S. W. 1100.

Where the evidence in an action against a common carrier showed that the hogs delivered by the defendant were not the ones plaintiff had shipped, but were smaller, and inferior in quality, the plaintiff was entitled to recover for the difference in value between the two lots, even though the mistake in delivery was not due to the negligence of the carrier. Memphis, etc., Packet Co. *v.* Abell, 30 S. W. 658, 17 Ky. L. Rep. 191.

place of destination,⁹⁵ in which case the consignee may also recover any sum which, in order to get possession of the cattle, he is required to pay as freight for carriage beyond their proper destination.⁹⁶

§§ 1782-1826. Delay in Transportation or Delivery—§ 1782. In General.—It is the duty of a carrier to transport stock delivered to it for shipment with reasonable promptness,⁹⁷ according to the usual course of business, considering the connections to be made, the way it is carried, and the time usually taken for the journey,⁹⁸ and though a carrier is not bound to transport live stock within any specified time, nor deliver the same at destination at any particular hour, or for any particular market,⁹⁹ it must transport with all convenient dispatch;¹ and the carrier is liable for injuries resulting from a failure to transport the same within a reasonable time.² The undertaking of the carrier is broken if an unusual delay occurs and it is not shown to have been caused by some excusable fact,³ but no reasonable delay constitutes a breach of the carrier's duty.⁴

Nature of Obligation.—In the absence of an express contract,⁵ or where the written contract does not specify any particular time for delivery at the point of destination, delivery must be made within a reasonable time,⁶ there being an implied obligation to so deliver them;⁷ and so when a carrier accepts live stock for transportation it must transport the same with reasonable dispatch.⁸

95. Delivery at wrong place.—*Louisville, etc., R. Co. v. Smith*, 14 Ky. L. Rep. 814; *Flakne v. Great Northern R. Co.*, 106 Minn. 64, 118 N. W. 58.

96. Recovery of freight charge beyond destination.—*Flakne v. Great Northern R. Co.*, 118 N. W. 58, 106 Minn. 64.

97. Reasonable promptness.—*Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540; *Thompson v. Quincy, etc., R. Co.*, 136 Mo. App. 404, 117 S. W. 1193; *Lay v. Chicago, etc., R. Co. (Mo. App.)*, 138 S. W. 884.

Hogs delivered just prior to train time.—Where hogs were delivered to a railroad company, as directed by its agent, just prior to the schedule time for the arrival of the train upon which they were shipped, the duty of moving them without unreasonable delay was imposed upon defendant. *McCrary v. Missouri, etc., R. Co.*, 74 S. W. 2, 99 Mo. App. 518.

98. Usual course of business.—*Illinois Cent. R. Co. v. Holt*, 92 S. W. 540, 29 Ky. L. Rep. 135.

99. Transportation within particular time.—*St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025; *Lay v. Chicago, etc., R. Co. (Mo. App.)*, 138 S. W. 884; *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

1. *St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025; *Texas, etc., R. Co. v. Stewart*, 43 Tex. Civ. App. 399, 96 S. W. 106.

2. Injuries resulting from delay.—*Louisville, etc., R. Co. v. Robinson*, 18 Ky. L. Rep. 275, 36 S. W. 6; *Libby v. St. Louis, etc., R. Co. (Mo. App.)*, 117 S. W. 659; *Douglass v. Hannibal, etc., R. Co.*, 53 Mo. App. 473; *Missouri Pac. R. Co. v. Nicholson*, 2 Texas App. Civ. Cas., § 168; *Gal-*

veston, etc., R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129.

3. Unusual delay.—*Southern R. Co. v. Railey Bros.*, 26 Ky. L. Rep. 53, 80 S. W. 786.

4. Reasonable delay.—*Galveston, etc., R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 35 S. W. 72; *St. Louis, etc., R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938; *St. Louis, etc., R. Co. v. Hunt (Tex. Civ. App.)*, 81 S. W. 322.

In an action against a carrier for damages resulting from delay in the shipment of cattle, it must be shown, in order to establish liability, that the delay was unreasonable and resulted from some want of diligence. *St. Louis Merchants' Bridge Terminal R. Co. v. Tassey*, 122 Ill. App. 339.

5. Absence of express contract.—*Baltimore, etc., R. Co. v. Whitehill*, 64 Atl. 1033, 104 Md. 295.

6. Time not specified in contract.—*Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672; *Southern R. Co. v. Railey Bros.*, 26 Ky. L. Rep. 53, 80 S. W. 786; *Ecton v. Chicago, etc., R. Co.*, 125 Mo. App. 223, 102 S. W. 575; *Gulf, etc., R. Co. v. Baugh (Tex. Civ. App.)*, 42 S. W. 245.

7. Implied obligation.—*Cincinnati, etc., R. Co. v. Case*, 122 Ind. 310, 23 N. E. 797; *Southern R. Co. v. Railey Bros.*, 26 Ky. L. Rep. 53, 80 S. W. 786; *Galveston, etc., R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 35 S. W. 72; *Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290.

8. Acceptance for shipment.—*Siemonsma v. Chicago, etc., R. Co.*, 137 Iowa 607, 115 N. W. 230; *McKenzie v. Michigan Cent. R. Co.*, 137 Mich. 112, 100 N. W. 260; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. App. 527; *Gulf, etc., R. Co. v. Porter*, 25 Tex. Civ. App. 491, 61 S. W. 343; *Groot v.*

Under the laws of Nebraska, the liability of a railroad company for unnecessary delay in shipment of live stock is the same whether the contract was a written or an oral one.⁹ Custom can not require shipper of stock to hold railroad harmless against ordinary delays in taking up freight, where the matter is regulated by law.¹⁰

Carrier Not Insurer as to Time.—A carrier must deliver live stock to the consignee within a reasonable time, but is not an insurer as to the time which carriage will be completed.¹¹

§ 1783. Diligence Required of Carrier.—The duty of the carrier is to use only ordinary care or reasonable diligence to transport and deliver cattle within a reasonable time,¹² under all the circumstances in transporting cattle to market,¹³ considering the nature of the shipment.¹⁴

Delay Caused by Negligence.—In the absence of a special contract fixing the time within which a carrier must deliver a live stock shipment, it is liable only for damages proximately caused by delay due to its negligence.¹⁵

A delay may be necessary and yet unreasonable. If it is made necessary by the negligence of the party chargeable therewith, such delay is in legal contemplation unreasonable, however imperatively necessary it may have been.¹⁶ Under an allegation that the delay was the result of the carrier's negligence, mere proof that the transportation extended beyond a reasonable time was in-

Oregon, etc., R. Co., 34 Utah 152, 96 Pac. 1019.

The reception of hog in the pens of a railroad company for transportation is equivalent to an obligation to transport them without unnecessary delay. *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527.

9. Form of contract immaterial.—*Nelson v. Chicago, etc., R. Co.*, 78 Neb. 57, 110 N. W. 741.

10. Custom as affecting statutory liability for ordinary delay.—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

11. Carrier not insurer.—*Nelson v. Chicago, etc., R. Co.*, 78 Neb. 57, 110 N. W. 741; *Trout v. Gulf, etc., R. Co.* (Tex. Civ. App.), 111 S. W. 220.

In the absence of contract, a carrier's responsibility for prompt delivery of live stock is that of an ordinary bailee for hire, and if damaged by unreasonable delay, or if it arrives too late for the market, recovery may be had for negligence only, and not on the ground that it is an insurer as to time. *Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672.

12. Reasonable diligence required.—*Arkansas—St. Louis, etc., R. Co. v. Vaughan*, 84 Ark. 311, 105 S. W. 573.

Missouri—Ratliff Bros. v. Quincy, etc., R. Co., 118 Mo. App. 644, 94 S. W. 1005.

Montana—Wahle v. Great Northern R. Co., 41 Mont. 326, 109 Pac. 713.

Texas—Gulf, etc., R. Co. v. Beattie (Tex. Civ. App.), 88 S. W. 367; *San Antonio, etc., R. Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214.

A carrier being bound only to use reasonable diligence in furnishing transportation facilities, a railway company was

not liable for a delay in transporting live stock delivered to it at 7 o'clock p. m. and moved at 5 o'clock the next morning by a special train sent out from the nearest division point 88 miles away at 11 o'clock p. m.; there being no other train or engine available at an earlier hour after the delivery for shipment. *St. Louis, etc., R. Co. v. Vaughan*, 105 S. W. 573, 84 Ark. 311.

Charge making carrier convey in as safe and speedy way "as possible."—In an action for damages to stock shipped over defendant's road, a charge that a common carrier is required to carry stock to its destination in as safe and speedy a way "as possible" is erroneous, only reasonable diligence being required. *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68.

13. Circumstances of the case.—*Missouri, etc., R. Co. v. Kyser*, 43 Tex. Civ. App. 322, 95 S. W. 747.

14. Nature of shipment.—*Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.; *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68; *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834; *San Antonio, etc., R. Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214; *Gulf, etc., R. Co. v. Beattie* (Tex. Civ. App.), 88 S. W. 367.

15. Delay caused by negligence.—*Otrich v. St. Louis, etc., R. Co.*, 164 Mo. App. 444, 144 S. W. 1199, adopting opinion 154 Mo. App. 420, 134 S. W. 665; *Chicago, etc., R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

16. Rogers v. Texas, etc., R. Co. (Tex. Civ. App.), 94 S. W. 158, see 101 Tex. 654, no op.; *Trout v. Gulf, etc., R. Co.* (Tex. Civ. App.), 111 S. W. 220.

sufficient to charge the carrier with the results of such delay, in the absence of a showing that the delay was caused by the carrier's negligence.¹⁷

§ 1784. What Constitutes Reasonable Diligence.—Negligence may be defined as the lack of that care which an ordinarily prudent person would exercise in the conduct of his own affairs, under the circumstances of the given case.¹⁸ While it is not every delay that will entitle a shipper of live stock to damages, if a delay is caused by the carrier's negligence and contributes to the injury of the stock, it constitutes a proximate cause and is ground for damages.¹⁹ A railroad company which unnecessarily delays the transportation of cattle, and needlessly confines them in cars at different stations along the road, and bruises them during transportation, is guilty of gross negligence, for which it is liable to the shipper;²⁰ but a carrier acting in good faith and to protect the shipment is not negligent.²¹ Delays incident to ordinary transportation of stock are the same as reasonable delays.²²

Overloading Train.—It is negligence for a carrier to overload a train and thereby cause unreasonable delay in transporting cattle since reasonable care imposes on a carrier the duty to provide a sufficient number of trains for the proper transaction of its ordinary business.²³

Place of Delay.—An unreasonable delay at any intermediate place between the points of shipment is sufficient to constitute a cause of action.²⁴ The refusal of a railway company to perform its admitted duty to place a car of horses in position to unload promptly on arrival at their destination is negligence.²⁵

What is Reasonable Time.—What is a reasonable time for the transportation of live stock depends on the circumstances surrounding the particular case,²⁶ such as length of journey, mode of conveyance, state of the roads, season of the year,²⁷ and nature of the shipment.²⁸ The time customarily made by a carrier for shippers of cattle between certain points will be considered a reasonable time so far as such shippers are concerned.²⁹ And in order to re-

17. **Mere proof of delay.**—*Ecton v. Chicago, etc., R. Co.*, 102 S. W. 575, 125 Mo. App. 223.

18. **Negligence defined.**—*Missouri, etc., R. Co. v. Webb*, 49 S. W. 526, 20 Tex. Civ. App. 431.

19. **Proximate cause.**—*Chicago, etc., R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

20. **Unnecessary delays.**—*Good v. Galveston, etc., R. Co. (Tex.)*, 11 S. W. 854.

21. *Otrich v. St. Louis, etc., R. Co.*, 154 Mo. App. 420, 134 S. W. 665.

22. **Reasonable delay.**—*Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131.

23. **Overloading train.**—*Ratliff v. Quincy, etc., R. Co.*, 94 S. W. 1005, 118 Mo. App. 644.

In an action for delay in delivery of a live-stock shipment, where there was evidence that the engine was overloaded and that it was in a defective condition, and this fact was known to those in charge, such facts should be considered in determining whether the railroad company was guilty of negligence rendering it liable for delay. *Cleveland, etc., R. Co. v. Heath*, 53 N. E. 198, 22 Ind. App. 47.

24. **Place of delay.**—Where a contract was for the shipment of cattle from Omaha to Callaway, as pleaded in the petition for injuries caused by delay, a contention that the evidence shows the de-

lay, if any occurred on the shipment from Kearney, an intermediate point, to Callaway, was immaterial, as any unreasonable delay at any intervening point was sufficient to constitute the cause of action. *Union Pac. R. Co. v. Nelson*, 76 Neb. 72, 106 N. W. 1036.

25. **Refusal to place car in position to unload.**—*Toledo, etc., R. Co. v. Beery*, 68 N. E. 702, 31 Ind. App. 556.

26. **What is reasonable time.**—*Cincinnati, etc., R. Co. v. Case*, 23 N. E. 797, 122 Ind. 310.

In an action against a carrier for delay in furnishing cars for shipment of live stock, an instruction that, in determining what would be a reasonable time, the jury might take into consideration the weather and the unusual rush of business, if there were such, could not be complained of by defendant. *Pecos, etc., R. Co. v. Evans-Snider-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, judgment affirmed, 97 S. W. 466.

27. *Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672.

28. **Nature of shipment.**—*St. Louis, etc., R. Co. v. Hunt (Tex. Civ. App.)*, 81 S. W. 322.

29. **Time usually made for specified shippers.**—*Ecton v. Chicago, etc., R. Co.*, 102 S. W. 575, 125 Mo. App. 223.

cover for delay in shipment of live stock, it is necessary to show the length of time ordinarily required for the transportation, and that a longer time was actually consumed than was necessary for the purpose.³⁰ The use of the words, "proper time," in an instruction is not erroneous, if, when read in connection with the paragraph in which they were used, it can only be understood to mean reasonable time.³¹

Particular Instances of Delay.—Delays of six hours,³² ten hours,³³ thirteen hours,³⁴ one day or more,³⁵ and twenty days,³⁶ have been held under various circumstances to give a cause of action.

Failure to Ship Promptly.—While a railroad company which undertakes to ship stock must do so in a reasonable time, it is not, in the absence of an agreement to that effect, bound to ship them on the first train leaving after the stock are delivered to it,³⁷ though it seems to be otherwise where cattle are loaded upon cars provided by a railroad company for their transportation, and with the knowledge of its agent, it then being the duty of the company to carry them by the first train if they are loaded in time,³⁸ in which case it is no excuse

30. Showing time ordinarily made.—*Johnston v. Chicago, etc., R. Co.*, 70 Neb. 364, 97 N. W. 479; *Cleve v. Chicago, etc., R. Co.*, 108 N. W. 982, 77 Neb. 166, 15 Am. & Eng. Ann. Cas. 13.

31. "Proper time" as "reasonable time."—*Missouri, etc., R. Co. v. Stanfield Bros.*, 90 S. W. 517, 40 Tex. Civ. App. 385.

32. Delay of six hours.—In an action against a carrier for injuries to stock, evidence that defendants stopped at stations for unnecessary lengths of time, and left the cars in which the cattle were loaded where they could not have the advantage of the breeze, whereby some of them died from heat, and that the train was delayed by standing on the track six hours in a distance of 200 miles, was sufficient to sustain a verdict in favor of plaintiff. *Minter v. Chicago, etc., R. Co.*, 82 Mo. App. 130.

33. A delay of ten hours in a shipment of nine car loads of cattle, for no other reason than that the regular train had left when the shipment was received from the initial carrier, was unreasonable, in the absence of a showing that the carrier had no other facilities for forwarding the shipment sooner. *Rogers v. Texas, etc., R. Co. (Tex. Civ. App.)*, 94 S. W. 158, see 101 Tex. 654, no op.

34. Delay of thirteen hours.—A delay of thirteen hours in a shipment of cattle, caused by an unexplained breaking down of the carrier's passenger engine, followed by the freezing of water in its tanks, where water could have been procured from a distance of nine miles on the carrier's road, was unreasonable. *Rogers v. Texas, etc., R. Co. (Tex. Civ. App.)*, 94 S. W. 158.

35. Delay of twenty-four hours.—Where there was an unusual delay of more than twenty-four hours in the transportation of plaintiff's horses, and at least half of the delay was apparently inexcusable, and occurred while defendant's agent knew that plaintiff was keeping a sharp look-

out for the arrival of the horses, in order to give them needed attention, the carrier was negligent. *Gilbert v. Chicago, etc., R. Co.*, 112 S. W. 1002, 132 Mo. App. 697.

Delay of twenty-six hours.—Where the run between two points could be reasonably made in thirty-six hours, there was an unreasonable delay where it took sixty-two hours for the run. *St. Louis, etc., R. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

Refusal to attach car at connecting point.—In an action for delay in transporting a car load of cattle, it appeared that, when the car reached defendant's stock yards, it should have been attached to a fast freight train, which would have landed it at its destination early Monday morning. The conductor refused to attach the car, because the connecting road had not sent a waybill, though plaintiff showed him the bill of lading. The car was afterwards fastened to a local freight train, and did not reach its destination till Tuesday at 11 a. m. Held, that plaintiff was entitled to damages. *Louisville, etc., R. Co. v. Brinley*, 17 Ky. L. Rep. 9, 29 S. W. 305.

36. Delay of twenty days.—In the usual course of the business of shipping cattle abroad, they are sold immediately on arrival, which fact was known to the ship agent when a contract for transportation was signed. Owing to the unseaworthiness of a ship, the voyage was prolonged twenty days, during which the market price of the cattle fell. Held, that the ship was liable for the shipper's loss caused by the fall in the market price. *The Caledonia*, 50 Fed. 567.

37. Necessity for shipping by first train after delivery.—*Pennsylvania Co. v. Clark*, 28 N. E. 208, 2 Ind. App. 146, 27 N. E. 586.

38. Illinois Cent. R. Co. v. Waters, 41 Ill. 73.

that the shipper might unload the stock;³⁹ nor is shipment by next train always sufficient.⁴⁰ Where a shipper applies to a company, a common carrier of live stock, for cars to be furnished, at a time and station named, for transportation of stock, it is the duty of the company to inform the shipper within a reasonable time whether it is able to furnish such cars; and if it fails to give such notice, and the shipper, relying on the conduct of the company, has his stock at such place on time, and no cars are there for their transportation, the company is liable in damages.⁴¹

§§ 1785-1794. Excuses for Delay—§ 1785. In General.—Where there is a material delay in the delivery of live stock, the company, to exonerate itself, must show that the delay arose from some other cause than its own negligence.⁴² A delay, if resulting from causes beyond the control of the carrier, may be excused,⁴³ and the shipper assumes the risk of unavoidable accidents and delays,⁴⁴ and if under such circumstances the carrier exercises due care for the protection and preservation of the property, he will not be liable.⁴⁵ A statute requiring a carrier to carry freight in the order which received is not violated by delaying a shipment of stock because, owing to an unavoidable exigency, it could not have been taken up by the passing train.⁴⁶

39. Opportunity to unload as defense.—Cattle were loaded on defendant's cars to be shipped on trains passing that night, but defendant's agent neglected to stop two trains which passed, and the cattle remained in the cars until the next forenoon. In an action by the shipper to recover the damage to the cattle, held, that defendant was not excused by the fact that the shipper could have pushed the cars to a "chute," and unloaded the stock. Illinois Cent. R. Co. v. Waters, 41 Ill. 73.

40. Shipment by next regular train not always sufficient.—The duty of the carrier is to forward the animals with reasonable dispatch, and more diligence is exacted in some cases than in others, according to the character of the shipment. A charge which would relieve the railroad from liability if the car was sent on by the next regular train, regardless of when the train left, and regardless of the facilities, the carrier had for avoiding delay, is properly refused. Galveston, etc., R. Co. v. Tuckett (Tex. Civ. App.), 25 S. W. 150.

Where a carrier's agent assured a cattle shipper before 7 o'clock in the evening that he could get his cattle out immediately, when in fact no regular train was due to leave until 9:30 the next morning, and a special train could only be had after eight or nine hours, and the cattle were delayed twelve hours, during which time they were injured, when the shipper would otherwise have unloaded them, and it was undisputed evidence that cattle kept loaded in cars standing still were more likely to injury than when the cars were moving, the carrier was liable for the injury sustained. St. Louis, etc., R. Co. v. Vaughan, 88 Ark. 138, 113 S. W. 1035.

Train not operated because of scarcity of freight—Failure to notify shipper.—Where a carrier induced a shipper to load his cattle in expectation of a train that

would take them at 10:42 a. m., and they were not moved till 5:30 p. m., because the carrier had declined to run the morning train that day on account of the scarcity of freight offered, and the shipper was not notified of that fact, the carrier was chargeable with negligence. Kansas, etc., R. Co. v. Ayers, 38 S. W. 515, 63 Ark. 331.

41. Failure to give notice of inability to furnish cars.—Ayres v. Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

42. Showing excusing cause.—Nelson v. Chicago, etc., R. Co., 78 Neb. 57, 110 N. W. 741; Southern R. Co. v. Railey Bros., 26 Ky. L. Rep. 53, 80 S. W. 786.

43. Cause beyond control of carrier.—Gulf, etc., R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45; Woodford v. Baltimore, etc., R. Co., 70 W. Va. 195, 73 S. E. 290.

44. Risks assumed by shipper.—McKenzie v. Michigan Cent. R. Co., 137 Mich. 112, 100 N. W. 260.

45. Exercising due care for preservation of property.—International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Gulf, etc., R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45.

46. Excuse for not performing statutory duty.—The Michigan Southern & Northern Indiana Railroad consolidation act (Laws 1855, § 5), requiring the company to carry freight from its depots and way stations in the order in which the same should be received, is not violated by delaying the transportation of live stock awaiting shipment at a way station, and ready when the train passed, but which, owing to an unavoidable exigency, could not have been taken without an extra engine sent on at night for that purpose. Michigan, etc., R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466.

Necessary Delay Resulting from Negligence of Carrier.—An instruction holding the carrier liable for delay in the shipment of cattle only in case the delay was both unreasonable and unnecessary is erroneous, since it would be liable if the delay was unreasonable, though rendered necessary by its negligence.⁴⁷

Duty to Inform Shipper of Necessary Delay.—A carrier is required to inform the shipper of necessary delay that the shipper may exercise his own direction as to the propriety of making the shipment.⁴⁸

Act of Employee.—A carrier of live stock can not escape liability for a delay because the engineer refused to continue the transportation for lack of rest, and the carrier used ordinary care to secure another engineer; the act of the first-mentioned engineer being that of the company.⁴⁹

Accident or Misfortune.—Where a freight train, by which plaintiff's cattle were transported, before arriving at the point where the cattle were taken up, killed a man who suddenly appeared on the track, and the train was delayed by the efforts of the crew in taking the body from the track and carrying it back to a station, such delay was not negligence, but the result of accident or misfortune.⁵⁰

Delay at Destination Caused by Stockyards Company.—Where it is the custom to deliver cars at the unloading platforms of a stockyards company, which notifies the consignee, and delivery at the platforms is regarded as a delivery to the consignee, the carrier's full duty is performed when it carries the stock to the proper unloading platform, and it is not responsible for any delays in unloading by the stockyards company, or for damages by reason of lapse of time between the arrival of the train at the yards and arrival at the selling pens of the consignee.⁵¹

Duty as to Anticipating Causes of Delay or Effects Thereof.—Only such causes as can not be reasonably anticipated, controlled, or avoided by reasonable care will excuse a carrier's unusual delay.⁵² A railroad company can not be exonerated from liability for an unreasonable delay in the transportation of stock on the ground that a heavy dew rendered the track slippery and impeded the progress of the train; such an occurrence being an ordinary one, against the effect of which it was the duty of the company to provide.⁵³ Where a carrier is guilty of negligent delay in shipping cattle, though the negligent act must be the proximate cause of the injury to hold the carrier responsible, yet, if the injury follows as a direct consequence of the negligent act, it can not be said that the carrier is not responsible because the particular injury could not

47. Necessary delay resulting from negligence of carrier.—*Rogers v. Texas, etc., R. Co.* (Tex. Civ. App.), 94 S. W. 158.

48. Duty to inform shipper of necessary delay.—*St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035.

Where a carrier, with knowledge of a shortage in its coal supply, contracted to transport cattle without stipulating against delays therefrom or notifying the shipper that such delays might be encountered, the carrier assumed the risk of delays arising from such cause, and it could not escape liability for such delays. *Holland v. Chicago, etc., R. Co.*, 123 S. W. 987, 139 Mo. App. 702.

49. Act of employee.—*Missouri, etc., R. Co. v. Woods* (Tex. Civ. App.), 117 S. W. 196.

50. Accident or misfortune.—*Ecton v. Chicago, etc., R. Co.*, 102 S. W. 575, 125 Mo. App. 223.

51. Delay at destination caused by stockyards company.—*Ratliff v. Quincy, etc., R. Co.*, 94 S. W. 1005, 118 Mo. App. 644.

52. Anticipating causes of delay.—Where the injury to an engine which caused a delay in the transportation of plaintiff's cattle was due either to negligence of defendant's employees in making couplings or to a defective engine end sill, and there was no evidence that the engine had been properly inspected before it left defendant's division point, defendant was responsible for such delay. *Vencill v. Quincy, etc., R. Co.*, 112 S. W. 1030, 132 Mo. App. 722.

53. Guarding against ordinary occurrences.—*Judgment*, 104 Fed. 728, 44 C. C. A. 179, affirmed. *Missouri, etc., R. Co. v. Truskett*, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259.

have been anticipated.⁵⁴

Delay Not Resulting in Injury.—Where it appears that, if the train had arrived on time, it would have been after the close of market hours for the day, and that the cattle would have been held over until the time when they were actually sold, the negligence of the company did not affect the price of the cattle with reference to the time of sale, and plaintiff can not recover.⁵⁵ Where the stockyard to which cattle were to be delivered was under water until the time of the arrival of cattle, damages for delay are not recoverable.⁵⁶

§ 1786. Delay Caused by Act of God, Public Enemy, etc.—A carrier must safely carry the stock and deliver it at destination within a reasonable time, unless prevented by act of God, the public enemy, or by unavoidable accident.⁵⁷ If the failure to receive orders for the movement of the train, on which were shipped a number of horses injured by delay in the shipment, is caused by atmospheric or other influences beyond the carrier's control, rendering unavailable the telegraph wires, such delay will be excused, and it is immaterial whether such unavoidable failure of the telegraph wires be attributed to the act of God or not. If the delay was induced by causes beyond the carrier's control, it is excused, regardless of the agency producing such failure or delay.⁵⁸ A carrier was not liable for injuries to cattle by delay in transportation caused by a snow storm obstructing the tracks.⁵⁹ Where a railroad company transporting cattle in the winter time unnecessarily or negligently delays them on the route so that they are exposed to severe cold and rain or snow, such weather is not an "act of God" which excuses the carrier from liability.⁶⁰

Knowledge of Carrier.—A carrier is liable for delay in the shipment of live stock caused by the failure of water supply for the operation of trains, resulting from a drought which was known to the carrier at the time it undertook to transport the stock.⁶¹ The fact that the carrier had no knowledge that floods would delay a shipment at the time the shipment commenced did not relieve the carrier from liability as to a portion of the shipment loaded at an intermediate point.⁶²

Concurring Negligence of Carrier.—To excuse the carrier on the ground that the extreme cold weather causing the water in the engine tanks to freeze was the act of God, and its attended effects caused the delay, such act must have been the proximate cause of the delay and free from any concurring negligence on the carrier's part.⁶³ Where a shipment of live stock but for the carrier's prior delay would have passed the point of an obstruction, resulting from an act of God before the obstruction occurred, the fact that they were further delayed by such obstruction was no defense to the carrier's liability for the damages sustained.⁶⁴

54. Unforeseen injury resulting from delay.—*Gillespie v. Louisville, etc., R. Co.* (Mo. App.), 129 S. W. 277.

55. Delay not affecting price of cattle.—*Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

56. Market at destination under water.—In action against carrier for delay in shipment of cattle, plaintiff can recover nothing where it is shown that market at destination being under water, he could not have sold them there had there been no delay. *San Antonio, etc., R. Co. v. Barnett* (Tex. Civ. App.), 27 S. W. 676.

57. Act of God or public enemy.—*Thompson v. Quincy, etc., R. Co.*, 117 S. W. 1193, 136 Mo. App. 404.

58. Nature of agency immaterial.—*International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

59. Snowstorm.—*Vencill v. Quincy, etc., R. Co.*, 112 S. W. 1030, 132 Mo. App. 722.

60. Negligent delay and severe weather in winter time.—*Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42; *Texas, etc., R. Co. v. Coggin*, 44 Tex. Civ. App. 423, 99 S. W. 1052.

61. Knowledge of carrier.—*Cincinnati, etc., R. Co.'s Receiver v. Webb*, 46 S. W. 11, 20 Ky. L. Rep. 330, 103 Ky. 705.

62. Thero v. Missouri Pac. R. Co., 144 Mo. App. 161, 129 S. W. 266.

63. Concurring negligence of carrier.—*Rogers v. Texas, etc., R. Co.* (Tex. Civ. App.), 94 S. W. 158, see 101 Tex. 654, no op.

64. Prior delay of carrier.—*Chicago, etc., R. Co. v. Miles*, 123 S. W. 775, 92 Ark. 573, 124 S. W. 1043; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

§ 1787. Delays Incident to Course of Business.—Unless a carrier undertakes to carry live stock by special train, it may make such reasonable train schedules as may be proper to the ordinary and economical conduct of business, considering the nature of the stock,⁶⁵ but a statute providing that railway companies shall have the right to regulate the time and manner in which passengers and property shall be transported, does not justify an instruction in an action against a carrier for delay in delivering stock that the carrier had a right to regulate the time to be occupied by its trains in the transportation of cattle between two points, and that the law presumes that the time fixed by the carrier was reasonable.⁶⁶ A carrier is not negligent in failing to delay its regular freight trains in order to handle a shipment of cattle.⁶⁷ Where transportation is made on schedule time, a carrier is not liable for the death of an animal due to the length of time taken for transportation.⁶⁸ It has been held that delays in transportation can not be excused on the ground that regular trains do not connect in time to avoid delay.⁶⁹ It was not sufficient excuse for a delay of a shipment of horses for twenty-four hours at an intermediate station that the carrier had on that day annulled a regular freight train scheduled to leave a connecting point an hour before the arrival of the horses, and had sent out an extra at an earlier hour.⁷⁰

Indicated Delays at Junction Points.—A shipper of stock, whose route is over different lines of railway, connecting at junctions, must take notice of delays at these junction points indicated on the time-table, and such delays, so indicated, can form no ground for a charge of negligence against the railway company.⁷¹

Delay Resulting from Right to Use of Private Road at Specified Times Only.—A railway company is not chargeable with negligence because of its delay in hauling stock cars over a private logging railroad during an entire forenoon and part of an afternoon, where the agreement between the railway company and the logging company was that no freight should be hauled over the logging road during forenoon on account of logging operations, and the stock cars were forwarded to their destination over the logging road as early in the afternoon as practicable.⁷²

§ 1788. Unusual Rush of Business or Want of Facilities.—Where a carrier burdened with a sudden and extraordinary press of business contracts

65. Right to make reasonable schedules.—*Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672.

66. Presumption as to reasonableness of time fixed by carrier.—*Sayles' Ann. Civ. St.* 1897, art. 4484; *Texas, etc., R. Co. v. Currie*, 76 S. W. 810, 33 Tex. Civ. App. 277.

67. Need not delay regular freight trains for cattle shipments.—*San Antonio, etc., R. Co. v. Turner*, 94 S. W. 214, 42 Tex. Civ. App. 532.

68. Death from length of time in transporting.—A carrier is not liable for the death of a horse due to the length of time taken in transportation, where it arrived at its destination substantially on schedule time, and there is no evidence that there were faster freight trains by which the destination could have been sooner reached; the failure to accelerate the movement by attaching the freight car to a passenger train not being negligence. *Pine Bros. v. Chicago, etc., R. Co. (Iowa)*, 133 N. W. 128.

69. Regular trains not connecting in time to avoid delay.—*Gulf, etc., R. Co. v.*

Porter, 61 S. W. 343, 25 Tex. Civ. App. 491.

Where the proof shows that fourteen car loads of cattle in shipment were unreasonably delayed over five hours for feed and rest, and the excuse offered was that there was no regular train going out, and that the cattle were kept waiting for a train, an instruction that any delay in the transportation on account of the carrier's regular train for an unreasonable time without some reasonable explanation would not be justifiable was proper. *St. Louis, etc., R. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

70. Annuling of regular train at connecting point as excuse for delay at intermediate station.—*Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

71. Indicated delays at junction points.—*Burns v. Chicago, etc., R. Co.*, 80 N. W. 927, 104 Wis. 646.

72. Delay resulting from right to use of private road at specified time only.—*Burns v. Chicago, etc., R. Co.*, 80 N. W. 927, 104 Wis. 646.

to transport live stock without stipulating against delays on account of such business or notifying the shipper that such delays might be encountered, the carrier is liable for delays caused thereby;⁷³ neither is a delay excused by the fact that a carrier needs its rolling stock for other purposes;⁷⁴ and so liability for injuries by delay in transportation of such property can not be escaped on the ground that there was an unusual rush of business on its road by the carrier receiving live stock for shipment⁷⁵ unless it also shows that it exhausted its resources for providing for the cattle.⁷⁶ A carrier which receives live stock for transportation, knowing its facilities are such that loss will result to the shipper, is negligent in undertaking the shipment, so as to make it liable for resulting loss.⁷⁷

As Excuse for Delay in Furnishing Cars.—It is a defense to an action against a carrier for damages to a shipper of live stock, caused by delay in furnishing him a car, that the delay was caused by an unexpected and unprecedented demand for cars.⁷⁸

Lack of Proper Appliances or Entire Want of Facilities.—In an action against a railroad company for damages resulting from delay in forwarding stock, the fact that such delay was caused by the lack, on the part of the company, of proper appliances for transportation, is no defense.⁷⁹ It is not a defense in an action against a carrier for damages to a shipper of live stock caused by delay in furnishing him a car that at the time defendant purchased the road it had no stock cars, and was wholly dependent on another road for such cars, and such other road failed to supply it.⁸⁰

§ 1789. Inherent Vices.—A delay of twelve hours in transportation of live stock, caused by holding the cattle on account of the sickness and death of one, does not constitute negligence, where the remaining cattle are sent forward by the next train.⁸¹

Delay Affecting Propensities of Animals.—A carrier is responsible for damages to a shipment of horses resulting from a negligent delay on a switch, though the inherent propensities of the horses may have contributed to the result.⁸² The carrier being liable for all injury done to live stock in transportation that is referable to negligent delay in transporting them, through the effect of such delay upon the physical condition, or latent vicious propensities, of the animals, whereby they are reduced in weight and injure each other.⁸³

§ 1790. Stops for Food, Water and Rest.—Where a carrier stops an intestate shipment of live stock in order to give them the food, water and rest

73. Unusual rush of business.—Holland v. Chicago, etc., R. Co., 139 Mo. App. 702, 123 S. W. 987.

74. Rolling stock needed for other purposes.—A delay of twenty-four hours at a station on the way will not be excused by the fact that the railroad company needed its rolling stock for the purpose of carrying passengers. Ormsby v. Union Pac. R. Co., 2 McCrary 48, 4 Fed. 706.

75. International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; Gulf, etc., R. Co. v. McAulay (Tex. Civ. App.), 26 S. W. 475; Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41, 9 S. W. 80; Texas, etc., R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530.

76. Carrier must show it exhausted its resources.—International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323.

77. Receiving live stock with knowledge of lack of facilities.—St. Louis, etc., R. Co.

v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

78. Delay in furnishing cars.—Missouri, etc., R. Co. v. Sneed, 107 S. W. 1182, 85 Ark. 293.

79. Want of proper appliances.—Tucker v. Pacific R. Co., 50 Mo. 385.

80. Dependence on other road for stock cars.—Missouri, etc., R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182.

81. Delay caused by sickness of animals.—Judgment, 56 Atl. 128, 70 N. J. L. 132, affirmed. Lewis v. Pennsylvania R. Co., 57 Atl. 1117, 71 N. J. L. 339.

82. Delay affecting propensities.—Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129.

83. Delay affecting condition of animals.—Richmond, etc., R. Co. v. Trousdale & Sons, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69.

required by the federal statute, the delay caused thereby is excusable⁸⁴ if the stock are forwarded with sufficient promptness after the lapse of the minimum rest period required by the statute.⁸⁵ Where a reasonable time for the transportation of a shipment exceeds the longest time the carrier is authorized to keep the cattle in the cars without unloading for rest, food, and water,⁸⁶ a stoppage for such a purpose is no defense to an action for damages resulting from negligent delay in transportation, where, but for such delay, the cattle could have been transported to destination before the expiration of the time provided by the interstate commerce act as the limit of confinement.⁸⁷ It follows that in an action for injuries to beef cattle from delay in transportation the time necessarily lost in stopping the cattle for food and rest under a federal statute should not be included in the jury's computation of negligent delay.⁸⁸

§ 1791. Delay Caused by Operation of Law.—See, also, ante, "Stops for Food, Water, and Rest," § 1790. A carrier is not liable for a delay caused by the detention and treatment of livestock under quarantine laws⁸⁹ nor for

84. Stop for food, water, and rest.—Louisville, etc., R. Co. v. Cecil, 145 Ky. 271, 140 S. W. 186.

85. Cattle forwarded by first regular train after rest period.—In an action against a railroad company for damages for delay in transporting a car load of cattle, it appeared that the car had been hauled part of the way in a special train, and then set out and unloaded to allow the cattle rest and feeding; that the car was taken on by the first regular freight train, twelve hours later. It did not appear that there was opportunity in the car for the cattle to rest, but it was shown that they were supplied with food and water. Held, that under Rev. St. U. S., §§ 4386, 4388, forbidding railroad companies transporting cattle from confining them in cars longer than twenty-eight consecutive hours without unloading them for rest for at least five hours, unless carried in a car in which they can and do have opportunity to rest, the delay was justified, and defendant can not be held liable therefor. Galveston, etc., R. Co. v. Warnken, 12 Tex. Civ. App. 645, 35 S. W. 72.

Cattle not forwarded by first train but arriving as quickly.—Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), provides that no interstate carrier of cattle shall confine them in cars for longer than twenty-eight consecutive hours without unloading for rest, water, and feeding for at least five consecutive hours, unless prevented by accidental or unavoidable causes, provided that, upon the written request of the owner or person in custody of the shipment, the time of confinement may be extended to 36 hours. Held, that a carrier must stop such a shipment for rest, water, and feeding at a proper place which it can select, if not unreasonably or arbitrarily done, when it becomes apparent that it can not be delivered at destination in the usual course of business within the twenty-eight hour limit, and where the person in

charge refuses to sign the thirty-six hour release and cattle were shipped from Arkansas through Missouri to East St. Louis, and upon arrival at a point in Arkansas, it became apparent that the shipment could not be carried to destination within the prescribed twenty-eight hours, a thirty-six-hour release having been refused, and it was unlawful to unload such cattle in Missouri, the carrier was not negligent in unloading, in a pen, the cattle at the Arkansas point reached, resulting in a delay in their delivery at destination, where the only train which they could have been shipped on, which passed through the place of feeding after a lapse of the five-hour period, was a slow train which reached destination at the same time as did the faster train upon which they were carried. St. Louis, etc., R. Co. v. Davenport, 97 Ark. 82, 133 S. W. 186.

86. Time for transportation exceeding period stock may be kept in cars.—Ecton v. Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575.

87. Time for transportation less than permissible limit of confinement.—Lay v. Chicago, etc., R. Co. (Mo. App.), 138 S. W. 884.

88. Rest period not included in computation of delay.—St. Louis, etc., R. Co. v. Carlisle, 78 S. W. 553, 34 Tex. Civ. App. 268.

89. Delay caused by quarantine laws.—Sheep shipped from a state quarantined for scabies in sheep under Act Cong. March 3, 1905, c. 1496, § 1, 33 Stat. 1264 [U. S. Comp. St. Supp. 1905, p. 617], authorizing the Secretary of Agriculture to establish quarantine districts and to regulate the movement of live stock therefrom, were before shipment inspected by a government inspector and certified to be free from the disease, pursuant to § 2 and a rule of the secretary of agriculture forbidding shipment of sheep from a quarantined state unless inspected and found free of the disease; and such certificate was delivered to the railroad com-

a delay caused by compliance with a state statute prohibiting the movement of trains on Sunday.⁹⁰ The fact that the statute of a state forbids the transportation of cattle from certain places outside the state is no excuse for refusal to ship or delay in receiving and shipping such cattle, the statute being unconstitutional and void.⁹¹

§ 1792. Acts of Owner.—The refusal of a shipper of live stock to comply with the provisions of the contract of shipment requiring that some one accompany the stock to care for them, and that they shall be loaded and unloaded, watered, and fed by the shipper's agent, will not excuse the carrier from transporting the stock to their destination without unreasonable delay caring for them at the shipper's expense;⁹² the fact that the shipper consents that cattle need not be fed and watered at the first station does not estop them from recovering damages resulting from unusual delay in reaching the next station where such delay is caused by the carrier's negligence.⁹³ Where delay causing injury to an animal results from the refusal of the shipper to accept freight movement, a recovery can not be had against an express company.⁹⁴ A carrier is not liable for damages resulting from delay in delivery where such delay is caused by the failure of the shipper or his consignee sooner to demand delivery.⁹⁵ The fact that a shipper tenders a check instead of money for freight charges does not relieve the carrier of liability for injuries to live stock due to delay in permitting the shipper to take the animals, where it appears that the money if tendered would be refused.⁹⁶

§ 1793. Delay Caused by Strikes.—The existence of a strike among railway employees, obstructing the operation of the road and the carrying of freight, will excuse delay in the carrying of cattle caused by such strike,^{96a} a carrier being liable for injury to live stock arising from such cause only when it fails to exercise reasonable diligence to expedite the shipment.⁹⁷ In a suit

pany to accompany the sheep as required by that rule. The sheep, after being transported by two connecting railroad companies, were delivered to a stockyards company, where, the certificate being lost, they were detained by a government inspector and subjected to a certain treatment. They were then transported to their destination by another railroad company. Held, in an action against all the railroad companies and the stockyards company for damages to the sheep, due to the detention and treatment, that the stockyards company and the railroad company carrying them from the stockyards to their destination were not liable, since the detention was due to the want of the certificate when brought to the stockyards, and for that they were in no way responsible. *Wakefield v. Chicago, etc., R. Co.*, 104 S. W. 778, 31 Ky. Rep. 1108.

90. Compliance with Sunday laws.—Where an interstate carrier, in order to comply with a federal statute and a state's Sunday law, stopped a shipment of mules, unloading, feeding, and holding them in stock pens for a day and a half, the delay was excusable. *Louisville, etc., R. Co. v. Cecil*, 140 S. W. 186, 145 Ky. 271.

91. Unconstitutional law.—*Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70.

92. Refusal of shipper to comply with contract as to care of stock.—*Spalding v. Chicago, etc., R. Co.*, 101 Mo. App. 225, 73 S. W. 274.

93. Consent of shipper that cattle need not be fed and watered.—*St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

94. Refusal to accept freight movement.—*Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450, Ann. Cas. 1913 D, 972.

95. Failure to demand delivery.—*Chicago, etc., R. Co. v. Pratt*, 13 Ill. App. 477.

A shipper of live stock can not recover damages for delay in delivery of the stock where it is consigned in the name of shipper and he was not present to demand delivery, and delivery was made to his employees immediately on the carrier's ascertaining their authority to receive it. *Moore v. Baltimore, etc., R. Co.*, 48 S. E. 887, 103 Va. 189.

96. Waiver of sufficient tender.—*Cunningham v. Wabash R. Co.* (Mo. App.), 149 S. W. 1151.

96a. Delay caused by strikes.—*Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; *Galveston, etc., R. Co. v. Karrer* (Tex. Civ. App.), 109 S. W. 440.

97. Sterling v. St. Louis, etc., R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

against a carrier for delay in transportation it may be shown in defense that the carrier could not deliver the stock in shorter time owing to a strike of employees upon next succeeding line, over which it had no control.⁹⁸

§ 1794. Duty of Carrier on Happening of Excusing Cause.—A common carrier of live stock is not relieved from responsibility for damage to the stock merely because delay, which occasions damage to the property, is the result of an unavoidable accident; but is bound, notwithstanding the accident, to use the highest degree of care, during the delay, for the safety of the property.⁹⁹ If cattle, on account of unprecedented floods destroying carrier's railway tracks, have to be carried by an unusual and circuitous route, or over the road of some other railroad company, the carrier must exercise such diligence as an ordinarily prudent person would, under the circumstances, exercise to secure the transportation by such other means and without unnecessary delay¹ but need not charter a train on another road that could transport the live stock at the earliest possible period.²

Removal of Injured Animal for Treatment as Conversion.—A carrier of horses removing, during transit, horses injured by a fire to have them treated, is not guilty of converting the horses, though the removal was made over the objection of the shipper, and the evidence was conflicting on the question whether the horses could have been carried to their destination without greater suffering than they endured, especially where one of the horses died from the effects of its injuries within a few days after its removal, and the other was finally cured and shipped to its destination and offered to the shipper who refused to receive it.³

§ 1795. Delay under Special Contract.—A carrier is liable where it fails to ship live stock at the agreed time causing it to be held at the point of shipment,⁴ where it fails to ship by a certain train agreed upon and the shipper

98. Strike on connecting road.—*Southern Pac. R. Co. v. Johnson*, 4 Texas App. Civ. Cas., § 45, 15 S. W. 121..

99. Care of property during delay.—*Kinnick v. Chicago, etc., R. Co.*, 69 Iowa 665, 29 N. W. 772; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

That a delay in transporting cattle was due to an accident to the carrier's engine did not avoid its liability for its refusal to give the shipper an opportunity to unload for food, water, and rest, where there were other engines available to move the cars to a place for unloading. *Kansas, etc., R. Co. v. West* (Tex. Civ. App.), 149 S. W. 206.

1. Duty where shipment over usual route impossible.—*St. Louis, etc., R. Co. v. Jones* (Tex. Civ. App.), 29 S. W. 695.

Railroad company is liable for damages resulting from delay of cattle shipped, where it had another route around washout on main line, which it might have used. *Receivers v. Olive* (Tex. Civ. App.), 23 S. W. 526.

2. Necessity for chartering train on another road.—*St. Louis, etc., R. Co. v. Jones* (Tex. Civ. App.), 29 S. W. 695.

3. Removal of injured animals for treatment.—*Spokane Grain Co. v. Great Northern Exp. Co.* (Wash.), 104 Pac. 794.

4. Causing stock to be held at shipping point.—*Goldsmith v. Tower Hill Steamship Co.*, 37 Fed. 806.

Failure to furnish cars.—Where cattle were held in shipping pens for any period of time after a carrier had agreed that cars should be ready for their shipment, the carrier was liable. *Southern Kansas R. Co. v. Morris* (Tex. Civ. App.), 99 S. W. 433, judgment affirmed in 100 Tex. 611, 102 S. W. 396.

A railroad company agreed to furnish plaintiff with cars at 10 a. m. of a certain day to transport his cattle. Plaintiff, at the set time, put his cattle in a pen provided by the company. Late in the afternoon, the company informed plaintiff that the cars would come the next morning. There being no grass and not sufficient water at that place, the cattle were injured by the delay. Held, that the company was liable therefor. *International, etc., R. Co. v. Ritchie* (Tex. Civ. App.), 26 S. W. 840.

After plaintiff had held his herd of 500 cattle five days, awaiting shipment, under a contract with defendant railroad company, the herd stampeded because of thirst and hunger, and fifteen escaped, and were lost. Held, that defendant was liable for the value of the fifteen head. *Galveston, etc., R. Co. v. Stovall*, 3 Texas App. Civ. Cas., § 251.

has loaded the cattle on cars for that purpose,⁵ or fails to ship fat cattle to market on the day agreed upon or the next, without any reason therefor.⁶ A carrier that unconditionally agrees to transport cattle at a given time can not excuse its nonperformance on the ground that its train broke down, etc.⁷

What Constitutes Contract.—Where a railway company transports cattle within a reasonable time, it is not liable because the cattle did not reach their destination at the time designated by the shipper, unless, when it received the cattle, it was notified of the shipper's design.⁸ Where a shipper of live stock contracts with defendant's freight agent for the shipment of the stock, and for its delivery to him at the point of destination, a few miles distant, on the same night, a casual statement to the shipper made by the conductor of the train a few minutes before it started, and after the stock was on the car, that he did not think that it would be unloaded that night, does not change the contract, and the shipper is entitled to damages for injuries suffered by the stock owing to its exposure overnight.⁹

Invalid Contract.—A shipper can not recover damages for breach of carrier's special agreement by which, contrary to Act Feb. 4, 1887, §§ 3, 6, and Act Feb. 19, 1903, it undertook, for the joint through rate, to expedite a railroad shipment of horses, though the shipper did not know that the established schedules did not provide for such special service.¹⁰

Negligent Delay Not Exceeding Additional Time Allowed by Contract as Reasonable Time.—A provision in a contract for the shipment of cattle to market, to the effect that the parties agreed that the schedule time and twelve hours additional should be considered reasonable time for transporting the cattle, does not relieve the carrier from liability for the loss resulting from delay caused by its negligence, even though such delay did not exceed the twelve-hours limitation of the contract.¹¹

Clause in Bill of Lading Denying Agreement to Deliver within Any Particular Time.—A bill of lading reciting that the agents of a carrier were not authorized to agree to forward live stock to be delivered at a specified time, nor for any particular market, taken in connection with the further clause that the carrier did not agree to so deliver live stock, was meant to save the carrier from liability for unavoidable delay, but did not excuse the company from carrying the freight in a reasonable time, nor for delays avoidable by care and diligence.¹²

Notice of Delay and Avoidance of Loss.—Where a steamship's sailing day was delayed, and in consequence libellant brought suit to recover alleged loss for the keep of his live stock while awaiting shipment under a prior contract, as well as for their loss of weight during such delay, but it appeared that part of the lot was sent forward by another steamer, and that the rest were sold without any loss proved, and that the steamer's delay was without fault, and that the libellant had early notice of the expected delay, held, that libellant had sustained no damage.¹³

5. Failure to ship by certain train.—Illinois Cent. R. Co. v. Waters, 41 Ill. 73.

6. Failure to deliver at agreed time.—Illinois Cent. R. Co. v. Simmons, 49 Ill. App. 443.

7. Excuses for delay.—Gann v. Chicago, etc., R. Co., 72 Mo. App. 34.

8. Necessity for communication of shipper's intention.—Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98.

9. Change of contract by causal statement of conductor.—Corbett v. Chicago, etc., R. Co., 86 Wis. 82, 56 N. W. 327.

10. Invalid contract.—Chicago, etc., R. Co. v. Kirby, 32 S. Ct. 648; 225 U. S. 155, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, reversing judgment Kirby v. Chicago, etc., R. Co., 90 N. E. 252, 242 Ill. 418.

11. Negligent delay not exceeding additional time allowed by contract.—Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293; S. C., 57 Mo. App. 366.

12. Clause denying agreement to transport within particular time.—Meriwether v. Quincy, etc., R. Co., 107 S. W. 434, 128 Mo. App. 647.

13. Notice of delay.—Goldsmith v. Tower Hill Steamship Co., 37 Fed. 806.

§§ 1796-1826. Damages for Delay in Transportation and Delivery—§§ 1796-1803. Liability for Damages—§ 1796. In General.—Proximate Cause.—The damages the shipper is entitled to recover, if any, from unreasonable delay are such as in fact proximately resulted from the delay alleged and shown, and not such as "might have resulted from unreasonable delay."¹⁴

§ 1797. Failure to Furnish Cars for Shipment.—See post, "Failure to Furnish Cars in Reasonable Time," § 1919.

§ 1798. Loss Occurring after Cattle Out of Carrier's Hands.—A carrier is not discharged from the direct consequences of its delay to transport cattle, because the injurious consequences of such delay did not result until the cattle were out of its hands. The consequences of delay would attend the cattle to their final destination just as the consequences of a fatal injury to one of them would attend the animal until its death; and in neither case could the party responsible excuse himself by showing that the actual loss or the death did not occur while the property was retained in his possession.¹⁵ Thus where a railway company, when it entered into a contract to carry cattle from Toledo to Buffalo, was informed that the ultimate destination of the cattle was Albany or New York, which fact was not stated in the contract; and a delay occurred through the defendants' fault, by which the shippers suffered a loss, owing to a depreciation of the market price of cattle; the carrier was not discharged by showing that the loss did not occur while the property was in its possession, if the price fell while the cattle were on their way from Buffalo to Albany, and the loss was the direct consequence of the defendants' delay.¹⁶

§§ 1799-1801. Special Damages—§§ 1799-1800. Notice of Special Circumstances—§ 1799. Necessity for Notice of Circumstances.—To recover special damages from carrier for delay in transporting cattle, shipper must show that carrier had notice of special condition, rendering such damages a natural and probable result of breach.¹⁷

Intention to Sell on Certain Market.—Where the action is for failure to deliver live stock for a certain market, the carrier must be shown to have known of the shippers intention to sell on that market.¹⁸

Where loss of commission on the purchase and sale of stock to be shipped is claimed as special damages for refusing to furnish space on a boat for

14. **Proximate cause.**—Ft. Worth, etc., R. Co. v. James, 39 Tex. Civ. App. 408, 409, 87 S. W. 730.

15. **Loss occurring after cattle out of carrier's hands.**—Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252, 256.

16. Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

17. **Necessity for notice of circumstances.**—Missouri, etc., R. Co. v. Belcher, 89 Tex. 428, 429, 35 S. W. 6; Missouri, etc., R. Co. v. Webb, 20 Tex. Civ. App. 431, 49 S. W. 526; International, etc., R. Co. v. Hatchell, 22 Tex. Civ. App. 498, 55 S. W. 186; Houston, etc., R. Co. v. Brown, 33 Tex. Civ. App. 237, 76 S. W. 580; St. Louis, etc., R. Co. v. Musick, 35 Tex. Civ. App. 591, 80 S. W. 673.

18. **Intention to sell on certain market.**—Hamilton v. Western, etc., R. Co., 96 N. C. 398, 3 S. E. 164.

In a suit against a railroad company

to recover damages for delay in forwarding cattle intended for Monday's cattle market, it is necessary, in order to charge defendant with the consequences of the delay, to show that defendant had knowledge, or from the circumstances of the case might reasonably have inferred, that the cattle were intended for that day's market. Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415.

Where a carrier contracted to transport certain thoroughbred cattle to an auction sale with notice that the sale had been advertised for a particular day, it had no right to assume that the sale would continue from day to day, or that the cattle could be as profitably sold on a different day, and hence, in case of its negligent failure to deliver the cattle in time for the sale, it was liable for whatever damages the shipper suffered by a failure of the cattle to arrive in time for such sale. Chicago, etc., R. Co. v. Miles, 123 S. W. 775, 92 Ark. 573, 124 S. W. 1043.

live stock, the carrier must be shown to have knowledge of these special circumstances.¹⁹

Loss of Services of Animals.—In an action against a carrier for damages for delay in transporting live stock intended for use, whether the loss of the services of the animals is to be considered in estimating the amount of damages depends (1) upon the knowledge of the carrier of the purpose with which they shipped, and (2) the pleading. If the special damages are pleaded and the carrier is shown to have known that the animals were shipped for immediate use by the owner, the loss of the use of the animals is properly an item of damages.²⁰

§ 1800. What Constitutes Notice.—Knowledge of Carrier's Agent as Knowledge of Carrier.—In an action against a carrier by a shipper of cattle for delay in carrying them to a certain market, proof that the carrier's agent knew at the time of shipment that the cattle were being shipped to such market for immediate sale shows knowledge of the carrier.²¹

§ 1801. What Constitutes Special Damages.—Loss of Sale.—Damages for loss of sale of a shipment of live stock by reason of the carrier's delay are special damages.²²

Loss of Services.—See ante, "Notice of Special Circumstances," §§ 1799-1800.

§ 1802. Remote or Speculative Damages.—In an action for damages sustained by the shipper of a race horse by reason of delay in shipping, the fact that the delay rendered it impossible to keep racing engagements can not be considered as an item of damages.²³

§ 1803. Waiver of Damages.—A provision in a contract for the shipment of live stock releasing carrier from damages to shipper sustained under prior verbal contract for failure to furnish cars at specified time, is unreasonable²⁴ and void where there is no consideration for it. A shipper of live stock by making a written contract of transportation, does not waive all damages for breach

19. Where a cattle shipper sued for breach of contract to lease him cattle space on defendant's line of ocean steamers, and the evidence was conflicting as to defendant's knowledge that plaintiff was shipping under a contract for commissions, and not on his own account, defendant was entitled to an instruction that, "if plaintiff did not inform defendant * * * that he had a contract for commissions on cattle which he was to purchase for shipment" at specified dates, "he can not recover any loss upon such commission." Order, 69 N. Y. S. 465, 34 Misc. Rep. 127, modified. *Brauer v. Oceanic Steam Nav. Co.* 73 N. Y. S. 291, 66 App. Div. 605.

20. **Loss of services of animals.**—At the time of an agreement to transport certain horses to Alaska, and to deliver them not later than a day named, defendant was informed that the purpose in shipping the horses was to use them in freighting goods over the Chilcoot Pass; that there was a great demand at that point for horses of the kind to be shipped, and that plaintiff could make from \$450 to \$500 per day from such use of them. Plaintiff had not, however, entered into any contracts for freighting with said horses, but was depending upon the condition of business for securing such con-

tracts when the horses were delivered. The horses were not delivered until twenty-seven days after the time agreed to, and there was evidence that during the interval between the time when said horses were to arrive under the contract and the date of their arrival a two-horse team could earn from \$50 to \$75 a day in freighting, and that single horses could have been rented for that purpose at \$20 a day. Held, that in estimating plaintiff's damages the jury might consider what might have been earned by the horses during the time of the delay. *Port Blakely Mill Co. v. Sharkey*, 102 Fed. 259, 42 C. C. A. 329.

21. **Knowledge of carrier's agent as knowledge of carrier.**—*Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

22. **Loss of sale.**—*International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 500, 55 S. W. 186; *Houston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 237, 76 S. W. 580.

23. **Remote or speculative damages.**—*Louisville, etc., R. Co. v. Gormley (Ky.)*, 111 S. W. 289.

24. **Waiver of damages.**—*Cross v. Graves*, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102.

of prior parol contracts to furnish the cars at a stated time, where there was no consideration for the waiver.²⁵ Where in an action for delay in shipping stock, defendant put in evidence a special contract releasing it from damages due to delay, but the reduced rate relied upon as a consideration for such waiver was shown to have been merely consideration for an agreement that the cattle should be shipped "at the owner's risk," the waiver, being without consideration, was not a bar to a recovery.²⁶

§§ 1804-1810. Elements—§ 1804. In General.—In ascertaining the amount of damages to which a shipper is entitled for injuries to live stock by delay in transportation, but all the injuries of which the delay is the direct and proximate cause, are elements of damage.²⁷

Other Deterioration as Element.—If there is other deterioration due to the delay of the carrier, that must also be taken into consideration in estimating damage.²⁸

Depreciation Necessarily Resulting from Transportation Disregarded.—But any depreciation necessarily resulting from transportation is to be disregarded.²⁹

§ 1805. Decline in Market.—A shipper suffering loss by the decline in the market of his cattle, occasioned by the carrier's negligent delay in transit, can recover the loss sustained.³⁰

25. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

Where an oral contract binding a carrier to furnish cars for a shipment of cattle at a specified time was breached before a written contract was signed, the carrier's liability for the breach of the oral contract for failure to furnish cars at specified time could not be avoided by the written contract, unless there was a consideration inuring to the shipper as compensation for the damages resulting from the breach when the contract was signed. *Gulf, etc., R. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W. 1110; *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190.

Failure of shipper to read written contract.—After plaintiff's cattle had been delayed at the point of shipment for several days, because of delay in furnishing cars, he was required to sign a written contract which was presented to him for the first time late at night after the stock was loaded and the train ready to depart. He signed it without an opportunity to read it, and no consideration was received for doing so. The contract contained a provision discharging the carrier from damages resulting from the delay in furnishing the cars, of which provision plaintiff had no knowledge. Held, that plaintiff by signing the contract did not waive his right to damages for the delay. *San Antonio, etc., R. Co. v. Timon* (Tex. Civ. App.), 110 S. W. 82.

26. *San Antonio, etc., R. Co. v. Barnett*, 12 Tex. Civ. App. 321, 34 S. W. 129.

27. Elements—Iowa.—*Wisecarver v. Chicago, etc., R. Co.*, 141 Iowa 121, 119 N. W. 532.

Kentucky.—*Louisville, etc., R. Co. v. Gormley*, 33 Ky. L. Rep. 188, 109 S. W. 346, rehearing denied, 111 S. W. 289; *Louisville, etc., R. Co. v. Robinson*, 18 Ky. L. Rep. 275, 36 S. W. 6.

Montana.—*Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

South Dakota.—*Stone v. Chicago, etc., R. Co.*, 8 S. Dak. 1, 65 N. W. 29.

28. Other deterioration as element.—*Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.

29. Depreciation necessarily resulting from transportation disregarded.—*Galveston, etc., R. Co. v. Botts* (Tex. Civ. App.), 70 S. W. 113; *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68.

30. Decline in market.—United States.—Loss occasioned by fall in market value during delays attributable to the carrier's fault is not too speculative to form the basis of damages, where, at the time the contract of carriage was made, both parties knew and contemplated that the cattle were to be sold in a given market on the first possible market day after arrival. *The Caledonia*, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming (C. C.), 43 Fed. 681 (D. C.), 50 Fed. 567.

Missouri.—*Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569; *Libby v. St. Louis, etc., R. Co.* (Mo. App.), 117 S. W. 659.

Texas.—A fall in the market is a proper element of damages from delay in shipment. *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834; *St. Louis, etc., R. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 641, 108 S. W. 1194; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 496; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418; *Texas Cent.*

§ 1806. Expenditures for Keep of Animals.—Expenses Incurred Where Carrier Fails to Furnish Cars.—Where a railroad company fails to furnish stock cars within a reasonable time after being ordered, it is liable to the shipper for the expense of holding the cattle while waiting for cars.³¹

Feeding, Pasturage and Care of Cattle.—In an action for damages to cattle by defendant railway company's negligent failure to furnish cars in a reasonable time after they were ordered, because of which plaintiff was compelled to pasture the cattle while waiting for the cars, plaintiff was entitled to recover for feeding, pasturage, and care of the cattle only such expenses for these items as were reasonably necessary, and hence a charge authorizing a recovery of the amount he expended was erroneous.³² A carrier is not liable to a shipper of cattle for expenditure for feed made necessary by unprecedented weather, which would not reasonably have been anticipated, while the shipper was holding his cattle waiting for cars, which he had demanded for their transportation; the carrier not being liable as an insurer, but only for negligence.³³

Recovery for Wages of Men Employed to Care for Cattle.—Where a carrier agreed to furnish cars on a certain day for the shipment of cattle, and negligently failed so to do, and the cattle had to be kept at the place of shipment, to their injury, until the carrier furnished the cars, about two weeks after the appointed time, and the owner of the cattle during the delay was compelled to pay pasturage and to employ men to look after the cattle, and to supply feed for the horses used for that purpose, he could recover from the carrier for the damages sustained.³⁴

Recovery of Wages of Men Caring for Cattle Not Special Damages.—In a suit against a carrier for failure to furnish cars in which to ship cattle, where it was alleged that because of such failure the plaintiff, while awaiting the cars, was compelled to pasture the cattle, for which he paid a certain sum, the value of the pasture for the time, that he was compelled to employ four men to care for the cattle, and that he was compelled to feed four horses used in caring for the cattle, and to pay for the feed a certain amount, a recovery therefor was not defeated on the ground that the items were of special damages, and that it nowhere appeared that they were necessarily and reasonably expended on account of defendant's negligence.³⁵

Freight Charges on Shipment Over Other Roads.—A carrier is liable for the additional freights paid by the shipper in transporting his cattle to destination over other railroads after the failure to furnish cars agreed to be supplied.³⁶

R. Co. v. Miller (Tex. Civ. App.), 88 S. W. 499.

West Virginia.—The difference in the market value of cattle at the time when they were actually delivered and at the time when they should have been delivered is an element of damages, in an action against the carrier for unreasonable delay in making delivery. *Woodford v. Baltimore*, etc., R. Co., 70 W. Va. 195, 73 S. E. 290.

31. Expenses incurred where carrier fails to furnish cars.—Texas, etc., R. Co. v. Smith, 79 S. W. 614, 34 Tex. Civ. App. 571.

Where a common carrier refused to accept a shipment of cattle tendered, the owner or the person offering it for transportation must use reasonable care to prevent injury to the cattle during the delay, but, if the shipment is wrongfully refused, he will be entitled to recover for

the reasonable expenses in caring for the property, as well as other damages. *Galveston*, etc., R. Co. v. Karrer (Tex. Civ. App.), 109 S. W. 440.

32. Feeding, pasturage and care of cattle.—Texas, etc., R. Co. v. Powell, 34 Tex. Civ. App. 575, 79 S. W. 86.

33. Wallace v. Pecos, etc., R. Co., 50 Tex. Civ. App. 296, 110 S. W. 162.

34. Recovery for wages of men employed to care for cattle.—Southern Kansas R. Co. v. Samples (Tex. Civ. App.), 109 S. W. 417.

35. Recovery of wages of men caring for cattle not special damages.—Southern Kansas R. Co. v. Samples (Tex. Civ. App.), 109 S. W. 417.

36. Freight charges on shipment over other roads.—Pecos River R. Co. v. Latham, 40 Tex. Civ. App. 78, 80, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

Delay of Shipment.—Delay occasioned to the plaintiff by the nonshipment of his goods, which consisted partly of live animals, and the necessary expense of taking care of and feeding the animals while waiting for transportation, are the natural and proximate consequences of the carrier's act.³⁷

Expenses Awaiting Next Regular Market.—Where a carrier undertakes to ship live stock, and, by unreasonable delay, fails to deliver the shipment at the market on the day intended, it is liable for the keep of it till it can be offered in the first regular meeting succeeding its arrival.³⁸

Expense of Holding Cattle at Destination Till Purchaser Found.—Where a carrier accepted live stock for shipment to a point where there was a market, with notice that they had been contracted for delivery within a specified time, and the purchaser refused to accept the shipment because of a negligent delay in transportation, the carrier was liable for the shipper's expense in holding the cattle until a purchaser could be secured, for their loss of flesh, and for a decline in the market price.³⁹

§ 1807. Expenses of Shipment to Another Market.—If the delay of defendant railroad company in shipping plaintiff's cattle to St. Louis caused plaintiff to lose the benefit of the week's market there, and justified a shipment from there to Chicago, defendant was liable for the extra expense in transporting the cattle to Chicago, except such expense as might have been occasioned by delay in the second shipment, and such expense would include additional charges and additional expense for feeding the cattle.⁴⁰

§ 1808. Shrinkage in Weight.—A shipper suffering loss by shrinkage in weight of his cattle, occasioned by the carrier's negligent delay in transit, can recover the loss sustained.⁴¹ The value of this loss of weight is to be ascertained by reference to the market when the cattle ought to have arrived there.⁴²

37. Delay of shipment.—*Missouri*.—Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

38. Expenses awaiting next regular market.—Louisville, etc., R. Co. v. Robinson, 18 Ky. L. Rep. 275, 36 S. W. 6.

39. Expense of holding cattle at destination till purchaser found.—Texas, etc., R. Co. v. Arnett (Tex. Civ. App.), 101 S. W. 834.

40. Expenses of shipment to another market.—St. Louis, etc., R. Co. v. Gunter, 39 Tex. Civ. App. 129, 86 S. W. 938.

41. Shrinkage in weight.—Libby v. St. Louis, etc., R. Co. (Mo. App.), 117 S. W. 659.

In an action against a railroad company on a special contract to load, carry, take care of, and unload two car loads of hogs, the plaintiff was entitled to recover for extra shrinkage in the hogs during unnecessary delays in the transit, as well as for a decline in their market value. *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569.

A carrier is liable for an unreasonable delay, which causes a shrinkage in the weight of the cattle shipped, and their classification in the market as "stale." *Douglass v. Hannibal, etc., R. Co.*, 53 Mo. App. 473.

Loss by nonshipment.—Delay occasioned to the plaintiff by the nonshipment of his goods, which consisted partly of live animals, and the necessary expense of taking care of and feeding the animals while waiting for transportation,

are the natural and proximate consequences of the carrier's act; but not so the loss occasioned by the shrinkage in weight of the animals while so waiting, unless these effects were caused directly by the defendant's act. *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

Failure to furnish cars for shipment.—Where a railroad failed to furnish cars for shipment of cattle as it had agreed, the measure of damages is the deterioration in value of cattle from shrinkage and loss of weight that resulted from holding them awaiting the arrival of cars, and that was the result of a breach of contract to furnish cars. *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed, on another point, in 87 Tex. 211, 27 S. W. 110.

Live stock held for several days for market.—Where on account of unreasonable delay in transportation, a shipment of live stock did not reach their destination at a time when there was a market, and it became necessary to hold them there for several days, in order to sell them, their condition, weight, etc., at that time is a factor proper to be considered in arriving at a correct measure of damages. *St. Louis, etc., R. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 641, 108 S. W. 1194.

42. Ft. Worth, etc., R. Co. v. Great-house, 82 Tex. 104, 111, 17 S. W. 834; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418; Texas

§ 1809. Loss of Services of Animals.—See ante, "Special Damages," § 1799-1801.

§ 1810. Death of Animals.—The death of animals which a carrier delays to ship is not an element of damage unless caused directly by the carrier's act.⁴³

§§ 1811-1818. Measure and Amount—§ 1811. In General.—In an action against a carrier of live stock for failure to promptly receive and transport cattle, the recovery is not limited to nominal damages, where there is proof of actual loss by reason of the detention of the cattle and a defendant's prayer limiting plaintiff's recovery to nominal damages was properly denied.⁴⁴

Expense of Restoration to Former Condition Not Proper Measure.—In an action against a railroad company for delay in the shipment of cattle, the necessary expense of restoring the cattle to the condition they were in before their shrinkage in weight is not the proper measure of damages.⁴⁵

§ 1812. Difference in Market Value at Destination as Measure.—In an action against a railroad company for delay in delivering live stock according to the schedule time, the measure of damages is the difference in market value of the cattle at the place of destination, in the condition and weight at the time of delivery to the consignee, and their market value in the condition and weight at the time they should have been delivered, if transported at schedule time and with reasonable dispatch.⁴⁶

Cent. R. Co. v. Miller (Tex. Civ. App.), 88 S. W. 499; *G. H. & S. A. R. Co. v. Stovall*, 3 Texas App. Civ. Cas., § 251; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

43. Death of animals.—*Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

44. Measure and amount.—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

45. Expense of restoration to former condition not proper measure.—*Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211, 27 S. W. 110.

46. Delay in transit.—*Arkansas*.—*Chicago, etc., R. Co. v. Miles*, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043.

Indian Territory.—*Missouri, etc., R. Co. v. Truskett*, 2 Ind. T. 633, 53 S. W. 444.

Iowa.—*Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550; *McManus v. Chicago, etc., R. Co. (Iowa)*, 136 N. W. 769.

Kansas.—*Missouri, etc., R. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754.

Where, in an action against a carrier for negligent delay in transporting cattle resulting in loss through a decline in the market price, it appeared that the cattle should have reached Kansas City on a certain day in time for the market, but that owing to the delay the first opportunity plaintiff had to sell on the market was the next day, an instruction that the measure of damages was the difference between the market value at the usual time the cattle were to be delivered in Kansas City and their market value on the succeeding day was proper. *Missouri,*

etc., R. Co. v. Fry, 79 Kan. 21, 98 Pac. 205.

Kentucky.—*Louisville, etc., R. Co. v. Smith*, 14 Ky. L. Rep. 814; *Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 555; *Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540; *Southern Railway v. Graddy*, 33 Ky. L. Rep. 183, 109 S. W. 881.

Massachusetts.—*Smith v. New Haven, etc., R. Co. (Mass.)*, 12 Allen 531, 90 Am. Dec. 166.

Missouri.—*Wilson v. Missouri Pac. R. Co.*, 66 Mo. App. 388, 2 Mo. App. Rep'r, 1366; *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403.

New York.—*Kent v. Hudson River R. Co. (N. Y.)*, 22 Barb. 278.

North Carolina.—*Hamilton v. Western, etc., R. Co.*, 96 N. C. 398, 3 S. E. 154.

South Dakota.—What horses would have sold for on the horse market, and what they did sell for, is a proper method of determining the difference in value between sound and injured animals, in an action against a carrier for delay in their transportation and for their negligent injury, as what property actually sells for on the open market is prima facie evidence of its real market value. *Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

Tennessee.—*East Tennessee, etc., R. Co. v. Hale*, 85 Tenn. (1 Pickle) 69, 1 S. W. 620.

Texas.—*Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Galveston, etc., R. Co. v. Johnson (Tex.)*, 19 S. W. 867; *San Antonio, etc., R. Co. v. Pratt*, 89 Tex. 310, 34 S. W. 445; *Chicago, etc.,*

Refusal to Sell at First Opportunity.—The shipper can not hold the stock over and sell them at the market of some subsequent day and recover for the depreciation in the market after his first opportunity to sell or for the extra expense of holding them over.⁴⁷

Cattle Held at Destination for Several Days.—A charge which makes the measure of the damages the difference between value at the time and in the condition they were sold and that when they reached there, where they were sold three days after arrival, is erroneous.⁴⁸

Legal Holiday Following Day of Arrival.—When by reason of the carrier's delay in transporting cattle, they arrived on a legal holiday, on which there was no market; and the shipper was compelled to hold them over until the following day, when there was a decline in the market, the measure of damages is the difference between their market value on the day they should have arrived, and their value on the opening of the market after their arrival.⁴⁹

§ 1813. Shipper under Contract to Deliver at Specified Time.—The measure of damages for the depreciation in value of live stock shipped to a

R. Co. v. Young (Tex. Civ. App.), 107 S. W. 127; Texas, etc., R. Co. v. Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; Chicago, etc., R. Co. v. Halsell (Tex. Civ. App.), 81 S. W. 1241, affirmed in 98 Tex. 244, no op.

In a suit for damages for injury to cattle caused by delay in shipping, market value at place of destination, and not at place of shipment, governs as to difference in value. Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 611, 18 S. W. 716; Gulf, etc., R. Co. v. Stanley, 89 Tex. 42, 44, 33 S. W. 109, affirming 29 S. W. 806; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 129, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834.

Failure to deliver promptly.—The measure of damages for a carrier's refusal to promptly deliver cattle upon their arrival at destination is the value of any cattle that died through the carrier's fault and the difference between the reasonable value of the remaining cattle in the condition in which they were delivered and their reasonable value at the time they should have been delivered. Southern Kansas R. Co. v. Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

Delay caused by wreck.—Where, by the negligence of a carrier, cattle shipped to a certain market, to be immediately sold there, are delayed by a wreck, the shipper is entitled to recover the difference in the state of the market at the time the cattle are, and at the time they should have been delivered, and the shrinkage in weights caused by the wreck and delay, to be ascertained by reference to the destined market when the cattle should have reached there. Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834.

Thus, where a carrier contracted to transport plaintiff's thoroughbred cattle

for sale at a special auction, but negligently failed to do so, and there was proof that the cattle on hand at the auction did not exhaust the demand, the measure of damages was the difference between the price that could have been got for the cattle at the auction and the price plaintiff succeeded in getting for the cattle at private sale. Chicago, etc., R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043.

47. Refusal to sell at first opportunity.—In an action against a railroad company for delay in transporting hogs, it appeared that through defendant's negligence the hogs were put on the Chicago market Saturday, instead of Thursday; that there was no market for them till Monday, when they could all have been sold; but that plaintiff only sold part of them on Monday, keeping the balance till Tuesday and Wednesday, when he sold for less than on Monday. Held, that he could recover for expense of keeping, shrinkage in weight, and depreciation in value only from Thursday till Monday. Ayres v. Chicago, etc., R. Co., 75 Wis. 215, 43 N. W. 1122.

In an action against a railroad company for delay in transporting plaintiff's stock to market, arising from its failure to have cars at a certain station at an agreed time, it appeared that the stock arrived in Chicago on Friday, in time for the Saturday market, but plaintiffs did not sell, but kept them over Sunday. Held, that there could be no recovery for any expense of keeping such stock, their depreciation in value, or their shrinkage in weight, after Saturday. Ayres v. Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

48. Cattle held at destination for several days.—Gulf, etc., R. Co. v. Ware, 34 Tex. Civ. App. 455, 78 S. W. 961.

49. Legal holiday following day of arrival.—Southern Kansas R. Co. v. Crump, 74 S. W. 335, 32 Tex. Civ. App. 222.

purchaser, by reason of the carrier's unreasonable delay in transportation and delivery, does not depend upon the contract price.⁵⁰ But the measure of damages where the contract fixed a day certain for delivery is the same as in other cases of delay, i. e., the difference between the market value at destination on day when carrier agreed to deliver and that on day when actually delivered.⁵¹

Breach of Agreement to Furnish Cars.—See post, "Breach of Agreement to Furnish Cars," § 1815.

§ 1814. Refusal to Receive Shipment.—Where a railroad company refused to receive cattle for shipment when they were first offered, giving no excuse therefor, and subsequently received and transported them, they are liable to the shipper for any loss resulting from a depreciation in value between the time they were first offered and the date on which they were finally received for shipment,⁵² and for the expense of keeping the cattle.⁵³

§ 1815. Breach of Agreement to Furnish Cars.—In an action against a carrier for breach of a contract to receive and transport cattle on a day certain, the measure of damages is the difference between their value at their destination when due there, if shipped on such day, and the value when they did arrive, together with any other deterioration due to the carrier's delay.⁵⁴ But where it is shown that the freight money had not been paid, or that there were other means of transporting the stock to the destination intended, of which the shippers could have availed themselves, the rule of damages would be modified.⁵⁵

Shipment under Contract.—Measure of damages for breach of contract to furnish cars, made with reference to a shipper's contract to sell the cattle, is the difference between the market value of cattle at time when and place whence they were to be shipped as they would have been under herd, and contract selling price.⁵⁶ Where the carrier had notice of the shipper's contract to deliver cattle at their destination on a certain day, and failed to furnish cars for the transportation thereof as agreed, and the cattle depreciated in value by reason of the delay, the measure of damages is the difference between the contract price at their destination and their market value in their damaged condition at the point of shipment, less the freight.⁵⁷ If plaintiff, on the ground that the

50. Shipper under contract to deliver at specified time.—Missouri, etc., R. Co. v. Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

Instruction as to general measure of damages erroneous.—In an action against a carrier for special damages for delay in transporting horses whereby plaintiff was prevented from consummating a sale of the horses and whereby he was obliged to sell them at the market value, an instruction that the measure of damages was the difference in the market value of the horses at their destination delivered at the time and in the condition in which they were and their market value at their destination delivered at the time and in the condition in which they should have been, was erroneous. Texas, etc., R. Co. v. Stewart, 96 S. W. 106, 43 Tex. Civ. App. 399.

51. San Antonio, etc., R. Co. v. Pratt, 89 Tex. 310, 312, 34 S. W. 445; Missouri, etc., R. Co. v. Cobb (Tex. Civ. App.), 36 S. W. 500, 501; Chicago, etc., R. Co. v. Halsell (Tex. Civ. App.), 81 S. W. 1241, 1243, affirmed in 98 Tex. 244; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834.

52. Refusal to receive shipment.—Chicago, etc., R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70.

53. Where a railroad company negligently refuses to transport live stock, it is liable for the expense of keeping the stock caused by such delay, and for the difference between the price of the stock when it would have arrived and the price when it actually did arrive at the market. Chicago, etc., R. Co. v. Todd, 105 N. W. 83, 74 Neb. 712.

54. Breach of agreement to furnish cars.—Texas, etc., R. Co. v. Nicholson, 61 Tex. 491; San Antonio, etc., R. Co. v. Pratt (Tex. Civ. App.), 32 S. W. 705, 706; Missouri, etc., R. Co. v. Darlington (Tex. Civ. App.), 30 S. W. 251; Galveston, etc., R. Co. v. Karrer (Tex. Civ. App.), 109 S. W. 440, 442; Inman v. St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37, affirmed in 93 Tex. 643, no op.

55. Texas, etc., R. Co. v. Nicholson, 61 Tex. 491, 497.

56. Shipment under contract.—Gulf, etc., R. Co. v. Martin (Tex. Civ. App.), 28 S. W. 576, 578.

57. International, etc., R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575.

cattle would not reach their destination at the time agreed upon, by reason of the delay, declined to ship the cattle, and took charge of them himself, or could have done so, and the value of the cattle afterwards depreciated, the damages should be computed on the basis of their market value at the point of shipment in an undamaged condition.⁵⁸

Carrier Having No Notice of Special Contract.—Where carrier agreed to ship cattle and had no notice of shipper's contract for their sale, measure of damages for failure to furnish cars and consequent loss in their weight, is the difference between market value at destination and market value at shipping point, in damaged condition, less freight.⁵⁹

Stock Unloaded and Sold Short of Destination.—Where a contract for the shipment of horses declared their destination to be T., and they were in fact unloaded and sold at W., in an action against the carrier for damages from delay in furnishing cars, values at T. should control on the question as to damages, rather than values at W.⁶⁰

Loss of Sale for Season.—The measure of damages for breach of a contract for furnishing cars for the shipment of cattle, which compelled plaintiff to cancel a contract for their sale, whereby he lost the opportunity of putting them on the market for that season, is the difference between the reasonable value of the cattle, when under herd at the contemplated time and place of shipment, and the amount stipulated in the contract of sale.⁶¹

§ 1816. Shipment for Pasturage.—Measure of damages for delay in shipment of cattle by railroad company is not affected by fact that they were to be shipped to pasture and not to market, but should cover actual impairment in value as well as excess of cost of keeping at station over amount that would have been required at place of destination.⁶²

58. *International, etc., R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575.

59. **Carrier having no notice of special contract.**—*International, etc., R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575, 576.

But in absence of notice of the contract of sale of cattle and complaint that special damages were suffered with reference thereto, the contract of sale made before shipment not having been pleaded, the sale price and the contract price could not properly furnish the measure of damages for a failure on the part of the railway to promptly furnish cars for shipment. *St. Louis, etc., R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673; *International, etc., R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575.

60. **Stock unloaded and sold short of destination.**—*Texas, etc., R. Co. v. Shipment* (Tex. Civ. App.), 98 S. W. 449.

61. **Loss of sale for season.**—*Gulf, etc., R. Co. v. Martin* (Tex. Civ. App.), 28 S. W. 576.

62. **Shipment for pasturage.**—*Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 221, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

In cases where the cattle were to be shipped to market for immediate sale, courts have held that the decline in the market value or the decrease in value for other reasons caused by the negligence of the carrier, is a proper measure of damages; but this does not prove that the

same rule does not apply in other cases. Compensation for the injury sustained is the object of the law in giving damages. If plaintiff intended to pasture his cattle, he was entitled to have the full benefit of their condition as it was when they should have been shipped, and it is not necessary that property should be upon the market for sale in order to entitle the owner to have its impaired value restored by the person causing the injury. The owner is not required to wait until his cattle had been pastured or fed sufficiently to restore their value as it was, before he could sue, or to make the uncertain and speculative matter of future cost of feed and care with its uncertain results a rule to, ascertain the amount to be paid, whereas the plaintiff was entitled to have the railroad company make them whole at once, and without delay. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 221, 27 S. W. 110, reversing, 6 Tex. Civ. App. 653, 24 S. W. 915.

The proper measure of damages for failure to comply with a special contract to furnish transportation for cattle which were being shipped to the Indian Territory, to be held in pastures until in condition to be placed on the market, was the difference in value between the cattle when placed in the pens at the point from which they were to be shipped, and at the time when they were actually shipped, together with any additional cost for food and hire of hands neces-

§ 1817. Subsequent Shipment to Another Market.—Where plaintiff shipped cattle to one market, and, by delay of the railroad company, they did not arrive in time for the market for which they were shipped, and plaintiff then shipped another, the measure of damages, if the latter shipment was justified, is the difference between the market price of the cattle sold, and the market price in the first market on the day they should have arrived there,⁶³ after deducting the necessary expense of transportation to the latter market.⁶⁴ The court of Kansas has held that in an action against a carrier for loss from a decline in the market occasioned by delays in transportation of cattle, the measure of damages is the loss by the decline of the market where the cattle were delivered, and an instruction to consider the price the cattle subsequently sold for at another market, to which they were reshipped over another road, and the decline of that market on a different day, is erroneous.⁶⁵

Original Shipment to Comply with Contract of Sale.—Where a shipper of live stock sued to recover damages on a shipment to be delivered at a certain date at M., which did not reach M. within the proper time, whereby he was prevented from complying with his contract in relation to them, and the stock was shipped by the railroad to T., in consequence of which he was forced to sell to another party at a less sum per head, to be delivered at T., when by reason of the carrier's further negligence, he was prevented from consummating this sale, and was forced to sell the stock at T. for their market value in their then condition; the measure of damages is the difference between the contract price of the horses at M. and the sum which they subsequently brought at the second sale, and, if both sales were missed through the negligence of the carrier, then the measure of damages would be the difference between the contract price at M. and the market value of the stock in the condition and at the time they arrived at T.⁶⁶

Initial Carrier Not Liable for Delay of Connecting Carrier.—Where cattle were negligently delayed, and it became necessary to ship the cattle to another market, the carrier was liable for loss of weight from their being held and reshipped to the other market, but it was not liable for the negligent delay of the connecting carrier in transporting them to such other market.⁶⁷

sitated by the delay in shipment. *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 44 S. W. 8.

The measure of damages to a shipment of cattle from negligence of the carrier, is the difference between their value in the condition in which they arrive and that in which, but for the negligence, they would have arrived, though they are not shipped for sale, but for pasturage. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109.

63. Subsequent shipment to another market.—*St. Louis, etc., R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938.

64. In an action against a railroad for damages resulting from delay, rough handling, etc., in transporting calves shipped by plaintiff to East St. Louis, the evidence showed that there was no market for the calves there in the condition in which they arrived, and that they were in consequence shipped to Chicago and sold, plaintiff's measure of damages was the difference in the value of the calves on the East St. Louis market, in the condition and at the time they should have reached that market by the exercise of ordinary care by defendants, and what they sold for in Chicago, after deducting the necessary expense of trans-

portation to the latter market. *Texas, etc., R. Co. v. Coggin*, 90 S. W. 523, 40 Tex. Civ. App. 523.

65. *Missouri, etc., R. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754.

66. Original shipment to comply with contract of sale.—*Texas, etc., R. Co. v. Stewart*, 38 Tex. Civ. App. 595, 86 S. W. 631.

Plaintiff shipped horses to M. in order to consummate a sale at M. conditioned on their arrival on a certain day, but the shipment failed to reach M. in time to consummate the sale, and the horses were shipped pursuant to another contract of sale to T., but, owing to delays in transportation, were not delivered in time to consummate the contract at T., and plaintiff was forced to sell at T. at the market value. Held that, if the carrier was liable for the loss of the first sale only, the measure of damages was the difference between the contract price of the horses at M. and the sum brought on the second sale. *Texas, etc., R. Co. v. Stewart*, 96 S. W. 106, 43 Tex. Civ. App. 399.

67. Initial carrier not liable for delay of connecting carrier.—*St. Louis, etc., R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 136, 86 S. W. 938.

Optional Contract to Ship to Another Market.—Where cattle were shipped over defendant railroad's line to one point, with the privilege of shipping them, if not disposed of there, to another point on a through freight rate, it is error, in an action to recover damages for loss of weight and depreciation in market value of the cattle, resulting from defendant's delay in transporting them, to charge as to the cattle shipped through to the latter point and there sold, that the measure of damages was the difference between the market value of the cattle in the condition and at the time they arrived at the first destination and the condition and at the time they should have arrived there.⁶⁸

Destination Changed during Transit Because of Quarantine Laws.—Where a contract for the shipment of cattle was made to G., but the destination was changed to W., while the cattle were en route because of the quarantine law, the proper measure of damages for injuries to the cattle through delay was the difference between the market value of the cattle at G., and not at W., in the condition in which they were delivered at that point and in the condition in which they would have arrived and been delivered if they had been transported with ordinary care and promptitude.⁶⁹

§ 1818. Interest.—An action against a railroad for delay in the transportation of stock, by reason of which the shipper suffered damage, is one for breach of contract, and interest is recoverable on the amount of the loss from the time compensation therefor was demanded.⁷⁰

§ 1819. Mitigation and Discharge of Damage.—Advance in Market.—In an action against a carrier for loss occasioned by delay in transporting live stock, the fact that part of the shipment brought more at the destination on account of the delay in their arrival should be considered in reduction of the loss sustained on the others as a result of the delay.⁷¹

Action for Shrinkage in Weight.—In an action against a carrier for shrinkage in the weight of cattle due to delay in transit, the shipper may take the market on the day the cattle were sold as his basis of calculation, showing the amount they would have brought on that day had they been transported in a reasonable time and the amount they actually sold for, and, if there was an advance in the market from the day the cattle should have arrived up to the time of sale, such advance is a matter of defense to be shown by the carrier.⁷²

§ 1820. Pleading.—Special Damages.—When specific damages are claimed against a carrier as a consequence of its delay to transport a shipment of live stock, such damages must be specially pleaded.⁷³

68. Optional contract to ship to another market.—Texas, etc., R. Co. v. Nelson, 38 Tex. Civ. App. 605, 86 S. W. 616.

69. Destination changed during transit because of quarantine laws.—Texas, etc., R. Co. v. Tracy, 38 Tex. Civ. App. 327, 328, 85 S. W. 833, affirmed in 101 Tex. 663, no op.

70. Interest.—Missouri, etc., R. Co. v. Truskett, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259, affirming judgment 104 Fed. 728, 44 C. C. A. 179; Texas, etc., R. Co. v. Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42, affirmed in 97 Tex. 649, no op.; Texas, etc., R. Co. v. Truesdell, 21 Tex. Civ. App. 125, 127, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; Missouri, etc., R. Co. v. Webb, 20 Tex. Civ. App. 431, 440, 49 S. W. 526; Mexican Nat. R. Co. v. Garcia (Tex. Civ. App.), 26 S. W. 780; Southern Pac. Co. v. Anderson, 26 Tex.

Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686; no op.; Texas, etc., R. Co. v. Murtishaw, 34 Tex. Civ. App. 447, 78 S. W. 953; Gulf, etc., R. Co. v. Batte (Tex. Civ. App.), 81 S. W. 813; International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323.

71. Advance in market.—Gulf, etc., R. Co. v. Hughes (Tex. Civ. App.), 34 S. W. 411.

72. Action for shrinkage in weight.—Ft. Worth, etc., R. Co. v. Richards (Tex. Civ. App.), 105 S. W. 236.

73. Special damages.—See ante, "Special Damages," §§ 1799-1801.

Delay resulting in loss of contract of sale.—St. Louis, etc., R. Co. v. Musick, 35 Tex. Civ. App. 591, 80 S. W. 673; International, etc., R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575.

Thus, damages for loss of sale, of a shipment of live stock by reason of the carrier's delay being special, must be specially pleaded.⁷⁴

§ 1821. Issues and Proof.—Evidence of Fall in Market.—Where the petition in an action for delay in shipment of cattle does not ask for any damages for loss resulting from fall in market, evidence thereof is inadmissible and its admission is reversible error.⁷⁵

§§ 1822-1823. Evidence.—§ 1822. Admissibility.—Where it is shown that carrier's agent knew cattle were being shipped to certain point for immediate sale, testimony is admissible to show state of market there at time they should have been delivered.⁷⁶

Where There Is No Market at Destination.—In an action for injury by delay in transporting a shipment of live stock where there was no market value at that point, such value may be ascertained by proof of the market value at other convenient points.⁷⁷

Evidence of Market Value at Destination a Day before Stock Due to Arrive.—In an action against a carrier for loss occasioned by delay in the transportation of live stock, evidence as to the market value of the stock at the point of destination a day earlier than the stock would have reached there, if there had been no delay, is inadmissible.⁷⁸

Evidence as to Contract Price Where Carrier without Notice of Contract.—In an action against a carrier for damages to live stock in transportation, it was error to permit defendant to prove the price at which plaintiff had contracted to sell the cattle, where defendant had no notice of the contract.⁷⁹

Written Statement by Purchaser of Purchase Price and Expenses Incurred.—In a suit against a carrier for delay in shipment, a written statement of a merchant at the point of destination as to what he paid for the stock, and of extra expenses incurred by the plaintiff, is inadmissible.⁸⁰

Purchase Price as Evidence of Value.—Evidence of the price which the shipper paid for live stock is properly excluded in an action against the carrier for injury to the stock by delay en route.⁸¹

§ 1823. Weight and Sufficiency.—Evidence to Establish Market Value.—In order to establish the market value at the place of delivery it is necessary that the evidence show that cattle of like quality had been bought and sold at that place during the season in sufficient quantity and often enough to show a market value.⁸²

Knowledge of Carrier.—See ante, "Necessity for Notice of Circumstances," § 1799.

§ 1824. Instructions.—Conformity to Claims in Pleading.—In an action for delay in shipping cattle, a charge allowing recovery for expenses in keeping them at destination was error, where plaintiff only claimed damages for delay.⁸³

74. *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 500, 55 S. W. 186; *Houston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 237, 76 S. W. 580.

75. *Evidence of fall in market.*—*Gulf, etc., R. Co. v. McAulay* (Tex. Civ. App.), 26 S. W. 475, 476.

76. *Admissibility.*—*Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 109, 17 S. W. 834.

77. *Where there is no market at destination.*—*East Tennessee, etc., R. Co. v. Hale*, 85 Tenn. (1 Pickle) 68, 1 S. W. 620.

78. *Evidence of market value at destination a day before stock due to arrive.*—*Gulf, etc., R. Co. v. Hughes* (Tex. Civ. App.), 31 S. W. 411.

79. *Evidence as to contract price where carrier without notice of contract.*—*Ft. Worth, etc., R. Co. v. Hamm* (Tex. Civ. App.), 93 S. W. 215.

80. *Written statement by purchaser of purchase price and expenses incurred.*—*Texas, etc., R. Co. v. Scrivener*, 2 Texas App. Civ. Cas., § 328.

81. *Purchase price as evidence of value.*—*Galveston, etc., R. Co. v. Tuckett* (Tex. Civ. App.), 25 S. W. 150.

82. *Evidence to establish market value.*—*Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 348, 89 S. W. 968, reversing 86 S. W. 47.

83. *Conformity to claims in pleading.*—*Galveston, etc., R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 647, 35 S. W. 72.

Instruction Already Covered.—In an action against a railroad for delay in delivering cattle, it was not error to refuse to charge that the measure of damage for the delay is the difference between the market price of cattle on the day the cattle should have been put on the market and the day they could have been marketed, where a prior charge stated that the measure was the difference between the price of cattle at the time they were delivered and could have been placed on the market, and at the time when they should have arrived and been placed on the market, and the damage by depreciation in weight caused by the delay.⁸⁴

Misleading Instructions—Shipment of Part to Another Destination.—Where a carrier contracted to take cattle to S., for sale on the market there, but delayed so long in their transportation that on their arrival at S. the shipper, because of the delay, determined to and did ship part of them to C., and sell them on the market there, it is erroneous to charge that the measure of damages is the difference between their market value at the time they reached their "place of destination" and their market value at the same place had they arrived when they should, as the jury may infer that C. was the "place of destination" as to the cattle sent there, and the carrier is not responsible for the market value of the cattle at that place.⁸⁵

§§ 1825-1826. Judgment—§ 1825. Measured in United States Money on Shipment to Mexico.—In action for detention in shipment of cattle from Laredo, Texas, to city of Mexico, judgment for plaintiff should be measured in United States money, as its value was at time of damage.⁸⁶

§ 1826. Excessive Damages.—Where under the evidence the jury would have been justified in finding a larger sum than that awarded, the verdict will not be set aside on the ground that it is excessive although they have gone a few dollars above the minimum losses proved or admitted in the evidence, but the verdict will be set aside when the evidence is too unsatisfactory to support a judgment for the amount rendered. Several instances are given in the footnotes.⁸⁷

84. Instruction already covered.—Texas, etc., R. Co. v. Boggs (Tex. Civ. App.), 40 S. W. 20.

85. Misleading instructions—Shipment of part to another destination.—Missouri, etc., R. Co. v. Quinn (Tex. Civ. App.), 29 S. W. 404.

86. Measured in United States money on shipment to Mexico.—Mexican Nat. R. Co. v. Garcia (Tex. Civ. App.), 26 S. W. 780.

87. Inadequate or excessive damages.—Verdict for \$3,818.51 damages for railroad's failure to ship and deliver cattle within time agreed, whereby they sold for less than they would have brought if delivered in time, held not excessive. Texas, etc., R. Co. v. Nicholson, 61 Tex. 491, 598.

In an action against a carrier for delay in delivering cattle shipped, evidence that the cattle sold for \$5,527.55, and that, had they been delivered in proper time and in proper condition, they would have sold for from 25 to 35 per cent more, warrants a verdict for \$745. Missouri Pac. R. Co. v. Russell (Tex.), 18 S. W. 594.

Verdict for \$2,000 where whole train load injured.—Evidence that a train load of cattle, after having been twenty hours

on the road, were delayed five hours on side tracks, without rest, food, or water, when a delay of only thirty minutes or an hour was necessary to transfer to a connecting carrier's line; that while thus delayed they hooked, horned, and bruised each other, and shrunk in weight, and were in bad condition upon reaching their destination, five hours later—is sufficient to sustain a verdict of \$2,000 damages. Texas, etc., R. Co. v. Truesdell, 51 S. W. 272, 21 Tex. Civ. App. 125.

Excessive recovery for loss in market value.—In an action against a railroad company for delay in delivering cattle shipped, it appeared that there was a delay of twenty-six hours in delivering the cattle, during which time the market fell twenty-five cents on the one hundred pounds, which, after deducting the ordinary loss of weight, would have amounted to \$769.25. There was a verdict for \$865. On account of the delay, and because the cattle had not been properly fed and watered, they were in such poor condition that they could not be put on the market on their arrival, but had to be held until the next day, when there was a further decline of ten cents on the one hundred pounds. The cattle sold for

Damage Awarded Not Above Amount Estimated by Witnesses.—Where several witnesses are permitted without objection to estimate the damage caused to the cattle by the unusual delay, and the amount allowed did not reach the limit testified to, the damage found was not excessive.⁸⁸

Verdict for Full Amount of Damages against One Connecting Carrier.—Where two connecting carriers were sued for injuries to cattle carried over both roads, and a verdict for the full amount of damages demanded was rendered against one road, the verdict is excessive, the evidence tending to show both roads negligent.⁸⁹

§§ 1827-1871. Liability of Carrier for Loss or Injury—§ 1827. In General.—A common carrier is liable for any loss or injury to live stock intrusted to him for transportation, unless it is able to show that the loss or injury was caused by the act of God or the public enemy, or that it resulted from the natural disposition and exertions of the animals themselves.⁹⁰

§ 1828. Liability as for Carriage of Goods.—A carrier assumes the same responsibility for the safe carriage and delivery of animals as in the carriage of other property, except injuries resulting from the nature, habits, propensities, viciousness, or other inherent qualities of the animals.⁹¹

§ 1829. Liability as Insurer.—A common carrier of live stock is generally an insurer of their safe delivery to the consignee against loss or damage.⁹² A common carrier is an insurer for safe delivery of live stock, and, as such, answerable for every loss which can not be attributed to the act of God, the public enemy, or the natural or proper vices of the animals themselves, and, as in the case of loss by the act of God or the public enemy, the burden is on the carrier to show exemption from liability, so also it is in the case of loss or death resulting from the nature or vice of the animal.⁹³

above the average price. Out of thirty-one lots sold on the same day, twenty-six sold for less and only four for more. Held, that the evidence was too unsatisfactory to sustain a judgment for the amount of the verdict. *Missouri Pac. R. Co. v. Russell* (Tex.), 15 S. W. 206.

88. Damage awarded not above amount estimated by witnesses.—*St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

89. Verdict for full amount of damages against one connecting carrier.—*Gulf, etc., R. Co. v. Lee* (Tex. Civ. App.), 65 S. W. 54.

90. Loss or injury.—*Chicago, etc., R. Co. v. Woodard*, 72 N. E. 558, 164 Ind. 360, petition for rehearing overruled, 73 N. E. 810, 164 Ind. 360; *Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

91. Liability as for carriage of goods.—*Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

A carrier is liable for safe transportation and delivery of cattle, the same as for other property, except so far as the viciousness or unruliness of particular animals or their liability to disease, etc., may interfere with the transportation of them. *McCoy v. K. & D. M. R. Co.*, 44 Iowa 424.

The common-law liabilities of carriers attach to the carriers of animals, modi-

fied only so far as the cause of damage for which recompense is sought is a consequence of the conduct or propensities of the animals undertaken to be carried. *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Bamberg v. South Carolina R. Co.*, 9 S. C. 61, 30 Am. Rep. 13.

92. Liability as insurer.—*Chicago, etc., R. Co. v. Slaterry*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

Where plaintiff's horses were destroyed by a conflagration while in charge of a common carrier, the loss was in no wise connected with or the result of any infirmity in the animals themselves, so as to raise the question of the negligence of care of the carrier, but was one falling under the common-law rule, which makes the carrier an insurer of the safe delivery of goods committed to it for transportation. *Stiles v. Louisville, etc., R. Co.*, 110 S. W. 820, 33 Ky. L. Rep. 625.

93. Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; *Louisville, etc., R. Co. v. Cecil*, 145 Ky. 271, 140 S. W. 186.

A carrier is an insurer against loss or injury to the stock, except such as occurs through the intervention of an act of God, the public enemy, the natural vice of the animals, or the act of the owner. *Libby v. St. Louis, etc., R. Co.* (Mo. App.), 117 S. W. 659.

A carrier of live stock is an insurer of the safe delivery thereof, except where

In Absence of Negligence.—A carrier of live stock is not an insurer to the extent of being liable for loss thereof or damage thereto from Texas fever contracted in transit, in the absence of negligence in exposing the stock to the disease.⁹⁴

Where Due Care and Diligence Exercised.—That an express company's employee used due care and diligence according to his best knowledge does not excuse liability for death of part of fish shipped; the company's duty being fixed by law, and not measurable by the employees knowledge.⁹⁵ Where a horse became frightened while in the custody of the carrier and ran away, but no fault was attributable to the carrier as to either the place where or the means by which the horse was fastened, the carrier was not liable.⁹⁶

Insurer beyond Legal Liability.—Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in cases where the act of God or inevitable accident excuses the nonperformance of a contract.⁹⁷

Under Texas Statute.—Under the statute of Texas, a railway company after receiving cattle for shipment, becomes an insurer of them, as in the case of other property which it is bound to transport, against loss from any cause, except the act of God or of the public enemy, the act of the owner, vicious propensities or inherent character, or, as it is sometimes called, the "proper vice" of the animals. This is the liability imposed upon the common carrier by the common law, and the statute declares that the liabilities of carriers in this state shall be the same as prescribed by the common law.⁹⁸ Where a carrier receives live stock in good condition for shipment, the carrier is liable for their safe delivery, and can be excused only on the ground that an act of God, the public enemy, the inherent vice of the animals, or some conduct of the shipper was the cause of loss or injury.⁹⁹

§ 1830. Liability for Negligence.—A carrier which receives and accepts live stock for transportation is bound to take reasonable care of them, and is liable to the owner if damages or loss ensues from its failure to take such care.¹ A carrier of live stock is liable for the results of any negligence to which it contributes, though its conduct may not have been the sole cause of the injury.²

"**Rough handling,**" without a further finding that such rough handling was

injury results from an act of God, the public enemy, or from the inherent propensities of the stock. *Baltimore, etc., R. Co. v. Clift*, 134 S. W. 917, 142 Ky. 573.

The general rule of the absolute liability of a common carrier for the safe transportation and delivery of property committed to it for carriage is applicable although the property consists of live stock, but subject to the exception that it is not an insurer against injuries resulting from the inherent nature or propensities of the animals, and without fault of the carrier. *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

94. In absence of negligence.—*Baltimore, etc., R. Co. v. Dever*, 112 Md. 296, 75 Atl. 352, 26 L. R. A., N. S., 712, 21 Am. & Eng. Ann. Cas. 169.

95. Where due care and diligence exercised.—*Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

96. Kaplan v. Midland R. Terminal Co., 88 N. Y. S. 945.

97. Insurer beyond legal liability.—*Hutch, on Carr.*, 2 Ed., §§ 171, 172. In-

ternational, etc., *R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 14, 27 S. W. 680, affirmed in 87 Tex. 311.

98. Under Texas statute.—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567, 2 Am. St. Rep. 494; *Texas, etc., R. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643, 644; *International, etc., R. Co. v. Nowaski*, 48 Tex. Civ. App. 144, 106 S. W. 437; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 104 S. W. 1075; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21, 21 S. W. 622; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 163, 2 S. W. 574; *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

99. International, etc., R. Co. v. Nowaski, 106 S. W. 437, 48 Tex. Civ. App. 144.

1. Liability for negligence.—*Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393.

2. (Wisecarver v. Chicago, etc., R. Co.), 141 Iowa 121, 119 N. W. 532.

negligently done, will not entitle the owner to damages. A negligent handling and a rough handling are not necessarily synonymous. A certain degree of rough handling may have occurred even though the care of an ordinarily prudent person may have been exercised on the part of the carrier's agents and employees engaged in the transportation.³

Loss from Disease.—A carrier is not liable for the death of a mare due to an attack of meningitis, of which it was not forewarned, when it did all in its power to care for the animal after the attack.⁴

Gross Negligence.—A railroad company is guilty of gross carelessness in making a "flying switch," whereby a freight car is kicked violently against another containing horses, thereby injuring them.⁵

A cause of unavoidable delay in shipment is no excuse for failure to exercise that degree of care required of a common carrier in the transportation of stock.⁶

Custom of Other Carriers.—In an action against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, he can not give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise.⁷

What Amounts to Negligence.—A car stall in which a horse was transported by a carrier is "reasonably safe" when it is such as a person of ordinary prudence would provide.⁸ An express company's failure to tie a calf shipped by express in a crate is not negligence in an action for loss of the calf by breaking out of the crate.⁹

§ 1831. Proximate Cause.—A carrier is liable for such loss of or injury to live stock as arises proximately from its act.¹⁰ An instruction, in an action

3. An instruction in an action for injury to a live-stock shipment that the shipper was entitled to damages for "rough handling" is not cured by a recovery being elsewhere made to depend on a finding of negligence, rough handling not necessarily being negligent handling. *Ft. Worth, etc., R. Co. v. James*, 87 S. W. 730, 39 Tex. Civ. App. 408.

The clauses of the charge in an action for injury to a shipment of cattle, in which the right to recover was submitted, having explicitly made such right to depend on a finding that the delays and rough handling alleged constituted negligence, and in another clause the jury being instructed that they could not allow anything for such shrinkage or damage as would be ordinary and reasonable in a shipment of cattle over such route, but in estimating the damages, if any, they would take into consideration only such as may have been sustained by the cattle by reason of unreasonable delays and rough handling, "rough handling" in such clause, as well as in one in which it was charged that if defendants transported said cattle with reasonable dispatch, and did not handle them roughly, plaintiff could not recover, is to be treated as meaning such unreasonable and negligent handling as was beyond the natural and usual way of handling such shipments. *Southern Kansas R. Co. v. Yarbrough*, 109 S. W. 390, 49 Tex. Civ. App. 407.

A railroad is liable to the shipper of cattle for its failure to provide suitable and proper means of carrying them, and

for keeping them in cars an unusual time and handling them in a rough manner. *Missouri, etc., R. Co. v. Truskett*, 53 S. W. 444, 2 Ind. T. 633.

4. **Loss from disease.**—*Klair v. Wilmington Steamboat Co. (Del.)*, 4 Pen. 51, 54 Atl. 694.

5. **Gross negligence.**—*Chicago, etc., R. Co. v. Calumet Stock Farm*, 96 Ill. App. 337, judgment affirmed in 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68.

6. *Chicago, etc., R. Co. v. Slaterry*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

7. **Custom of other carriers.**—*Miller v. Pendleton (Mass.)*, 8 Gray 547. See *Lewis v. Smith*, 107 Mass. 334.

8. **What amounts to negligence.**—*Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

9. *Deake v. United States Exp. Co.*, 172 Mich. 451, 138 N. W. 196.

10. **Proximate cause.**—*Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507.

A carrier is not liable for the loss of horses through sickness, where it did not appear that such sickness was caused by the negligence of the carrier. *Schoenfeld v. Louisville, etc., R. Co.*, 21 So. 592, 19 La. Ann. 907.

In an action against a carrier for damages to a dog in transportation, an instruction to find for defendant if the consignee receipted for the dog in good condition, and after such receipt the dog developed disease from which it died, is properly refused, since such request did

for injury to a live-stock shipment, that a shipper was entitled to recover from the carrier such damages as might have resulted from unreasonable delay or unusually rough handling instead of such damages as proximately resulted therefrom, is erroneous.¹¹

Leaking Tanks.—Where it is shown that horses were shipped by rail during cold weather, and that while in cars they were wet by water leaking from water tanks on cars, and that some of them became sick with pneumonia and others with catarrhal fever, there can be no recovery of damages for negligence in allowing tanks to leak unless sickness is shown to have been caused thereby.¹²

Stock Pen Out of Repair.—The negligence of a carrier in permitting the gate of a stock pen to remain out of repair is the proximate cause of injuries to cattle escaping through the gate and being frightened by a passing train.¹³

§ 1832. Time Liability Arises.—A railroad company's liability as a common carrier for damage to stock begins when it receives stock for transportation.¹⁴ Where cattle have been delivered to and accepted by a railroad in its loading pens, the company is liable as a common carrier for damages to the cattle from the time of delivery.¹⁵ A carrier is liable for damages to live stock to be transported from injury caused by the negligence of its servants after but not before, the property was received by it for transportation.^{15a}

§ 1833. Liability for Negligence of Agent.—A contract with a carrier for the transportation of horses stipulated that the horses were to be accompanied by their grooms. The horses were admitted to the inclosure, where the carrier usually received such freight, and the carrier was notified thereof. In the process of loading the horses one of them was injured. Though the agents of both parties were engaged in loading when the injury occurred, there was a delivery to the carrier.¹⁶ Where a shipper of an animal accompanying the same, requested the agent of the express company in charge of the consignment to aid him in placing the animal where it could get more air and prevent it from dying by overheating, and, on the agent declining to do so, the animal died, the agent is guilty of neglecting his plain duty under the circumstances, and the carrier is liable for his negligence.¹⁷

Representations as to Time of Shipment.—Where plaintiff showed that he would have cared for his cattle at a junction point, either in the yards of the connecting carrier or elsewhere, so as to prevent injury received while standing in the cars, but for the assurance of defendant's agent that the cattle could be forwarded at once, it can not be claimed that the agent's representations were not the proximate cause of the injury because the yards of the connecting railroad would not have held all the cattle.¹⁸

not include as a necessary element of defendant's nonliability that the disease did not originate from injury received in the transportation. *Southern Exp. Co. v. Ashford*, 28 So. 732, 126 Ala. 591.

11. *Ft. Worth, etc., R. Co. v. James*, 39 Tex. Civ. App. 408, 87 S. W. 730.

12. **Leaking tanks.**—*Weed v. International, etc., R. Co.*, 21 Tex. Civ. App. 689, 690, 53 S. W. 356.

13. **Stock pen out of repair.**—*Texas, etc., R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162, reversing 36 S. W. 1111.

14. **Time liability arises.**—*St. Louis, etc., R. Co. v. Mitchell*, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S. 546; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 188, 23 S. W. 754; *Galveston, etc., R. Co. v. Jackson* (Tex. Civ. App.), 37 S. W. 255; *Gulf,*

etc., R. Co. v. Trawick, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948.

When live stock is delivered to a carrier for transportation, its liability commences when the stock is delivered to it at its stock pens or warehouses for shipment. *Louisville, etc., R. Co. v. Stiles*, 133 Ky. 786, 119 S. W. 786.

15. *Nelson v. Chicago, etc., R. Co.*, 78 Neb. 57, 110 N. W. 741.

15a. *Seaboard, etc., Railway v. Friedman*, 128 Ga. 316, 57 S. E. 778.

16. **Liability for negligence of agent.**—*Bowie v. Baltimore, etc., R. Co.*, 1 MacArthur (8 D. C.) 609.

17. *United States Exp. Co. v. Council*, 84 Ill. App. 491.

18. **Representations as to time of shipment.**—*St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035.

§§ 1834-1843. Liability in Particular Instances—§ 1834. Furnishing and Repairing Cars.—A carrier of live stock is bound to furnish cars suitably equipped to safely transport horses to their destination, and is liable for injuries to them from a failure to do so.¹⁹ Where an express company, having contracted to transport a shipment of horses, assumed care of them while the car into which they had been loaded was being repaired, it was bound to use ordinary care; and it was no answer to a charge of negligence that its care of the horses was voluntary.²⁰

§ 1835. Careless Moving of Cars.—A carrier is liable where it injured cattle in a car by kicking the car against another standing on a switch.²¹

§ 1836. Carriage beyond Destination.—A railway company is liable for damages resulting from its negligently carrying cattle beyond the destination specified by the shipper.²²

§ 1837. Exposing Stock to Fire, Weather or Disease.—The placing of a car bedded with straw, containing valuable live stock, so near the engine that sparks therefrom could easily ignite the straw, and thus burn up and consume the car and its contents, is negligence.²³

Exposing to Inclement Weather.—If a carrier, while transporting a car load of live stock, for its own convenience sets the car out on a side track, and leaves it for several hours exposed to extreme cold, its obligation to take the necessary steps for protecting the stock is of the highest order known to due care, and such obligation is not modified by the shipper accompanying the stock under a special contract, which requires him to provide feed and water.²⁴ Where a carrier, having contracted to ship certain horses on a through train, in fact, shipped them on a way freight, and, after keeping them in the cars for an excessive period, unloaded them in improper stock pens, from which they were permitted to escape and roam over the prairies without food or shelter in a blizzard, and after the stock was recovered they were again placed and kept in the car for several hours before they were moved, when they were in a weakened condition, without notice to plaintiff, there was evidence of negligence on the part of the carrier.²⁵

Exposing to Disease.—A railroad company transporting cattle is chargeable with notice that Texas or splenic fever is infectious or contagious.²⁶

§ 1838. Negligent Delivery.—Where a carrier contracted to ship live stock on a particular train, and by reason of their being shipped on an earlier train, and the consequent failure of the shipper to be present to receive them, one of them died from the long confinement, the carrier is liable for the loss.²⁷

§ 1839. Liability for Delay.—When a carrier failed to carry a shipment of live stock within a reasonable time and failed to give the same reasonable

19. **Liability in particular instances.**—Chicago, etc., R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

20. **Kimball v. American Exp. Co.**, 76 N. H. 81, 79 Atl. 492.

21. **Careless moving of cars.**—Illinois Cent. R. Co. v. Kerl, 77 Miss. 736, 27 So. 993.

22. **Carriage beyond destination.**—Missouri, etc., R. Co. v. Hayes, 74 Kan. 880, 88 Pac. 64.

23. **Exposing stock to fire, weather or disease.**—McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689.

24. **Exposing to inclement weather.**—Colsch v. Chicago, etc., R. Co. (Iowa), 117 N. W. 281.

25. **Drake v. Great Northern R. Co.**, 24 S. Dak. 19, 123 N. W. 82.

26. **Exposing to disease.**—Dorr Cattle Co. v. Chicago, etc., R. Co., 128 Iowa 359, 103 N. W. 1003.

A carrier, being negligent in exposing cattle while in transit to Texas fever, is liable for the loss, though not occurring till after delivery. Baltimore, etc., R. Co. v. Dever, 112 Md. 296, 75 Atl. 352, 26 L. R. A., N. S., 712, 21 Am. & Eng. Ann. Cas. 169.

27. **Negligent delivery.**—Harrison v. Weir, 69 N. Y. S. 957, 34 Misc. Rep. 519, motion to dismiss appeal denied, 73 N. Y. S. 1119, 68 App. Div. 25.

care, the shipper was entitled to recover the damages resulting from the delay and from the negligent care.²⁸

§ 1840. Liability for Deviation.—It is elementary law that if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss, which occurs either on his own or his connecting lines. By the deviation he becomes an insurer of the goods. It is also settled that when goods are delivered to a carrier for transportation to a designated point, it is his duty, as a general rule, to transport them by the safest and most direct route. If instructed as to the route, he selects a different one, he becomes responsible for any loss that may occur in transit. If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he should be held liable for all losses, when shipped over a route contrary to the express instruction of the shipper.²⁹ Where a carrier deviates without necessity from the regular and usual course, he is held responsible for any loss which may occur, whether by the act of God or from any other cause.³⁰ But in another case it is stated that the contracting carrier is liable for injuries to a shipment diverted from the route contemplated by the contract, and this though the diversion was compelled by necessity.³¹

Caused by Act of God.—But where the deviation from the usual or stipulated route was caused by unprecedented floods, which rendered it absolutely necessary for the sheep to be carried over another route to prevent their loss, or at least a much greater delay than actually occurred, it is not liable.³²

Stock Sold at Intermediate Point.—Where a contract for the shipment of stock provided that it was to be unloaded at a point intermediate between the point of shipment and of destination, and the agent who made the contract knew that the shipper intended to sell the stock at this intermediate point, the carrier on failure to ship the stock to the intermediate point, was liable for all damages resulting; and evidence that the shipper had made arrangements with a certain company for the handling of the stock at the intermediate point, that this company would have paid him a rebate for the use of his cars from that point to the place of destination, that the animals contracted a disease at the place to which they were erroneously shipped, and that the shipper incurred certain

28. **Liability for delay.**—Cincinnati, etc., R. Co. v. Pendleton, 96 S. W. 434, 29 Ky. L. Rep. 721.

29. **Liability for deviation.**—Texas, etc., R. Co. v. Eastin, 100 Tex. 556, 561, 102 S. W. 105; Gulf, etc., R. Co. v. Irvine (Tex. Civ. App.), 73 S. W. 540.

30. Hutch. on Carr., § 190; International, etc., R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 12, 27 S. W. 680.

Suit for injuries sustained by live stock during shipment. Prior to May 31, 1889, the express company contracted with Jackson to make shipment of thoroughbred horses from Belle Meade, Tenn., to Hunt's Point, N. Y., where they were to be sold on June 17, 1889. This shipment was to be made in safe and suitable cars, by fast train, in charge of company's agent, and to arrive at destination some days before the sale. The Johnstown flood occurred on May 31, 1889, breaking the company's ordinary line for eastern transportation. This was known to both parties when, on June 6, 1889, the company received the horses and began their shipment. The company selected one of several available lines as a substitute for

the broken line, and the proof tends to show that it did not select the best one. The proof also tends to show that the company did not take the precaution to secure transportation in advance. Upon the substitute line selected the cars containing the horses were hitched to a coaling train that conveyed them only seventy-two miles in twelve hours, during which the horses, abandoned by the company's agent, were subjected to such treatment as resulted in serious injury. It was held, the express company is liable for the injuries sustained by the horses. The act of God—the Johnstown flood—was not the proximate cause of the injury. It occurred before the shipment began, and was then fully known to the company. The subcarrier's negligence was imputable to the express company, its principal. Adams Exp. Co. v. Jackson, 92 Tenn. (8 Pickle) 326, 21 S. W. 666.

31. Missouri, etc., R. Co. v. Leibold (Tex. Civ. App.), 55 S. W. 368.

32. **Caused by act of God.**—International, etc., R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 12, 27 S. W. 680.

expenses in reshipping them to intermediate point, was properly admitted.³³

Liability of Agent of Carrier.—Where a railroad agent shipped cattle over a certain route contrary to the express directions of the shippers, he was guilty of misfeasance, and liable for loss occurring by reason of the shipment over the route selected by him.³⁴

• **§ 1841. Liability for Injury to Cattle in Yards.**—A common carrier of live stock is required to maintain reasonably safe stock pens for the convenience of shippers.³⁵ Where a carrier of live stock provides stockyards at its stations to receive stock for shipment, it should keep them in reasonably safe condition, and the failure so to do is negligence.³⁶ A carrier receiving cattle for shipment, and putting them into pens till they are shipped, is liable for injury resulting to them from defects in the pens due to its negligence.³⁷ A railroad company which constructs yards by the side of its track to facilitate the loading and unloading of stock is not responsible as a common carrier for stock placed in such yards by the owner to await shipment, but is bound only to the exercise of ordinary care in the construction and maintenance of its yards.³⁸

Cattle Escaping from Yards.—A carrier which furnished pens for cattle to be put into, for purposes of shipment, is liable for injury to them from escaping, it having so negligently constructed or maintained the pens that they were insufficient to hold the cattle.³⁹ The negligence of a carrier in permitting

33. *Stock sold at intermediate point.*—Southern Kansas R. Co. v. Cox, 95 S. W. 1124, 43 Tex. Civ. App. 79.

34. *Liability of agent of carrier.*—Texas, etc., R. Co. v. Eastin, 100 Tex. 556, 102 S. W. 105.

35. *Liability for injury to cattle in yards.*—Reading v. Chicago, etc., R. Co., 165 Mo. App. 123, 145 S. W. 1166.

36. *St. Louis, etc., R. Co. v. Beets*, 89 Pac. 683, 75 Kan. 295, 10 L. R. A., N. S., 571.

37. *Galveston, etc., R. Co. v. Jackson* (Tex. Civ. App.), 37 S. W. 255.

Where cattle were billed for shipping over a railroad, and placed in stock pens maintained by such railroad at its station for use of its patrons, such railroad became responsible for damages arising from the insecurity of such pens. *Tracy v. Chicago, etc., R. Co.* 80 Mo. App. 389.

A carrier of live stock is required to furnish pens where the animals can be safely kept while waiting to be loaded for transportation; and it is at least open to the jury to find that pens on ground sloping to the south, with no shade, shelter, or water thereon, and an embankment to the south, shutting off the breeze, are not safe pens for fat hogs during June. *Lackland v. Chicago, etc., R. Co.*, 74 S. W. 505, 101 Mo. App. 420.

Plaintiff in an action for injuries to cattle during their transportation over defendant's railway having shown that when the cattle were presented for shipment the pens were not sufficient to accommodate them, it was not error to instruct that it was defendant's duty to furnish stock pens sufficient to accommodate ordinary shipments. *Texas, etc., R. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188.

Rev. St., art. 4519, requires a railroad to

have at each place of unloading freight suitable buildings and inclosures to protect the same from damages. The evidence showed that plaintiff's cattle reached their destination at midnight, and were then offered him upon payment of the freight. He did not have the money with him, and refused to receive the cattle that night, whereupon they were unloaded, and put in the company's pens. The weather was cold and wet, and the plaintiff, who was a stranger in the city, did not know where to take his cattle. Held, that the evidence supported the finding that the plaintiff was not obliged to receive the cattle when tendered under such circumstances, and accordingly the company's liability as a carrier did not cease upon the unloading of the cattle. *Houston, etc., R. Co. v. Trammell*, 68 S. W. 716, 28 Tex. Civ. App. 312.

38. *Missouri, etc., R. Co. v. Byrne*, 40 C. C. A. 402, 100 Fed. 359.

39. *Cattle escaping from yards.*—*Missouri, etc., R. Co. v. Byrne*, 3 Ind. T. 740, 49 S. W. 41.

Where a shipper of live stock arranges with the station agent to ship two car loads of cattle, and afterwards places the cattle in the company's stockyard for shipment, and one entire side of the pen falls down because the posts are rotten off, and the cattle escape, the company is liable for the resulting injuries. *St. Louis, etc., R. Co. v. Beets*, 89 Pac. 683, 75 Kan. 295, 10 L. R. A., N. S., 571.

It appeared that plaintiff's horses were unloaded at one of defendant's yards en route, that they escaped from the pen in which defendant had placed them, and were damaged while at large. Held, that defendant was an insurer against damage from such a cause. *Texas, etc., R. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643,

the gate of a stock pen to remain out of repair, is the proximate cause of injuries to cattle escaping through the gate on being frightened by a passing train.⁴⁰

Cattle in Pens for Future Shipment.—Where a railroad company constructs yards by the side of its track to facilitate the loading and unloading of stock, it is not responsible as a carrier for stock placed in such yards for future shipment, but subject to the right of the shipper to remove for feed and water, before the shipment is actually made; but the liability is that of an ordinary bailee.⁴¹

Notice to Carrier of Placing Cattle in Pens.—A carrier is not relieved from liability for injury to cattle placed in its pens awaiting transportation, under an agreement with its agents that they were to be placed therein on a certain day, by the mere fact that the carrier did not have actual notice of the cattle having been placed in the pens on the day agreed upon, where the cattle were put in the pens on that day, and injured therein because of negligence of the carrier.⁴²

Injury from Delay in Shipment.—Where a shipper placed his cattle in pens for shipment, when he knew there were no cars there in which to ship them, and permitted them to remain in the pens and await the arrival of the cars without feeding and watering them because relying on the carrier's representations that cars would soon be there, the carrier is liable for the injury resulting from such failure.⁴³

In Yards for Food, Water and Rest.—Where cattle were unloaded for food, etc., in compliance with the federal statute, and while in the stockyards were burned without any negligence of the carrier, it was liable for the loss.⁴⁴

§ 1842. Liability for Loss after Delivery to Consignee.—A carrier of live stock is not liable for damages occurring to the stock after delivery to the shipper or consignee.⁴⁵ But the fact alone that the cattle died after their delivery at the point of destination would not relieve the carrier of liability. The true test of its liability in this connection depends upon whether the death of such cattle was the result solely of injuries received by reason of the carrier's negligence while transporting them. The damage is not too remote because the cattle died after delivery.⁴⁶ Where horses shipped received injuries by a carrier's negligence, the carrier was liable for the death or permanent effects of such injuries, whether such death or permanent injuries became known before or after the horses left its line, and this, though the carrier limited its liability to such injuries as occurred on its own line.⁴⁷

§ 1843. Liability for Loss on Connecting Carrier.—A common carrier can not be held liable for damages resulting to live stock beyond its own line, in the absence of a contract assuming such liability.⁴⁸ A carrier is liable for neg-

40. Judgment, 36 S. W. 1111 affirmed in Texas, etc., R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162.

41. Cattle in pens for future shipment. —Chicago, etc., R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678.

42. Notice to carrier of placing cattle in pens.—Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank, 81 S. W. 1050, 36 Tex. Civ. App. 293.

43. Injury from delay in shipment.—Gulf, etc., R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110.

44. In yards for food, water and rest.—Louisville, etc., R. Co. v. Stiles, 133 Ky. 786, 119 S. W. 786.

45. Liability for loss after delivery to consignee.—Chicago, etc., R. Co. v. Young (Tex. Civ. App.), 107 S. W. 127.

46. Missouri Pac. R. Co. v. Edwards, 78 Tex. 307, 310, 14 S. W. 607.

47. Texas, etc., R. Co. v. Stephens (Tex. Civ. App.), 86 S. W. 933.

48. Liability for loss on connecting carrier.—Ft. Worth, etc., R. Co. v. McNulty, 7 Tex. Civ. App. 321, 26 S. W. 414; Galveston, etc., R. Co. v. Noelke (Tex. Civ. App.), 110 S. W. 82.

The court charged that plaintiff could not recover unless defendant failed to transport the cattle within a reasonable time, or failed to use ordinary care in handling and transporting them, and that defendant would be liable only for injuries occasioned by its negligence, and while in its possession on its own line. Held, that the contention that an instruction that the measure of damages for cat-

lently loading a log so as to protrude and strike car in which horses were loaded, though injury occurred after car had passed to another line.⁴⁹

Recovery Over against Connecting Carrier.—Where an initial carrier shipped cattle over certain connecting lines contrary to the express directions of plaintiffs, thereby becoming an insurer of the cattle, it was entitled to recover against a connecting carrier for negligence of the latter for which it was adjudged liable, and to be subrogated to the right of plaintiff.⁵⁰

§§ 1844-1852. Circumstances Exempting from Liability as Insurer

—**§ 1844. In General.**—Carriers are liable for loss or injury to live stock, unless caused by the act of God, or the public enemy, or the negligence of the shipper, or by the "proper vice" of the animals,⁵¹ but must use ordinary care to prevent loss or injury caused from such vice, and, to relieve it from liability, it must appear that the vice or natural propensity was the sole proximate cause of the loss or injury.⁵²

§§ 1845-1846. Loss Arising from Act of God—§ 1845. In General.

—A carrier of live stock is not liable for injury thereto resulting from the "act of God."⁵³ Where plaintiffs delivered to defendant carrier certain cattle, to be transported in a freight train, but while in transit the train was caught in a blizzard, and the cattle froze to death, the proximate cause of the loss was an act of God, exempting the carrier from liability.⁵⁴

Where Act of God Could Have Been Anticipated.—In an action against a carrier for damages suffered through negligence in accepting horses for transportation without having proper means and facilities to transport and deliver them, plaintiffs need only show delivery to defendant, that it failed to carry them to their destination and deliver them, and that there was loss of or injury to some of them, and to acquit itself of responsibility defendant must show that, when it accepted them, it could not by ordinary care have known or anticipated that it could not discharge the obligation assumed, and it does not avail it that after acceptance its road was disabled by a flood, however unprecedented, if by reasonable diligence it could have anticipated that such would be the case. A carrier was bound to notice signs of approaching danger such as to awaken apprehension when means of avoiding it were available, and, when the contract was made and the stock accepted, it assumed the risk, if it neglected to avail itself of information of danger which it had or might have had by exercising ordinary diligence.⁵⁵

tle injured in transportation was the difference between their market value at the time and place of destination, in the condition in which they would have arrived if "properly handled and transported," and their market value in the condition in which they did arrive, was objectionable, as making defendant liable for injuries sustained on a connecting line, was without merit, when taken in connection with the other instructions. *Missouri, etc., R. Co. v. Chittim*, 60 S. W. 284, 24 Tex. Civ. App. 599.

49. *Galveston, etc., R. Co. v. Herring* (Tex. Civ. App.), 36 S. W. 129, 130.

50. Recovery over against connecting carrier.—*Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

51. Circumstances exempting from liability as insurer.—*Galveston, etc., R. Co. v. Powers*, 54 Tex. Civ. App. 168, 117 S. W. 459; *St. Louis, etc., R. Co. v. Lewellen Bros.* (Tex. Civ. App.), 116 S. W. 116.

A common carrier of goods is excused from liability for loss of or damage to live stock only in the event loss or damage results from the act of God or of the public enemy. *Cooper v. Raleigh, etc., R. Co.*, 36 S. E. 240, 110 Ga. 659.

52. *Galveston, etc., R. Co. v. Powers*, 54 Tex. Civ. App. 168, 117 S. W. 459.

53. Loss arising from act of God.—*McC Campbell v. Louisville, etc., R. Co.*, 150 Ky. 723, 150 S. W. 987.

Where the live stock is killed by reason of an unavoidable accident or by the act of God, unmixed with any negligence on the carrier's part, the carrier is not liable therefor. *New England, etc., Co. v. Paige*, 108 Ga. 296, 33 S. E. 969.

54. *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507.

55. Where act of God could have been anticipated.—Under Rev. Codes, § 5353, making a carrier liable for loss or injury

Climatic Conditions.—A carrier is not liable for loss or injury to live stock caused by unprecedented climatic conditions, where the provisions for the protection of stock are sufficient for conditions ordinarily prevailing.⁵⁶ A carrier is not liable for injury or loss caused by unprecedented floods.⁵⁷ A carrier, shipping stock accompanied by the owner, is not liable for loss occasioned by excessive heat in transit, in absence of evidence of negligence.⁵⁸ Though a carrier was responsible for delay in shipment of stock at New Orleans, it can not be held liable to the consignor in damages resulting from injury to his stock, the proximate cause of which was exposure to a severe storm that began after the stock left New Orleans.⁵⁹ Where, through the negligence of a carrier of live stock the cattle were so delayed that they had to be held over one day in December for a market, and in the meantime they sustained injuries by reason of cold and rain, the carrier was liable for the injuries so caused, since cold weather in that month was not an act of God which would excuse the carrier.⁶⁰

§ 1846. Where Carrier's Negligence Concurs.—The rule is well settled that if the negligence of a common carrier concurs with the act of God in causing damage to the property entrusted to it for transportation, it is liable for the damage caused by such concurring negligence, although it may have been contributed to by the vis major.⁶¹

Negligent Exposure to Inclement Weather.—Where the negligence of a carrier, intrusted with a shipment of cattle, exposes the cattle to inclement

from any cause whatever, except from some inherent defect, vice, weakness or spontaneous action thereof, or the act of a public enemy, or "any irresistible superhuman cause," and Rev. Codes, § 5354, providing that these exemptions do not apply if the carrier negligently exposes the stock to the cause of loss, a carrier is liable for accepting stock without suitable facilities for transportation, or when it knows, or by ordinary care should know, they will be exposed to injury or loss from any exempted cause mentioned. *Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

56. Climatic conditions.—*McC Campbell v. Louisville, etc., R. Co.*, 150 Ky. 723, 150 S. W. 987; *Louisville, etc., R. Co. v. Warfield*, 98 S. W. 313, 30 Ky. L. Rep. 352; *Ft. Worth, etc., R. Co. v. Galton*, 45 Tex. Civ. App. 67, 100 S. W. 166.

57. Floods.—Defendant railroad company had a large shipment of cattle owned by plaintiffs, to be taken over its line and delivered to a connecting carrier at Atchison, Kan. Owing to floods, it was unable to reach that place with the shipment, and was also notified by the connecting carrier that it could not receive and forward the cattle from there, because of wash-outs on its line. Neither road had yards in which they could be placed at Atchison, and defendant arranged with another company to forward them from Kansas City, and took them there, placing them in the stockyards. These yards had been in large use for many years, and, while the Kaw river, near them, was known to be very high, no flood had ever extended

to the yards. However, on the night after the cattle were placed therein an unprecedented rise occurred—many feet higher than had ever been known before—doing an immense amount of damage to property of all kinds in the valley, and flooding the stockyards. To prevent the cattle from drowning, they were driven into overhead viaducts leading from one portion of the yards to another, where they remained for more than a week; a large number dying from starvation, and the remainder being seriously injured. Held, that the proximate cause of the loss was the flood, and that defendant was not chargeable with negligence in not anticipating the same, nor liable for the loss. *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. 135, judgment affirmed in 147 Fed. 457, 77 C. C. A. 601, and 147 Fed. 463, 77 C. C. A. 607.

58. Cleve v. Chicago, etc., R. Co., 84 Neb. 158, 120 N. W. 959.

A railroad company is a common carrier of cattle, but as such is not responsible for losses occasioned by the cattle dying or being injured by heat, unless the loss or damage has been occasioned by some negligence or misfeasance of the company or its servants. *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

59. Herring v. Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322.

60. Texas, etc., R. Co. v. Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052.

61. Where carrier's negligence concurs.—*Atchison, etc., R. Co. v. Nation* (Tex. Civ. App.). 92 S. W. 823, 827, affirmed in 101 Tex. 628, no op.

weather, the carrier is liable for the resulting damage, although the weather also contributed to such damage.⁶²

§§ 1847-1848. Inherent Vice of Animals—§ 1847. In General.—A common carrier of live stock is exempt from liability for loss or injury caused by the nature and propensities of the animals, and which can not be prevented by foresight, vigilance and care.⁶³ Where the court defines inherent vice as a

62. Negligent exposure to inclement weather.—*Atchison, etc., R. Co. v. Nation* (Tex. Civ. App.), 92 S. W. 823.

63. Inherent vice of animals.—*United States*.—*Webster v. Union Pac. R. Co.*, 200 Fed. 597.

Alabama.—*South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

Delaware.—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

Florida.—*Summerlin v. Seaboard, etc., Railway*, 56 Fla. 687, 47 So. 557, 19 L. R. A., N. S., 191.

Illinois.—*Illinois Cent. R. Co. v. Brelsford*, 13 Ill. App. 251.

Indiana.—*Judgment*, 87 N. E. 555, reversed. *Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, 89 N. E. 951.

Iowa.—*Hanley v. Chicago, etc., R. Co.*, 154 Iowa 60, 134 N. W. 417; *McCoy v. K. & D. M. R. Co.*, 44 Iowa 424.

Kentucky.—*McC Campbell v. Louisville, etc., R. Co.*, 150 S. W. 987, 150 Ky. 723.

Minnesota.—*Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

Mississippi.—*Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418, 13 So. 698; *Louisville, etc., R. Co. v. Bigger*, 66 Miss. 319, 6 So. 234.

Missouri.—*Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151; *Foust v. Lee*, 138 Mo. App. 722, 119 S. W. 505.

New Jersey.—*Judgment*, 56 Atl. 128, 70 N. J. Law, 132, affirmed. *Lewis v. Pennsylvania R. Co.*, 59 Atl. 1117, 71 N. J. L. 339.

New York.—*Hayman v. Philadelphia, etc., R. Co.*, 8 N. Y. St. Rep. 86.

North Carolina.—*Harden v. Chesapeake, etc., R. Co.*, 157 N. C. 238, 72 S. E. 1042.

Texas.—*Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 104 S. W. 1075; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567, 2 Am. St. Rep. 494; *Texas, etc., R. Co. v. Snyder* (Tex. Civ. App.), 86 S. W. 1041; *Gulf, etc., R. Co. v. Staton* (Tex. Civ. App.), 49 S. W. 277, 278; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256,

266, 12 S. W. 530; *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131; *Thomas v. Wells-Fargo Exp. Co.* (Tex. Civ. App.), 95 S. W. 723.

While a common carrier of goods, who also transports live stock, is, as to the latter property, a common carrier, he is exempt from liability for loss or injury caused by the nature and propensities of the animals, and which can not be prevented by foresight, vigilance, and care. *Cooper v. Raleigh, etc., R. Co.*, 36 S. E. 240, 110 Ga. 659; *Burke v. United States Exp. Co.*, 87 Ill. App. 505; *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68.

In an action for injury to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock. *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68.

While a common carrier is an insurer of inanimate goods against loss and damage, except such as is inevitable or caused by public enemies, it is not liable, as an insurer of animals, against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care, being relieved from responsibility in the transportation of animals for such injuries as occur from or in consequence of their vitality. *Green v. Chicago, etc., R. Co.*, 137 S. W. 611, 156 Mo. App. 259.

An instruction in an action against carriers for injuries to a shipment of live stock that if the injuries to the cattle were the result of weakness of the cattle, or their condition was such that they were unable to make the journey without injury, the verdict should be for defendants, presents only another contingency on which the verdict should be for defendants, and does not impose on defendants the absolute duty to safely carry the cattle if they were not able to make such a journey. *Texas, etc., R. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

If injury to an animal occurred by reason of the nature and propensities of the animal and its nervousness and fright, without negligence of defendant, plaintiff could not recover, defendant carrier not being an insurer against such injury. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

The rule of the common law makes a common carrier responsible for the safe

fault not possessed by the ordinary of its kind, it is too restrictive.⁶⁴ A charge holding one of connecting lines of carriers of live stock liable for all injuries to cattle received on its line, is erroneous where it does not recognize the carrier's exemption from damage by ordinary shrinkage or the inherent weakness or vice of the cattle.⁶⁵

Mares with Foal.—The greater portion of the stock being mares with foal, there was an inherent defect, and the company is only liable for such damages as accrued from failure to exercise reasonable and necessary care.⁶⁶

Carrier Charged with Notice of Vice.—A carrier is not liable for the loss of live stock carried, if it die of disease or inherent weakness, or becomes sick without fault, or receives injury through its own vicious propensities, but this principle is not to be so extended as to relieve the carrier from the duty to take notice of the ordinary weakness, character, and propensities of domestic animals, and to make such provision against loss or injury therefrom as may reasonably be done.⁶⁷ A railroad company transporting cattle is chargeable with notice that Texas or splenic fever is infectious or contagious.⁶⁸

Unruly Bulls.—A charge that, if cattle were injured by getting together and breaking out of stock pens, and they did not do so from the defects in the gates and fastenings thereof, but from their inherent viciousness, to find for the carrier, sufficiently exempted the carrier from liability if the injuries occurred on account of the shipper's having confined vicious and unruly bulls in the pens.⁶⁹

Issue Not Pleaded by Carrier.—In an action against a carrier for injury

carriage and delivery of property intrusted to his care, unless he is prevented by the act of God or of the public enemy. But this rule is not applied in its full extent to the carriage of live stock. In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559.

Bad shipping conditions.—In an action against a railroad company to recover for damages to cattle shipped over defendant's road, a refusal to charge that "if the cattle, before and when loaded, were in bad shipping condition, and their condition was the cause of their injury, then plaintiff can not recover," is not erroneous, where the court charged that if the cattle, before and when loaded, were in bad condition, and their condition was the cause of their injury, then plaintiff can not recover, as the law does not recognize a shipping condition, as contradistinguished from their ordinary or general condition. *Felton v. Clarkson*, 53 S. W. 733, 103 Tenn. 457.

Analogous to injury by act of God.—A common carrier is liable for goods, except in case of damage from inevitable accident, as of lightning, etc., from public enemies, or from the intrinsic qualities of the goods; but, in transportation of animals, any damage caused by the animal's own viciousness or by the viciousness of other animals on board with it at the time, would come within the protection of this latter exception, by analogy, and the carrier is clearly excusable. *Hall v. Renfro*, 60 Ky. (3 Metc.) 51.

Horses seized with car fright.—A car-

rier notified a shipper to load his horses by a certain time, or the car would not be included in a train, which was done. Immediately after the horses were loaded, both the shipper and a caretaker departed, and about an hour later a stranger noticed that the horses were in an excited condition, and were biting, kicking, and trampling each other. There was no evidence that the carrier had negligently operated any train in the yards, or even that a passing train had frightened the horses, and the only reasonable inference was that the horses had been seized with "car fright," induced by their inherent propensities. Held, that the carrier was not liable to the shipper for his loss. *Quinby v. Union Pac. R. Co.*, 120 N. W. 453, 83 Neb. 777.

Under Montana statute.—Under the express provision of Rev. Codes, § 5353, a carrier of live stock is not liable for damage thereto from inherent vice or propensity. *Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

⁶⁴ *Texas Cent. R. Co. v. Hunter & Co.* 47 Tex. Civ. App. 190, 193, 104 S. W. 1075.

⁶⁵ *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84.

⁶⁶ **Mares with foal.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

⁶⁷ **Carrier charged with notice of vice.**—*Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212.

⁶⁸ *Dorr Cattle Co. v. Chicago, etc., R. Co.*, 128 Iowa 359, 103 N. W. 1003.

⁶⁹ **Unruly bulls.**—*Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.

to cattle by reason of a wreck due to its negligence, an instruction that the carrier is not liable for injuries done to the cattle by each other by reason of their inherent viciousness is properly refused, if the carrier has not raised such issue by pleading and proof, and no evidence of such injuries is brought out by the shipper.⁷⁰ But where the case as made by the shipper shows that the damages were due to an inherent vice of the cattle, he can not recover, though the carrier's pleadings do not raise the issue of inherent vice.⁷¹

Right to Have Defense Affirmatively Charged to Jury.—Where, in an action for injury to cattle during shipment, defendant pleaded that the injury was due to the weak and impoverished condition of the cattle, and there was evidence tending to sustain such plea, it was error for the court to refuse defendant's request for a charge affirmatively presenting such defense, although it was submitted in a negative form in the charge given.⁷²

Want of Vitality of Animals.—A common carrier of live stock is not liable for losses caused by the want of vitality of the stock, or which could not, by vigilance and foresight, be guarded against.⁷³

Viciousness of Other Animals.—A railroad company is not liable for injuries inflicted by one horse upon another while being carried in a car, if caused by the peculiar propensities of the horses to fright or bad temper, or by the fault of their owner in attaching their halters or not removing their shoes.⁷⁴

Where Shipper Does Not Accompany Stock.—In the absence of a special contract by a carrier to look after stock shipped over its line, a shipper who neglects to send a care taker with his cattle assumes all damages caused by their unduly crowding and injuring one another, and that which results from their natural restiveness and viciousness.⁷⁵

Where Injury Could Not Have Been Prevented by Due Diligence.—When transporting animals by railroad, the shipper is responsible for an injury not caused by an occurrence incident to the carriage of animals in a railroad car, and which could, from their peculiar nature and propensities, have been prevented by the exercise of diligence and care.⁷⁶

Known to Carrier.—A carrier of live stock must make proper provision for the stock respecting traits or conditions of which it has notice, and especially when the carrier makes stipulations in regard to such conditions.⁷⁷

§ 1848. Where Carrier's Negligence Concurs.—That a carrier may avoid liability for injuries to horses during transportation on the ground of their vices and natural propensities, it must appear that the injuries occurred by reason of such vices and natural propensities alone, or in conjunction with some innocent cause, and the burden is upon the carrier to prove that fact.⁷⁸ Where a carrier

70. Issue not pleaded by carrier.—Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834.

71. Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 29 S. W. 1110.

72. Right to have defense affirmatively charged to jury.—Texas, etc., R. Co. v. Dawson, 34 Tex. Civ. App. 240, 78 S. W. 235.

73. Want of vitality of animals.—Indianapolis, etc., R. Co. v. Jurey, 8 Ill. App. 160.

A railroad company was sued as a common carrier for the loss of a mare, which died on the car from overheating. It was in doubt whether the fault was in the mare or in the ventilation of the car. Held, that the jury were properly instructed that if a want of inherent vitality, irrespective of any fault of the company's servants, caused the death of the

mare, plaintiff, her owner, had no cause of action. Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54.

74. Viciousness of other animals.—Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

75. Where shipper does not accompany stock.—Heller v. Chicago, etc., R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541.

76. Where injury could not have been prevented by due diligence.—Clarke v. Rochester, etc., R. Co., 14 N. Y. 570, 67 Am. Dec. 205.

77. Known to carrier.—Harden v. Chesapeake, etc., R. Co., 157 N. C. 238, 72 S. E. 1042.

78. Where carrier's negligence concurs.—Chicago, etc., R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

accepts for transportation cattle which are weak and thin, but able to be transported, and its negligence proximately causes injury or concurs with the condition of the cattle in producing injury to them, the carrier, it seems, may be held liable for the full extent of the injury.⁷⁹

Negligent Delay.—Where the carrier carries the animals without any negligence on its part, there can be no liability for injuries where the vicious propensities or inherent bad condition of animals give rise to the damage in transit, without any fault of the carrier, but where there is evidence to show that cattle were subjected to great delay, and not properly treated en route, and even those not mares suffered injury therefrom, the carrier can not say that it is relieved from certain damages in respect to the mares because they were predisposed to injury from its negligence. Nor can it claim that the injuries to such mares were not such as should have been reasonably anticipated as the effect of negligent treatment.⁸⁰

Where Animals in Weak Condition.—In an action for breach of contract to furnish cars for the shipment of cattle, a requested instruction that if plaintiff's cattle were damaged, and were poor and weak, and their poor and weak condition, independent of any other causes, "aided, assisted, or contributed to the damage," then defendants were not liable for any damage that might have been occasioned by the condition of the cattle, was properly refused as misleading. It is difficult to see how a condition, independent of any other causes, could aid, assist, or contribute to the damage.⁸¹ In an action for injury to cattle during shipment, the court properly refused to charge that if their weak and impoverished condition "contributed to their death or injury," such demand so occasioned should be excluded. The defendant carrier having received the cattle for shipment, was bound to exercise ordinary care to transport them with reasonable dispatch, and was liable for negligence and unreasonable delay proximately resulting in injury, although the results were more disastrous than they would have been had the cattle been in good condition.⁸²

§ 1849. **Loss or Injury Caused by Shipper.**—Negligence on the part of the shipper as to the condition of the animals shipped does not constitute a defense unless it proximately contributes to the injury.⁸³ A shipper's default in failing to perform the duties required of him by a live stock transportation contract was no defense to the carrier's liability for its default, unless the default of the shipper was one of the causes of the damage.⁸⁴ Where, in an action against a carrier for injuries to cattle, the carrier claims that the cattle were weak from want of proper care prior to transportation, a requested instruction failing to require that the shipper's prior treatment of the cattle proximately caused, or contributed to cause, the injuries complained of, in order to preclude a recovery, is properly refused.⁸⁵

Knowledge and Intent of Shipper.—It is the duty of a railroad company as a common carrier to provide suitable and safe machinery and appliances in carrying on its business for the benefit of the public, and a shipper using defective appliances provided by the company, without careless conduct on his part, although knowing its defects, will not be deprived of his right to recover

79. Ft. Worth, etc., R. Co. v. Alexander, 36 Tex. Civ. App. 297, 81 S. W. 1015, affirmed in 98 Tex. 616, no op.

80. **Negligent delay.**—Gulf, etc., R. Co. v. Staton (Tex. Civ. App.), 49 S. W. 277, 278.

81. **Where animals in weak condition.**—Pecos River R. Co. v. Latham, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

82. Texas, etc., R. Co. v. Dawson, 34 Tex. Civ. App. 240, 78 S. W. 235.

83. **Loss or injury caused by shipper.**—Ft. Worth, etc., R. Co. v. Alexander, 36 Tex. Civ. App. 297, 81 S. W. 1015, affirmed in 98 Tex. 616, no op.

The carrier is not liable for the death of cattle caused by the acts of the shipper. International, etc., R. Co. v. Nowaski, 48 Tex. Civ. App. 144, 106 S. W. 437.

84. Drake v. Great Northern R. Co., 24 S. Dak. 19, 123 N. W. 82.

85. Ft. Worth, etc., R. Co. v. Alexander, 81 S. W. 1015, 36 Tex. Civ. App. 297.

damages resulting from the use of such defective appliances.⁸⁶ If the owner of live stock shipped by railroad, who undertakes to secure them in the cars, finds that the door is in a weak and unsafe condition, and does not inform the station agent of the company, to whom the defect is unknown, he can not afterwards hold the company responsible for any loss or damage that may arise from that cause.⁸⁷ The defect in a car furnished to transport horses that the side slats are so far apart as to allow horses to get their feet through them is not so apparent to the shipper loading his horses on the car as to convict him of negligence, in an action for damages caused by such defect.⁸⁸ Where plaintiff brought his hogs to defendant's railroad station after he had been informed by defendant's agent that it was uncertain exactly when cars for shipment of the hogs could be furnished, proof by plaintiff, in an action by him against defendant for damages resulting from delay in transportation of the stock, as to the muddy conditions of defendant's stock pens at the shipping point and plaintiff's expense in feeding the hogs there while waiting for the cars, was inadmissible.⁸⁹ That the shipper through an arrangement with a company of horse and mule buyers at an intermediate point had made arrangements to unload there and would have received from it a rebate for the use of the cars from that place to the destination stated in the shipping contract, would not be a defense to the carrier. The carrier was in no manner connected with this agreement for a rebate, and whether such an arrangement between the horse company and the shipper was lawful, and therefore one which the carrier was bound to respect, or not, can not affect the undoubted right of the shipper to have his stock billed as requested with privilege of unloading and feeding at the intermediate point, upon paying the company's customary rates from point of origin to destination. That his secret intention was to unload and sell at the intermediate point, and to allow the purchaser to complete the transportation under this contract, can not in the least affect the legality of his contract with carrier.⁹⁰

Concurring Negligence of Carrier.—In an action for damage to cattle during transit through the negligence of the carrier, the contributory negligence of the shipper is not a complete bar to recovery where, independent of it, the carrier's negligence in intermixing the cattle and in delaying shipment, caused the damage to the cattle.⁹¹ In an action against a carrier for damages from the death of part of a shipment of live stock, an instruction that, if the shipper was guilty of negligence proximately contributing to the death of the live stock, he can not recover, should be supplemented by a statement that this would be true, regardless of the carrier's negligence.⁹²

Acquiescence of Carrier.—In an action against a railroad company to recover damages for the loss of a horse killed by the burning of a car in which the animal was being carried, the plaintiffs can not be charged with contributory negligence in placing straw for bedding and hay for feed, in the car, or in leaving open the door for ventilation, where these acts are done with the knowledge and apparent acquiescence of the defendant's agent, and in accordance with the usage of the company.⁹³

Improper Interference with Management of Car.—A common carrier is not liable for injuries to a horse occasioned by the improper interference of its

86. **Knowledge and intent of shipper.**—*White v. Cincinnati, etc., R. Co.*, 89 Ky. 478, 12 S. W. 936, 11 Ky. L. Rep. 689, 7 L. R. A. 44.

87. *Betts v. Farmers' Loan, etc., Co.*, 21 Wis. 80, 91 Am. Dec. 460.

88. *Union Pac. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986.

89. *Illinois Cent. R. Co. v. Holt*, 92 S. W. 540, 29 Ky. L. Rep. 135.

90. *Southern Kansas R. Co. v. Cox*, 43

Tex. Civ. App. 79, 83, 95 S. W. 1124, affirmed in 101 Tex. 659, no op.

91. **Concurring negligence of carrier.**—*Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 329, 28 S. W. 525, reversing 27 S. W. 186.

92. *Houston, etc., R. Co. v. Burns*, 41 Tex. Civ. App. 83, 90 S. W. 688.

93. **Acquiescence of carrier.**—*Trexler v. Baltimore, etc., R. Co.*, 28 Pa. Super. Ct. 198.

owner with the carrier's management of the car in which the horse is being shipped.⁹⁴

Taking Animal from Carrier.—The fact that a carrier takes a horse out of the usual course of shipment, so that its delivery at the point of destination will be thereby materially and unnecessarily delayed, does not warrant the owner or his agents in removing it from the car at a place en route where no suitable means are provided for removal, and run the risk of injuring it, and, if it is done without the carrier's consent, it will not be liable for any resulting injury.⁹⁵

Routing Shipment.—Where an action is brought against a carrier for failure to note on the waybill and shipping contract of a shipment of live stock that they were to be unloaded and fed at an immediate point en route, and the carrier pleaded contributory negligence and delay to take steps to have them properly routed, after the discovery of the carrier's dereliction in this respect, evidence that the shipper at a certain station en route had a conversation with the person whom he took to be the carrier's agent concerning the omission, is admissible whether the person spoken to was the agent of the carrier or not, as it is relevant to the issue as to whether the shipper took other steps to have the mistake of the carrier corrected.⁹⁶

Failure to Inspect Car.—A shipper of horses is not required to inspect a car furnished by a carrier for their transportation to see if it is properly equipped.⁹⁷

Failure to Furnish Care Taker.—Where the shipper of live stock does not agree to furnish a care taker, and some of the animals die or are injured for want of proper care and protection while in transit, the carrier is liable, and must bear the loss.⁹⁸

Failure to Lock Car Door.—In an action against a railroad company to recover the value of a horse which was killed by jumping from defendant's car, the evidence showed that the plaintiff put the horse in the car, tied him by a halter and rope near a sliding window or door, which plaintiff opened and left open. Though it may have been negligence on the part of the defendant to set the car in motion with the window open, it was contributory negligence on part of plaintiff to open it and leave it open just before, as he knew the car was to be moved, and he therefore could not recover.⁹⁹ The plaintiff shipped a stallion in a freight car of the defendant, and to insure ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and, after wandering some distance, strayed upon the track at another point, and was killed by defendant's train. The plaintiff's negligence resulting in the liberation of the animal was not the proximate cause of the injury, and would not preclude a recovery.¹ Where a shipper of horses prevented the carrier's servant from locking the car door, as he was directed to do, and on the passage some of the horses were lost in consequence, the carrier was not liable for the loss.²

Failure to Feed and Water.—It is not contributory negligence on the part of a shipper of cattle to put them in pens of the carrier at its request and allow them to await the arrival of cars, without feed or water, when the carrier's

94. **Improper interference with management of car.**—Roderick v. Baltimore, etc., R. Co., 7 W. Va. 54.

95. **Taking animal from carrier.**—Louisville, etc., R. Co. v. Gormley, 109 S. W. 346, 33 Ky. L. Rep. 188, rehearing denied (Ky.), 111 S. W. 289.

96. **Routing shipment.**—Southern Kansas R. Co. v. Cox, 43 Tex. Civ. App. 79, 81, 95 S. W. 1124, affirmed in 101 Tex. 659, no op.

97. **Failure to inspect car.**—Chicago,

etc., R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

98. **Failure to furnish care taker.**—Chicago, etc., R. Co. v. Williams, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289.

99. **Failure to lock car door.**—Hutchinson v. Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433.

1. Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287, 7 So. 648.

2. Lee v. Raleigh, etc., R. Co., 72 N. C. 236.

agent informs the shipper that the cars are expected soon.³ Where live hogs are shipped in railroad cars, and are doing well, and not suffering for water at a given point or station on the route, the omission of the shippers to water them at that point or station is not negligence, in the absence of information that water can not be had at the next station; and, if water is scarce at the next station, the company should inform the shippers of the fact, and not to give such information is gross negligence.⁴ Failure of a shipper to notify a railroad company to stop a train, so that he can water, feed, and rest the cattle before they have been confined on the cars more than 28 hours, in violation of Act March 3, 1873, is not necessarily fatal to his right to recover for damages caused by the negligent delay and confinement of the cattle, if he has not consented thereto.⁵

Failure to Lock Stock Pen Gates.—Where the shipper provided stock pens with a chain and lock, which lock was attached to the chain and hung on the gate, the key of the lock being kept in the drawer of the agent in his office, and the shipper placed his cattle in the stock pen and with his employees fastened the gate with a piece of barbed wire, and neither the shipper nor any one of his employees inquired of the agent for the key or demanded of him that he see that the cattle were more securely fastened, and the cattle became frightened and broke out of the pens, it was held the carrier was not negligent as the only cause of the failure of the shipper to secure his cattle by lock and key was his neglect to inquire of the proper person for the key.⁶ A live-stock shipper drove cattle for shipment into a receiving pen of a railroad company. The gate leading thereto was sagged so that it could not be fastened without lifting the gate. The employees of the shipper made no effort to raise the gate, and left the cattle without notifying the railroad company of the condition of the gate. The cattle, in rubbing against the latch, pushed the gate open and escaped. A part of them were lost, and the rest were recovered by the shipper at some expense. The loss was due to the negligence of the shipper, and the railroad company was not liable therefor.⁷

In Crating Animals.—That a shipper of dogs delivered them to a carrier in a crate which was insufficient, so that a dog escaped, was not negligence exonerating the carrier; the defense of contributory negligence not being available in such case.⁸

Use of Car Not Fit for Service.—A shipper is entitled to assume that a carrier undertaking to furnish a car for the transportation of live stock, performed its legal duty, but he can not remain silent where the car is manifestly unfit.⁹

Loading and Unloading.—The fact that a shipper in loading his horse on a carrier's car, took it upon a platform which he knew to be unsafe and dangerous, does not, as a matter of law, render him guilty of contributory negligence, such question being always for the jury.¹⁰ In an action for injuries to a horse

3. **Failure to feed and water.**—Missouri, etc., R. Co. v. Kyser, 95 S. W. 747, 43 Tex. Civ. App. 322; Gulf, etc., R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110, 1112.

4. Toledo, etc., R. Co. v. Thompson, 71 Ill. 434.

5. Southern Pac. Co. v. Arnett, 61 C. C. A. 131, 126 Fed. 75.

6. **Failure to lock stock pen gates.**—Gulf, etc., R. Co. v. Taliaferro, 40 Tex. Civ. App. 388, 390, 89 S. W. 1120, affirmed in 101 Tex. 640, no op.

7. St. Louis, etc., R. Co. v. Law, 68 Ark. 218, 57 S. W. 258.

8. **In crating animals.**—Atlantic, etc., R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

9. **Use of car not fit for service.**—Blair v. Wells Fargo & Co., 155 Iowa 190, 135 N. W. 615.

10. **Loading and unloading.**—Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715.

The court erred in giving to the jury a peremptory instruction, the proof showing that the company had knowingly failed to provide suitable and safe appliances for loading and unloading its cars; and knowledge of such unsafe appliances on the part of appellant, without any careless conduct on his part in using same, was not such contributory negligence as would prevent a recovery. White v. Cincinnati, etc., R. Co., 89 Ky. 478, 12 S. W. 936, 11 Ky. L. Rep. 689, 7 L. R. A. 44.

while being loaded into a freight car, where the evidence fails to show any negligence on the part of the railroad, but shows that the injury was caused solely by negligence on the part of plaintiff's agent, a verdict for plaintiff is in violation of a statute providing that no person shall recover damages from the railroad for injuries to his property caused by his own negligence.¹¹ Where there is evidence that, on reaching their destination, a shipper's cattle had the appearance of having been trampled on, and were much bruised, and that this was caused by the fact that he had loaded the cattle promiscuously, without reference to their age, sex, condition, or size, it is error to refuse an instruction that he is not entitled to recover for injuries resulting from the promiscuous intermingling of the cattle, and this error is not cured by an instruction that the carrier is not liable for injuries resulting from "overloading" the cars.¹² In an action for injuries to live stock in transit, it was error to refuse to instruct that, if defendant placed the car in which the stock was delivered to it in such position that the stock could be conveniently unloaded from said car, and plaintiff then failed to unload said stock from said car, it being his duty under the contract to load and unload the stock, and it was injured because of such failure to unload, then they should find for defendant.¹³ That the shipper, in unloading the horses, allowed some of them to go out without leading them, does not show, as a matter of law, that he was guilty of contributory negligence.¹⁴ The plaintiff shipped cattle on the defendant road under a special contract to load and unload them at his own risk, in consideration of a lower rate. Plaintiff unloaded them early in the morning without notifying defendant's agent, and used a defective chute found on the premises, belonging to defendant, and one of the steers was injured by falling through the chute. It was proper to charge that if the jury should find that plaintiff undertook to unload the cattle before daylight, without notice to defendant or its servants, and in so doing used a chute which he knew was defective, he was guilty of negligence, and could not recover, irrespective of the shipping contract.¹⁵

Same—Delay in Unloading.—Where stock arrives at its destination on a dark and stormy evening, in the woods, on a logging railroad, where there are no conveniences for unloading, about half a mile from the logging camp, the owner is not chargeable with contributory negligence in waiting until the next morning before erecting temporary platforms to enable him to unload the stock, especially where it appears that an attempt to unload after dark on temporary platforms is a hazardous undertaking.¹⁶

Unloading in Violation of Federal Statute.—Where cattle were not injured in unloading, but by being put in infected pens after unloading and after the carrier's agent had assured the shipper, ignorant of the infection, that there was no danger, that they were unloaded in violation of the regulations of the United States Department of Agriculture did not defeat a recovery.¹⁸

Overloading Cars.—Where it is the fault of the shipper, in whole or in part, that too many animals are crowded into a car, he can not recover for injury

11. *Southern R. Co. v. Bivings*, 3 Ga. App. 552, 60 S. E. 287.

12. *Missouri, Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

13. *Cincinnati, etc., R. Co. v. Green*, 14 Ky. L. Rep. 815.

14. *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

15. *Candee v. New York, etc., R. Co.*, 73 Conn. 667, 49 Atl. 17.

16. **Delay in unloading.**—*Burns v. Chicago, etc., R. Co.*, 104 Wis. 646, 80 N. W. 927.

18. **Unloading in violation of federal**

statute.—The quarantine regulations of the United States, Department of Agriculture as to where cattle may be unloaded in Texas refer only to cattle shipped from one state to another, and are to protect other cattle at destination, and a violation of such regulation by a carrier of cattle from a northern state through Texas to Mexico does not defeat a recovery in absence of evidence that cattle in Mexico could be infected, or that Mexico was a territory in whose favor the quarantine was established. *International, etc., R. Co. v. McCullough* (Tex. Civ. App.), 118 S. W. 558.

resulting therefrom,¹⁹ irrespective of whether or not he had by contract assumed the duty of loading,²⁰ or the car was not as large as the one he had ordered.²¹ But where a carrier accepts a car load of stock, after inspection, with full knowledge of the number and weight of the cattle, and issues its bill of lading showing such facts, it can not, in a subsequent action for damages received during the transportation, show that the car was overloaded.²² A shipper shipped cattle over a carrier's road, under a contract requiring the shipper to load, unload, and reload the stock. A car was overloaded, and the shipper requested that the stock be reloaded before the car started, and he made a similar request several times while the stock was in transit, which was refused by the carrier, and several of the cattle were killed and injured in consequence thereof. The carrier was liable, since the injury was caused by a failure to furnish proper cars, and not from negligence in loading.²³ Where the shipper assumed the risks of danger from overloading, and the carrier pleaded that the cars were overloaded, no pleading on the part of the shipper is necessary to rebut that defense and to warrant a charge submitting that issue.²⁴

During Deviation by Carrier.—Where plaintiff shipped certain hogs over defendant's railroad to a fine stock show, he did not assume the risk of the exposure of the hogs to cholera in an infected zone wherein he knew cholera to exist, where there was no necessity for diverting the car containing the hogs into such infected zone.²⁵

Negligence of Shipper Accompanying Stock.—If plaintiff was himself

19. Overloading cars.—Where the evidence showed that the plaintiff, while loading cattle in defendant's cars, had notice that the cars were being overloaded, it was error for the trial court not to set aside a verdict for damages arising from such overloading. *Ft. Worth, etc., R. Co. v. Word* (Tex. Civ. App.), 32 S. W. 14.

In an action against a carrier for damage to cattle in transit by their falling in the cars in consequence of having got wet and slippery in a mudhole in defendant's stock pen, it appeared that the cattle were loaded and cared for in transit by plaintiff's employees, who were given free transportation; that the cattle were loaded fifty head to the car, when the capacity of the cars was about 45; and that plaintiff's employees abandoned the cattle before the destination was reached and while many of them were down in the cars. Held, that a finding of absence of contributory negligence should be set aside. *Missouri, etc., R. Co. v. Belcher* (Tex. Civ. App.), 41 S. W. 706.

20. *Texas, etc., R. Co. v. Edins*, 36 Tex. Civ. App. 639, 640, 83 S. W. 253. See *Texas Cent. R. Co. v. O'Laughlin* (Tex. Civ. App.), 72 S. W. 610.

21. Car smaller than one ordered.—In an action against a carrier for injuries to live stock, evidence is admissible that plaintiff overloaded the car, though it was not as large as the one he had ordered from the company. *Texas, etc., R. Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 567.

The fact that plaintiff's contract with defendant called for 34-foot cars, and that defendant represented the cars supplied to be that size, will not justify plaintiff

in loading the number of cattle usually carried in 34-foot cars after he discovers it could not properly be done. *Ft. Worth, etc., R. Co. v. Word* (Tex. Civ. App.), 32 S. W. 14.

22. *Colsch v. Chicago, etc., R. Co.* (Iowa), 117 N. W. 281.

A carrier is liable for injuries to shipment of live stock caused by overloading a car, when it had been notified that the car was overcrowded, and requested to place stock in another car. *Missouri Pac. R. Co. v. Graves*, 2 Texas App. Civ. Cas., § 676.

Where a railroad company receives a car of hogs from a shipper and undertakes to carry them in spite of the fact that they were overcrowded in loading, it is liable for the injuries sustained by the hogs through its failure to use due care and reasonable means to protect them from overheating. *Lake Shore, etc., Railway v. Gibson*, 8 O. C. C., N. S., 345, 28 O. C. C. 538.

The fact that an owner of sheep was guilty of contributory negligence in overcrowding a car for their transportation did not relieve the carrier from liability for its negligence in keeping the car, without unloading, an unreasonable length of time at a feeding station. *Moore v. Chicago, etc., R. Co.*, 151 Iowa 353, 131 N. W. 30.

23. *International, etc., R. Co. v. Pool*, 59 S. W. 911, 24 Tex. Civ. App. 575.

24. *Texas, etc., R. Co. v. White*, 35 Tex. Civ. App. 521, 80 S. W. 641, affirmed in 98 Tex. 635, no op.

25. During deviation by carrier.—*Council v. St. Louis, etc., R. Co.*, 123 Mo. App. 432, 100 S. W. 57.

relieved from the duty of accompanying the stock by the fact that a pass was given him by the railroad on a passenger train he was still under obligation to have some one else representing him to do so.²⁶ It is not negligence for a live stock shipper, accompanying the stock to feed, water, unload, and take care thereof, not to remain in the car with the stock while the train is in motion, to prevent or extinguish any fire that may occur, where the contract provides that the shipper shall remain seated in the caboose while the train is in motion.²⁷ A shipper accompanying a shipment of live stock must give notice that the stock requires attention which he can not give, and he must notify the carrier to transfer the cars to a suitable place for unloading where unloading is necessary, but in the absence of any showing to the contrary he may assume that an agent transacting business in the office of the carrier where freight and passenger business is transacted is the proper agent to whom his request may be directed.²⁸ A shipper accompanying a shipment of horses is not guilty of contributory negligence, where he fed, watered, and blanketed the horses on the first appearance of sickness, and telegraphed ahead for a veterinary surgeon.²⁹

Reshipment of Stock.—Where a carrier receiving dogs for shipment by a certain train ships them by an earlier train, and, no one being present to receive them, returns them to the place of shipment, and the shipper, hearing of their return, directs them to be reshipped on the next day, without in any way providing for them, he is not entitled to damages for the death of one of the dogs, resulting from his long confinement; the proximate cause of the death being the neglect of the shipper to have the dogs attended to before their reshipment.³⁰

Agent of Shipper.—The shipper purchased a mare, and arranged with the agent of an express company for her transportation. She was delivered and placed in a stall in a car, and tied by an employee of the company, who was acting under the directions of the shipper's agent. The company's employee attempted to tie her, and objected that she was tied too long, but his opinion was overruled by the others. During the trip the mare reared, and got her forefeet or legs over the top of the gate of the stall, and permanently injured herself. The proximate cause of the accident was the slack tie, for which the company was not liable.³¹

§ 1850. Waiver of Liability by Shipper.—When a carrier agrees to furnish a certain car for a particular purpose, which is known to him, and fails, his negligence is not waived by the shipper's acceptance of the car furnished; and where a shipper of horses ordered an Arms palace car, and was given an inferior kind, he did not waive the negligence of the carrier in using the one sent, and the carrier is liable for injuries to the horses because of the inferior car.³²

§ 1851. Where Shipper Accompanies Live Stock.—That the owner of a shipment of live stock accompanies the same does not relieve the carrier of its common-law liability, in the absence of a specific agreement that he would care for the animals.³³

§ 1852. Duty of Carrier after Excusing Cause Ceases.—Cattle were killed in a railroad accident through no negligence of the company, and the

26. **Negligence of shipper accompanying stock.**—*Susong v. Florida Cent., etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

27. *Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

28. *Westphalen v. Atlantic, etc., R. Co.*, 152 Iowa 232, 132 N. W. 57.

29. *Blair v. Wells Fargo & Co.*, 155 Iowa 190, 135 N. W. 615.

30. **Reshipment of stock.**—*Harrison v. Weir*, 75 N. Y. S. 909, 71 App. Div. 248.

31. **Agent of shipper.**—*Ames v. Fargo*, 99 N. Y. S. 994, 114 App. Div. 666.

32. **Waiver of liability by shipper.**—*Louisville, etc., R. Co. v. Rash & Co.*, 132 S. W. 553, 141 Ky. 225.

33. **Where shipper accompanies live stock.**—*Midland Valley R. Co. v. Pugh*, 33 Okla. 648, 126 Pac. 759.

shipper had agreed to relieve the company of its common-law liability. The company offered to transport the carcasses if the shipper would take charge of them, but he refused. If the carcasses had been dressed at once, they would have had a marketable value. The company was not liable for failing to dress the carcasses, or to ship them to the place to which the cattle were consigned.³⁴

§§ 1853-1871. Damages—§§ 1853-1858. Elements of Damages—§ 1853. In General.—Some injury or depreciation in live stock is naturally and necessarily caused by long shipments, even when the carriers exercise due care and diligence in the transportation. For such injury or damages not occasioned by the carrier's negligence, no recovery can be had.³⁵ This is true even though the injuries be such as not to have been contemplated by the parties.³⁶ If when accepting horses for transportation a carrier was able to carry them to their destination and used reasonable diligence, no recovery can be had for damage thereto ordinarily incident to transportation, resulting from being confined in the cars and carried contrary to their natural habits, and from unavoidable delay.³⁷ No recovery can be had for injuries to a horse delivered for shipment, caused by the horse hitting his feet, legs, and body against the sides and back of the stall upon becoming excited and frightened by the usual and ordinary movements and noise of the train.³⁸

Loss after Delivery.—Where animals are injured while under the control of a carrier for transportation by the fault of the carrier, all injuries of which the wrong or negligence of the carrier is the direct and proximate cause, and appearing at any time before trial of the suit against the carrier, are proper elements to be considered in computing the amount of the damages.³⁹ Although the animals did not die until after they had been delivered by carrier, this does not affect the right of the shipper to recover damages for them as killed by the negligence of the carrier.⁴⁰ The only known limit to the inquiry up to the trial is whether or not the subsequent development in the condition of the animal is traceable directly to the injury inflicted by the carrier.⁴¹

34. Duty of carrier after excusing cause ceases.—*Lee v. Marsh* (N. Y.), 28 How. Prac. 275, 43 Barb. 102.

35. Damages.—*St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 210, 103 S. W. 1176; *St. Louis, etc., R. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *Louisville, etc., R. Co. v. Gormley*, 33 Ky. L. Rep. 802, 111 S. W. 289; *Reed v. Rome, etc., R. Co.*, 48 Hun 231, 16 N. Y. St. Rep. 58.

Iowa.—*Wisecarver v. Chicago, etc., R. Co.*, 141 Iowa 121, 119 N. W. 532.

Kentucky.—*Louisville, etc., R. Co. v. Gormley*, 33 Ky. L. Rep. 188, 109 S. W. 346, rehearing denied, 33 Ky. L. Rep. 802, 111 S. W. 289.

Montana.—*Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

South Dakota.—*Stone v. Chicago, etc., R. Co.*, 8 S. Dak. 1, 65 N. W. 29.

A charge in an action against a carrier for negligent injury to live stock which authorized the jury to assess damages for injuries necessarily received by the stock in transit, irrespective of the carrier's negligence, is erroneous. *St. Louis, etc., R. Co. v. Smith*, 77 S. W. 28, 33 Tex. Civ. App. 520.

36. A carrier is responsible for all such damages as naturally and proximately follow as a result of its failure to perform

its duty, no matter whether apprehended by it or not. *Wisecarver v. Chicago, etc., R. Co.*, 141 Iowa 121, 119 N. W. 532.

In an action for injuries to a shipment of horses, it need not be shown that the damages were in the minds of the parties when the relation of carrier and shipper arose. *Wisecarver v. Chicago, etc., R. Co.*, 141 Iowa 121, 119 N. W. 532.

37. *Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

38. *Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450, Ann. Cas. 1913 D, 972.

39. In an action against a carrier for injuries to a horse, an instruction limiting the damages to such injury as was ascertainable immediately after the accident was not prejudicial to defendant, since plaintiff was entitled to recover, if at all, for all injury which was the direct result of the accident, and, in order to properly ascertain the extent of this injury, it would be competent to show the horse's condition, not immediately after the accident, but down to the date of the trial. *Louisville, etc., R. Co. v. Gormley*, 109 S. W. 346, 33 Ky. L. Rep. 188, rehearing denied in 111 S. W. 289, 33 Ky. L. Rep. 802.

40. Cattle dying after delivery.—*Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

41. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292.

Loss in Weight.—A railroad company is not liable for damages resulting from the loss in weight of cattle transported by rail, as a result of that mode of transportation.⁴²

§ 1854. **Interest.**—In addition to the damages found, the jury may allow interest at the legal rate from the date of the delivery of the cattle at the point of destination.⁴³ The interest allowed is allowed as damages, and not as interest.⁴⁴ The measure of damage for negligent injury to live stock in transit is the difference between their value as damaged and what it would have been if delivered in good order, with interest from the date of delivery of the stock by the carrier, subject to valuation agreed upon in the shipment contract.⁴⁵ Under statutes allowing interest upon claims against a carrier as a penalty for not settling promptly, the entire amount claimed must be recovered in order to entitle the shipper to the statutory interest on any of the claim.⁴⁷ So, also, where an additional penalty is provided, the interest can be recovered only upon the original claim, not the claim plus the additional penalty.⁴⁸

Must Be Claimed in Pleadings.—To permit a recovery of interest as a part of the damages in an action for injuries to a shipment of cattle, the petition should allege and set forth such item.⁴⁹ Though it has been held that in an action for damages caused by delay in the shipment of cattle, interest may be allowed on the amount of damages sustained, though it is not asked for in the pleading.⁵⁰

§ 1855. **Shrinkage in Weight.**—In an action against a railroad company to recover for cattle injured and killed while in transit, it is error to instruct that the injury must be permanent before it can be made the subject of recovery, and that, though the cattle were reduced in flesh, plaintiff can not recover if the damages were but temporary.⁵¹

42. **Loss in weight.**—Ohio, etc., *R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291.

43. **Interest.**—Southern Pac. Co. *v. Anderson*, 26 Tex. Civ. App. 518, 521, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *G. C. & S. F. R. Co. v. Holliday*, 65 Tex. 512, 521; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 611, 18 S. W. 716; *Texas, etc., R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 128, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 191, 23 S. W. 754; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Gulf, etc., R. Co. v. Batte* (Tex. Civ. App.), 81 S. W. 813; *Mexican Nat. R. Co. v. Garcia* (Tex. Civ. App.), 26 S. W. 780; *Gulf, etc., R. Co. v. Lee* (Tex. Civ. App.), 65 S. W. 54; *Heidenheimer v. Johnston*, 76 Tex. 200, 206, 13 S. W. 46; *Galveston, etc., R. Co. v. Johnson* (Tex.), 19 S. W. 867.

44. *St. Louis, etc., R. Co. v. Dolan* (Tex. Civ. App.), 84 S. W. 393.

45. *Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

47. Where a statute regulating common carriers provided that in case of loss or damage to goods not settled within sixty days a carrier should be liable for the amount of such loss and damage, with interest thereon, from the date of the filing of the claim, and that, unless the consignee recover in the action the full

amount claimed, no penalty shall be recovered, interest on the amount of the actual loss established is recoverable from the time of filing the claim, whether the amount of the loss be greater or less than the amount claimed, though no penalty can be assessed unless the full amount claimed is recovered. *Winslow Bros. & Co. v. Atlantic, etc., R. Co.*, 79 S. C. 344, 60 S. E. 709.

48. Laws 1907, c. 5618, allows, in an action against a carrier upon a claim for freight lost or damaged where the carrier fails to pay the claim in sixty days after presentation, a maximum sum as a reasonable attorney's fee of 15 per cent of any amount recovered over \$100. Held, that the "amount recovered" means the amount of the claim recovered, and not that amount plus 50 per cent per annum interest also allowed by the statute. *Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

49. **Must be claimed in pleadings.**—*Gulf, etc., R. Co. v. Lee* (Tex. Civ. App.), 65 S. W. 54; *Texas, etc., R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447, 78 S. W. 953; *Gulf, etc., R. Co. v. Batte* (Tex. Civ. App.), 94 S. W. 345.

50. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

51. **Shrinkage in weight.**—*Gulf, etc., R. Co. v. Simmons* (Tex. Civ. App.), 28 S. W. 825.

Before Transportation Begins.—A shipper who places cattle in the pens some hours before the time agreed upon with the carrier for their departure can not recover from the carrier for their shrinkage in weight owing to heat and loss of food and water during that time.⁵²

Shrinkage Due to Shipper's Fault.—In an action against a railroad company for damage to cattle shipped, alleged to have been due to the cattle being stampeded through the negligence of defendant before being loaded, where defendant alleges that the shrinkage in weight was partly due to the fact that plaintiff watered the cattle a short time before they were penned for shipment, and introduces evidence to that effect, it is error to refuse to specially instruct that defendant would not be liable for any shrinkage due to such cause.⁵³

§ 1856. **Freight.**—Where a shipper in action for damages to horses recovers full value of horses killed or missing, he can not recover amount of freight paid on them.⁵⁴

§ 1857. **Expenses.**—Where the complaint for injuries to horses in transit alleges that their condition, on reaching their destination, was such that the shipper had to keep them for a long time to render them salable, the expense is a proper element of damage.⁵⁵ Where live stock is injured in transportation by a carrier, the owner, after performing labor and incurring expense in treating the animals, can only recover the difference between the value of the animals in the condition in which they should have arrived at their destination and their value after such labor had been performed and expense incurred, with the value of reasonable and necessary expenses added.⁵⁶ Where the animals are delivered in an injured condition and because of the injuries they are not in a fit condition for immediate sale, the expenses incurred by the shipper in feeding and preparing them for the market, as it redounds to the benefit of the carrier and reduces the total amount of damages, is a proper element to be considered in ascertaining the amount of damages caused by the injuries.⁵⁷

52. **Before transportation begins.**—*International, etc., R. Co. v. Earnest* (Tex. Civ. App.), 77 S. W. 29.

53. **Shrinkage due to shipper's fault.**—*Gulf, etc., R. Co. v. Wilm*, 9 Tex. Civ. App. 161, 28 S. W. 925.

54. **Freight.**—*Galveston, etc., R. Co. v. Kelley* (Tex. Civ. App.), 26 S. W. 470, 471; *Gulf, etc., R. Co. v. Kemp* (Tex. Civ. App.), 30 S. W. 714.

55. **Expenses.**—*Galveston, etc., R. Co. v. Tuckett* (Tex. Civ. App.), 25 S. W. 150; *St. Louis, etc., R. Co. v. Ozier*, 86 Ark. 179, 110 S. W. 593, 17 L. R. A., N. S., 327; *Chicago, etc., R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Galveston, etc., R. Co. v. Stovall*, 3 Texas App. Civ. Cas., § 251.

In an action for injuries to a race horse during transportation, the jury in estimating damages should take into consideration the difference between the fair market value of the horse immediately before the injury and afterwards, and award such sum as will reasonably compensate the owner for any injury the horse sustained resulting directly from the injury he received, including the expenses incurred in caring for the horse because of the injuries. *Louisville, etc., R. Co. v. Gormley*, 33 Ky. L. Rep. 802, 111 S. W. 239.

56. *St. Louis, etc., R. Co. v. Foster* (Tex. Civ. App.), 89 S. W. 450.

Where, in an action against a carrier for damages to live stock in transportation, the court instructed that the measure of damages was the difference in the market value at the place of destination in the condition in which they were delivered and their market value had the carrier exercised ordinary care, it was improper to also instruct that plaintiff was entitled to recover all reasonable veterinary bills and bills of medicine incurred by plaintiff and his time in caring for and treating the horses after they arrived at their destination. *St. Louis, etc., R. Co. v. Foster* (Tex. Civ. App.), 89 S. W. 450.

57. *Arkansas.*—*St. Louis, etc., R. Co. v. Ozier*, 86 Ark. 179, 110 S. W. 593, 17 L. R. A., N. S., 327.

Indiana.—*Chicago, etc., R. Co. v. Woodward*, 72 N. E. 558, 164 Ind. 360, petition for rehearing overruled, 73 N. E. 810.

Indian Territory.—*Missouri, etc., R. Co. v. Truskett*, 53 S. W. 444, 2 Ind. T. 633; *Hendrix v. Wabash R. Co.*, 80 S. W. 973, 107 Mo. App. 127.

Kentucky.—*Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301.

Utah.—*Groot v. Oregon, etc., R. Co.*, 94 Pac. 1019, 24 Utah 152.

Where General Damages Recovered.—The rule that the owner of property which is injured in transportation must exert himself to prevent damages or render the injury as slight as possible, and, when he has done so, may recover his reasonable and necessary labor or expense performed or incurred for the purpose has no application where he had been allowed to recover the general measure of damages.⁵⁸

After Arrival at Destination.—It is the consignee's duty, under the law, after delivery of the cattle in an injured condition to him at their destination, to exercise reasonable care and prudence to avoid further loss or enhancement of damages, and hence he should recover the reasonable value of the time and medicine devoted to that purpose, should the jury believe that, in so doing, he acted as a man of reasonable prudence.⁵⁹

Search for Lost Animals.—In an action against a carrier for allowing animals to escape, the reasonable expenses incurred in collecting them again is an item of damages which should be considered.⁶⁰ In an action against a railroad company to recover damages to cattle occasioned by reason of insufficient pens, it appeared that the cattle were so crowded into small pens that they were trampling each other to death, when plaintiff turned them out. The shipper was entitled to recover the value of the cattle lost and killed, the money expended in searching for lost cattle, and for time lost in the search.⁶¹

§ 1858. Feed for Cattle.—A shipper of cattle, who is obliged to pay a feed bill in order to obtain their possession from the carrier, is entitled to recover from the carrier the amount of such bill if the cattle were not in fact fed, or if they were fed contrary to the shipper's directions not to feed them en route.⁶²

§§ 1859-1860. Measure of Damages—§ 1859. Total Loss.—In an action against a carrier for the death of live stock intrusted to it for transportation the measure of damages is their market value at the place and time of delivery, had they arrived alive and uninjured by any negligence of the carrier.⁶³

58. Where general damages recovered.—*St. Louis, etc., R. Co. v. Foster* (Tex. Civ. App.), 89 S. W. 450, 451.

59. After arrival at destination.—2 Sedg. on Damages, 8th Ed., §§ 435, 437; *Waco, etc., Water Co. v. Cauble*, 19 Tex. Civ. App. 417, 47 S. W. 538; *Westfall v. Perry* (Tex. Civ. App.), 23 S. W. 740; *Missouri, etc., R. Co. v. Allen*, 39 Tex. Civ. App. 236, 239, 87 S. W. 168.

60. In an action against a railroad company for permitting the plaintiff's mules, in charge of the company, to stampede, a part of which the plaintiff by search recovered, it was held proper, in estimating the damages, to consider his services and expenses therein. *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183.

In an action against a railroad company to recover damages to cattle occasioned by reason of insufficient pens, it appeared that the cattle were so crowded into small pens that they were trampling each other to death, when plaintiff turned them out. Held, that he was entitled to recover the value of the cattle lost and killed, the money expended in searching for lost cattle, and for time lost in the search. *Gulf, etc., R. Co. v. York*, 2 Texas App. Civ. Cas., § 813.

61. *Gulf, etc., R. Co. v. York*, 2 Texas App. Civ. Cas., § 813.

62. Feed for cattle.—*Galveston, etc., R. Co. v. Botts* (Tex. Civ. App.), 70 S. W. 113.

63. Measure of damages.—*Texas, etc., R. Co. v. Snyder* (Tex. Civ. App.), 86 S. W. 1041; *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W. 769, affirmed in 93 Tex. 690, no op.; *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84; *St. Louis, etc., R. Co. v. Burns* (Tex. Civ. App.), 80 S. W. 104; *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Gulf, etc., R. Co. v. Simmons* (Tex. Civ. App.), 28 S. W. 825, affirmed in 93 Tex. 662, no op.; *Texas, etc., R. Co. v. Sims* (Tex. Civ. App.), 26 S. W. 634; *Texas, etc., R. Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 567; *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569; *Louisville, etc., R. Co. v. Mason*, 79 Tenn. (11 Lea), 116; *Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

Where, in an action for the freight for transporting horses, defendant filed a counterclaim for damages to the horses, an instruction that the measure of dam-

Freight Deducted.—In case of total loss, during transportation, of mares shipped with foal, there being what is called inherent defect in such freight, the measure of damages is price at destination if delivered in reasonable time in best condition possible if carrier exercised due care, less freight.⁶⁵

§ 1860. Partial Loss.—The measure of damages to a shipment of live stock resulting from negligence of the carrier in transportation is the difference in their market value at the place of destination in the condition in which they should have been delivered, and the condition in which they were delivered.⁶⁶ This rule applies to injuries to animals escaping from pens,⁶⁷ for injuries to stock resulting in their being shipped in cars infected with disease,⁶⁸

ages is the difference in the value of the horses at the point of destination, less any necessary depreciation in value that would ordinarily result from transportation and their value at the point of destination at the time they were delivered, and an instruction that, if the jury found some amount due the carrier on its claim for freight and some amount due for damages, it should deduct the smaller from the larger and return a verdict for the excess for the party entitled to it, sufficiently submitted the measure of recovery. Judgment, 87 N. E. 555, reversed. *Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, 89 N. E. 951.

65. Freight deducted.—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 133, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

66. United States.—*Southern Pac. Co. v. Arnett*, 111 Fed. 849, 50 C. C. A. 17; *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566. See, generally, the title DAMAGES.

Delaware.—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

Georgia.—*East Tennessee, etc., R. Co. v. Herrman*, 92 Ga. 384, 17 S. E. 344.

Illinois.—*Chicago, etc., R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Wabash R. Co. v. Campbell*, 117 Ill. App. 630, judgment affirmed in 76 N. E. 346, 219 Ill. 312, 3 L. R. A., N. S., 1092; *Cleveland, etc., R. Co. v. Patton*, 104 Ill. App. 550, judgment affirmed in 67 N. E. 804, 203 Ill. 376.

Iowa.—*Colsch v. Chicago, etc., R. Co. (Iowa)*, 117 N. W. 281.

Kentucky.—*Southern R. Co. v. Thomas*, 28 Ky. L. Rep. 951, 90 S. W. 1043; *Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540; *Illinois Cent. R. Co. v. Curry*, 32 Ky. L. Rep. 513, 106 S. W. 294; *Southern Railway v. Graddy*, 33 Ky. L. Rep. 183, 109 S. W. 881; *Louisville, etc., R. Co. v. Gormley*, 33 Ky. L. Rep. 802, 111 S. W. 289.

Massachusetts.—*Smith v. New Haven, etc., R. Co. (Mass.)*, 12 Allen 531, 90 Am. Dec. 166; *McKahan v. American Exp. Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A., N. S., 1046.

New York.—*Reed v. Rome, etc., R. Co.*, 48 Hun 231, 16 N. Y. St. Rep. 58.

South Carolina.—*Davis Bros. v. Blue Ridge R. Co.*, 81 S. C. 466, 62 S. E. 856.

Texas.—*Galveston, etc., R. Co. v. Johnson (Tex.)*, 19 S. W. 867; *Texas, etc., R. Co. v. Klepper (Tex. Civ. App.)*, 24 S. W. 567; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109.

If, through the negligence of the carrier, heifers shipped over its road lost their calves, the difference between their market value, if they had arrived in calf, and their market value after losing their calves, constitutes the amount of the plaintiff's damages. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292.

Though the measure of damages for injuries to live stock by a carrier is the difference in value in the condition it was delivered at its destination, and its value had it been transported without negligence, a jury most probably so understood an instruction that the measure of damages was the difference in value in the condition the stock was delivered at its destination, and what it would have been worth had it been properly delivered. *Texas Cent. R. Co. v. Hunter & Co.*, 104 S. W. 1075, 47 Tex. Civ. App. 190.

In an action for injuries to live stock during transportation, it is misleading to charge that the measure of damages is the difference between the market value at the place of destination and what the value of the stock would have been had it arrived there "in good condition." *Galveston, etc., R. Co. v. Johnson (Tex. Civ. App.)*, 29 S. W. 428.

67. Stock escaping from pens.—The measure of damages for injuries to horses while escaping from stock pens preparatory to loading is the difference between the market value of the horses in their damaged condition, and what their value would have been if they had not been injured. *Louisville, etc., R. Co. v. Thompson*, 144 Ky. 765, 139 S. W. 939.

68. Cars infected with disease.—In an action against a carrier for negligently shipping the cattle in cars erroneously placarded "Southern Cattle," thereby indicating that the cattle were diseased, the measure of damages is the difference be-

for failure to feed and water the stock during transit,⁶⁹ and for violation of the federal statute requiring interstate shipments of live stock to be unloaded, watered, and fed once in every twenty-eight hours.⁷⁰

Where Cattle Have No Market Value.—Where cattle injured in transportation such as those for damage to which plaintiff sued, had no market value, the measure of damages for such injuries was the difference in their actual value before and after shipment.⁷¹ In an action against a carrier for damages to cattle owing to the carrier having kept the cattle in unsuitable pens after arrival at destination, and while the shipper was procuring money to pay extra freight charge, there being no market price at the place of destination, the true measure of damages was the difference, if any, between the actual value of the cattle in their condition at the time they were delivered to plaintiff and what their actual value would have been when so delivered to plaintiff had they been held with ordinary care.⁷² Where live stock injured in transportation has no market value, the measure of damages for such injuries is the difference in the intrinsic value before and after shipment.⁷³

Actual Value.—The market value of live stock and the actual or intrinsic value is, generally speaking, the same.⁷⁴ An instruction that the measure of damages to a shipment of cattle is the difference between their value at destination, in the condition they arrived, and what it would have been had they not been injured, is not misleading, because not confining the recovery to the difference in "market value," where all the evidence was directed to the question of such difference in market value.⁷⁵

Net Value.—The measure of damages for cattle injured and crippled through the negligence of a carrier is the difference in their market value at the place of destination, in the condition in which they should have been delivered, and in the condition in which they were delivered, and not necessarily the difference in net value at destination immediately before and after the injury.⁷⁶

Selling Price.—In an action against a carrier for delay in transportation of cattle, the damages were not to be determined from what the cattle actually sold for at the place of destination at the time they were sold, but from their market value in their then condition.⁷⁷

tween the market value of the cattle on arrival at destination in the condition then existing with reference to the cars, and the market value of such cattle of like kind and character at that time. Judgment, 117 Ill. App. 630, affirmed. *Wabash R. Co. v. Campbell*, 76 N. E. 346, 219 Ill. 312, 3 L. R. A., N. S., 1092.

69. Failure to feed and water.—Where cattle accepted by a carrier for immediate shipment were damaged by failure of the carrier to feed and water them during a delay of twenty-four hours before shipment, the measure of damages was the difference between the market value of the cattle in the damaged condition at the place of delivery and what their fair market value would have been at the same time and place if they had been delivered in a sound condition. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754.

70. Violation of federal twenty-eight hour law.—In a suit for damages to an interstate shipment of sheep, for failing to unload them for water, food, and rest, as required by Rev. St., § 4386 (U. S. Comp. St. 1901, p. 2995), the measure of damages

is the difference, if any, in the fair market value at the point of destination in the condition they were delivered and what it would have been, if they had been properly unloaded for food and water. *St. Louis, etc., R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

71. Where cattle have no market value.—*Missouri, etc., R. Co. v. Chittim* (Tex. Civ. App.), 40 S. W. 23; *Texas, etc., R. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188.

72. Atchison, etc., R. Co. v. Veale & Co., 87 S. W. 202, 39 Tex. Civ. App. 37.

73. Missouri, etc., R. Co. v. Chittim (Tex. Civ. App.), 40 S. W. 23; *Texas, etc., R. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188.

74. Colsch v. Chicago, etc., R. Co. (Iowa), 117 N. W. 281.

75. Gulf, etc., R. Co. v. Terry (Tex. Civ. App.), 89 S. W. 792.

76. Net value.—*St. Louis, etc., R. Co. v. Burns* (Tex. Civ. App.), 80 S. W. 104.

77. Selling price.—*San Antonio, etc., R. Co. v. Turner*, 94 S. W. 214, 42 Tex. Civ. App. 532.

Freight Deducted.—In a case of partial loss, during transportation, of a mare shipped with foal, the measure of damages is the difference between the price at destination if delivered in a reasonable time in best condition possible if carrier exercised due care and price as received, less freight.⁷⁸

Cattle Not Intended for Sale.—Although cattle were not shipped for immediate sale, but it was intended to pasture them for a number of months after reaching their destination, their deterioration in market value at the place of destination, or so much thereof as was caused by the carrier's negligence, is the correct measure of damages.⁷⁹

Where Cattle Held until They Recover from Injury.—The general rule, that the measure of damages for injury occasioned in the shipment of cattle is the difference between their market value on arrival at their destination, and what would have been such market value there but for the injury, is not applicable where the cattle are not destined for market, and are not sold on arrival at their destination, but are kept by the owner until they recover from the injury. In such case the correct measure of damages is the actual damage caused by the improper treatment, and any extra expense which the owner may have incurred by reason thereof in attending to the cattle.⁸⁰

At Place of Destination.—The market considered in estimating the decline in value is the market at the place of destination,⁸¹ and it is not the decline in the market of the place from which the stock was shipped.⁸² When, however, there is no evidence of the market of the place of delivery, that of the neighboring places may be considered.⁸³ The market value of cattle, incurred by setting of a car on fire, is the market value at the place of destination and not at the point where the injury occurred.⁸⁴ The measure of damages for injuries to live stock is based on the value at the place of destination, where the shipper prepaid the freight, notwithstanding a contract that the value at the place of shipment should be considered, under a statute which prohibits common carriers from limiting their common-law liability.⁸⁵ Where the contract of ship-

78. Freight deducted.—Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 132, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

79. Cattle not intended for sale.—Gulf, etc., R. Co. v. Hume, 6 Tex. Civ. App. 653, 657, 24 S. W. 915, affirmed, on this point, by the supreme court, in 87 Tex. 211, 27 S. W. 110, but reversed on another point; Gulf, etc., R. Co. v. Stanley (Tex. Civ. App.), 29 S. W. 806, 807, affirmed in 89 Tex. 42, 33 S. W. 109; Missouri, etc., R. Co. v. Kyser, 38 Tex. Civ. App. 355, 87 S. W. 389, affirmed in 101 Tex. 649, no op.

80. Where cattle held until they recover from injury.—Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777; Texas, etc., R. Co. v. Avery (Tex. Civ. App.), 33 S. W. 704, 705.

Where cattle are damaged while in transit, by the negligence of a railroad company, and the owner retains them after they reach their destination until the damage is ascertained, he should be restricted, in his recovery against the company, to the actual loss he sustained, and not be allowed to recover what erroneously appeared to be the damage when the cattle first reached such destination. Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777.

81. Texas, etc., R. Co. v. Sherrod (Tex. Civ. App.), 87 S. W. 363, affirming 89 S.

W. 956; Missouri, etc., R. Co. v. Fry, 74 Kan. 546, 87 Pac. 754; McManus v. Chicago, etc., R. Co. (Iowa), 136 N. W. 769.

82. McManus v. Chicago, etc., R. Co. (Iowa), 136 N. W. 769.

The measure of damages for injuries to cattle in transit is the difference between the value of the cattle at their destination in the condition in which they should have arrived and their value in the condition in which they actually arrived, and their market or other value at the point of shipment is immaterial. Texas, etc., R. Co. v. Sherrod (Tex. Civ. App.), 87 S. W. 363, judgment affirmed in 89 S. W. 956.

83. Louisville, etc., R. Co. v. Mason, 79 Tenn. (11 Lea) 116.

84. Texas, etc., R. Co. v. Dishman, 38 Tex. Civ. App. 277, 278, 85 S. W. 319, affirmed in 101 Tex. 663, no op., distinguished in Texas, etc., R. Co. v. Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829.

In the absence of a special contract, damage to horses from a railroad company's negligence in loading them on cars must be estimated on their value at the place of destination. Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 28 S. W. 580.

85. International, etc., R. Co. v. Parish, 43 S. W. 1066, 18 Tex. Civ. App. 130.

ment of stock recites that it is from the place of shipment to that of final destination, and limits the liability of the railroad until delivery to a connecting line at an intermediate point, the stock being shipped for sale at the point of final destination, the measure of damages for injuries before delivery to the connecting line is the market value of the stock at the point of final destination.⁸⁶

Where Animals Converted.—Where a carrier departs from the method of shipment of live stock specified in the contract, and the shipper seeks to recover damages done to the horses, and not the value of them, even if trover is the only remedy, the amount recoverable is the value of the horses when converted, less their value when redelivered to plaintiff.⁸⁷

§ 1861. Special Damages.—Notice of Special Circumstances.—In some cases the right of the shipper of live stock to recover damages may depend upon the carrier's knowledge of special circumstances. This is usually true where the special circumstance, if known by the carrier, would make it necessary that a higher degree of care than is usually necessary be exercised. Where, however the special damages are for abortions caused by negligently handling pregnant cows, it not appearing that pregnant cows require a greater amount of care than other cows, the knowledge of the carrier of their condition is immaterial.⁸⁸ The value of the animals may be a special circumstance knowledge of which by the carrier is necessary to fix its liability. When, however, the agent of the carrier has notice of the nature and value of the animals, there being no limitation of liability, the classification of the animals in the bill of lading of which the shipper is ignorant is not binding.⁸⁹ In an action against a carrier for damages to a shipment of horses, it not appearing that the carrier was notified that plaintiff intended to use the horses for the purpose of putting in a crop, he could not recover damages because of his failure to put in as much of a crop as he otherwise would have done, nor recover the value of extra time and trouble in moving the crippled horses from the place of destination to the place where he was putting in the crop.⁹⁰ Where a carrier agrees to ship a race horse over its line and the line of a connecting carrier, it is its duty to provide a suitable car, and to transport it to its destination safely and without unreasonable delay; and, if it carries the horse out of the way so as to cause unnecessary delay, and by reason thereof it is injured, or the owner is prevented from keeping his horse's engagements in the races in which it was entered, and

⁸⁶. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

⁸⁷. *McKahan v. American Exp. Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A., N. S., 1046.

⁸⁸. Plaintiffs imported cattle for breeding purposes, and in the course of their transportation by defendant railroad company they were so injured in a collision that many of them, which were with calf, miscarried. Held, in an action for damages, that it was not necessary to show that the carrier had notice that the cattle were with calf, in order to charge it with the damages resulting from abortions produced by its negligence, where there was nothing to show that any special or unusual care was requisite by reason of their being pregnant. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, following (C. C.), 41 Fed. 849.

⁸⁹. Where a carrier knows that the shipment is worth more than the value stated by the shipper, no estoppel will arise in its favor. *Chesapeake, etc., R.*

Co. v. Magowan, 144 S. W. 80, 147 Ky. 422.

Where the agent of a carrier knows that a horse shipped is a race horse and valuable, and there is no limitation of liability in the bill of lading, or any reference to any classification under which the horse was shipped, and the shipper did not know of the classification, the carrier's liability for injuries to the horse is not limited, regardless of the classification. *Kissenger v. Fitzgerald*, 67 S. E. 588, 152 N. C. 247.

⁹⁰. *Missouri, etc., R. Co. v. Allen*, 87 S. W. 168, 39 Tex. Civ. App. 236.

In an action against a carrier for an injury to a jack while being shipped to the owner, no recovery can be had for a loss of profits to be derived from letting him to mares, when it is not averred in the declaration and proved, that the carrier was informed of the intended use of the animal. *Chicago, etc., R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403.

the purpose for which it was being shipped was known to the shipper, it is liable for the damage sustained thereby.⁹¹

Mare in Foal.—A common carrier is not liable for injuries to a mare while being transported, resulting from her being in foal, unless it has notice that she is in foal, or of facts sufficient to charge it with knowledge of her condition.⁹² Plaintiff shipped a valuable cow, some eight months with calf, by defendant's road. Through carelessness in the management of the train, she sustained injury. The plaintiff was not bound, in presenting her for shipment, to explain to defendant's agent her condition, and, if he made no fraudulent concealment or misstatement in regard to her condition, his right of action for damages for the injury was not affected.⁹³

Cattle Shipped for Breeding.—In an action against a railroad company for injuries to cattle in a collision, by reason of which numerous cows miscarried and suffered impairment of their breeding capacity, defendant's liability for damages for its negligence is not lessened by the fact that it received no notice from plaintiffs that the cattle received for shipment were intended for breeding purposes; especially where it knew that they had been imported from Europe, and were being shipped westward, away from the markets for beef cattle.⁹⁴

§ 1862. **Speculative or Remote Damages.**—No recovery can be had against a common carrier for the loss of an unborn colt, through negligence of the carrier during shipment of the mare, although recovery may be had for the enhanced value of the mare resulting from her being with foal.⁹⁵ Thus plaintiff was not entitled to recover expense incurred by him on a trip to the place of destination of the hogs in order to recover them; such expense not being the proximate or natural consequence of the carrier's breach of contract.⁹⁶ So, also in a suit by the owner of certain race horses against a carrier for injuries sustained by them in transportation, loss of benefit to such horses by training which they would have received at the hands of professional trainers employed by plaintiff, but which they could not receive because of their injuries, was not a proper element of damage.⁹⁷ A carrier, in the course of transportation, unloaded cattle, contrary to plaintiff's directions, in a state where cattle of a certain kind were prohibited, but he did not tell the carrier that his cattle were of that kind, and plaintiff was arrested and fined. The unloading was not the proximate cause of plaintiff's loss, and he could not recover of the carrier, although the statute under which he was fined was unconstitutional.⁹⁸ By reason of the failure of defendant, a common carrier, to provide sufficient pens at the point of destination to accommodate cattle shipped over its road, it became necessary, in order to prevent considerable damage to said cattle, for plaintiffs to turn them out on the common in the nighttime, by reason of which some escaped and were lost, one being killed in the pen before being let out.

91. Louisville, etc., R. Co. v. Gormley, 109 S. W. 346, 33 Ky. L. Rep. 188, rehearing denied, 111 S. W. 289.

92. Mare in foal.—Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887.

93. McCune v. Burlington, etc., R. Co., 52 Iowa 600, 3 N. W. 615.

94. Cattle shipped for breeding.—Estill v. New York, etc., R. Co., 41 Fed. 849.

95. Speculative or remote damages.—Texas, etc., R. Co. v. Randle, 18 Tex. Civ. App. 348, 349, 44 S. W. 603; Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. Rep. 45; Kansas, etc., R. Co. v. Barnett, 69 Ark. 150, 61 S. W. 919; East Tennessee, etc., R. Co. v. Herrman, 92 Ga.

384, 17 S. E. 344; Atkinson v. Wabash R. Co., 143 Ind. 501, 41 N. E. 947.

The owner of a jack injured in transportation can not recover of the carrier a loss of profits sustained in being prevented from putting the jack to mares, without pleading and proof of outstanding contracts therefor. Chicago, etc., R. Co. v. Hale, 83 Ill. 360, 25 Am. Rep. 403.

96. Southern R. Co. v. Webb, 39 So. 262, 143 Ala. 304, 111 Am. St. Rep. 45; Kansas, etc., R. Co. v. Barnett, 69 Ark. 150, 61 S. W. 919.

97. Atkinson v. Wabash R. Co., 41 N. E. 947, 143 Ind. 501.

98. McAlister v. Chicago, etc., R. Co., 74 Mo. 351.

Plaintiff brought suit to recover the value of the cattle lost and killed, money expended in searching for the lost cattle, and their own time lost in said search. It was held, that the damages claimed are not remote.⁹⁹

§ 1863. Mitigation of Damages.—But a carrier can not mitigate the damages arising from its failure to place the cars where the shipper could unload the same, the train having been stopped by a flood, by speculations as to what would have happened had the cattle been unloaded.¹

Sale of Dead Animals.—Where an owner of cattle, which died from injuries in transit, sold the same at the point of destination, the amount received therefor should be deducted from damages recovered against the carrier for injuries to the cattle.²

Duty of Shipper to Mitigate Damages.—In an action against a carrier for injuries to cattle received while in transit, when it appears that there was no market value for the cattle at their place of destination in their injured state, the jury may consider the fact that, by reasonable care and at a reasonable expense on the part of the owner, and within a reasonable time, the damages could have been mitigated by a recuperation of the cattle, if this appears from the evidence.³ While an injured party is required to do what he could do, with slight effort and cost, at his command, or by reasonable care, to lessen his damages, a shipper of cattle for sale is not required to hold and feed his cattle for a period of time in order to obviate the effect of a carrier's negligence, but he may dispose of them at once in the market, and sue for the difference between what their market value was at that time and place, and what it would have been if properly transported.⁴

Duty to Seek Market.—A shipper of cattle damaged in transit may put them on the market for sale at their place of destination, and is not required to seek some other market.⁵

Damage Caused by Billing Cattle.—In an action by the shipper of cattle from Texas to Ohio, based on the carrier's stamping the bill of lading with the words "Southern Cattle," by reason of which the government inspector refused, when they were in St. Louis, in the carrier's possession, to allow them to go forward, and the carrier appropriated them, the doctrine of avoidable consequence is not available, so that an instruction that if the shipper could have taken charge of the cattle at St. Louis, when they were stopped, and by reasonable diligence have saved any considerable loss in the handling and sale of the cattle, the carrier was liable only for the amount of damages which could not have been so saved, is properly refused.⁶

§§ 1864-1869. Evidence of Damages—§ 1864-1868. Admissibility—

§ 1864. Evidence of Market Value.—Where an action is brought against a carrier for damages to live stock resulting from its negligence in executing its contract of carriage, evidence of their market value is inadmissible on the question of damages.⁷ But evidence as to their value at other places than destination

99. *Gulf, etc., R. Co. v. York*, 2 Texas App. Civ. Cas., § 813.

1. **Mitigation of damages.**—*Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

2. **Sale of dead animals.**—*Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84.

3. **Duty of shipper to mitigate damages.**—*Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556.

4. *St. Louis, etc., R. Co. v. Hunt* (Tex. Civ. App.), 81 S. W. 322, 323.

5. **Duty to seek market.**—*St. Louis, etc., R. Co. v. Honea* (Tex. Civ. App.), 84 S. W. 267.

6. **Damage caused by billing cattle.**—*St. Louis, etc., R. Co. v. Cassidy, etc.*, Comm. Co., 107 S. W. 628, 48 Tex. Civ. App. 484.

7. **Evidence of damages.**—*Missouri, etc., R. Co. v. Wells*, 58 S. W. 842, 24 Tex. Civ. App. 304.

Though the measure of damages to live stock in course of shipment is the difference between the value of the animals as delivered and their value as they should have been delivered, it was not error to permit plaintiff to testify with reference to what the value would have been at the destination if they were delivered in

was inadmissible.⁸ And the evidence of a witness testifying as to the market value of cattle is properly excluded, where the witness knew the market value of the cattle at the initial point of carriage and not at the destination.⁹

At Another Season of Year.—In an action against a carrier for injury to horses being carried on its road, evidence of a market value in January, though incompetent as to value in September, is harmless, where the verdict is for much less than is warranted by all the competent evidence.¹⁰

At Other Point than Destination.—Where there was no market value for cattle shipped at their place of destination, in estimating the amount of damages for injuries to them while in transit evidence is admissible for their market value at the nearest market.¹¹

Evidence of Value of Unborn Colt Inadmissible.—In a suit against a carrier for injuries to a mare resulting in the death of an unborn colt, evidence of the value of the unborn colt is improperly admitted, but the increased value of the mare, because in foal, could be proven.¹²

§ 1865. Evidence of Actual Value.—Proof of the intrinsic value of live stock is admissible in an action against a carrier for failure to deliver them, where they have no market value at their destination.¹³ Where there is evidence, tending to show that there was no market at the place of destination for race horses in similar cases, competent evidence showing their actual value is admissible, and the fact that a market value is not alleged does not deprive the shipper of the right of tendering proper proof of such actual value.¹⁴

§ 1866. Evidence of Cost and Selling Price.—Where, in an action for injuries to live stock shipped, they are shown to have had a market value at their destination, evidence as to what the shipper paid for them is immaterial.¹⁵ But in an action against a carrier for damages to live stock during shipment, evidence of the price actually received for them at their destination is admissible to corroborate testimony as to their value at that place.¹⁶ The price re-

the same condition as they were in at the point from which they were shipped. *Gulf, etc., R. Co. v. Mathews*, 76 S. W. 607, 33 Tex. Civ. App. 285.

8. *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 452, 37 S. W. 234; *Texas, etc., R. Co. v. Sherrod* (Tex. Civ. App.), 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956; *International, etc., R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68; *Texas, etc., R. Co. v. Stephens* (Tex. Civ. App.), 86 S. W. 933; *Texas, etc., R. Co. v. Barber* (Tex. Civ. App.), 30 S. W. 500.

9. *Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 384, 89 S. W. 956, affirming 87 S. W. 363.

10. **At another season of year.**—*Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019, reversing 25 S. W. 311.

11. **At other point than destination.**—*Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556.

In a suit against carrier for death of a Berkshire hog while in transit, when there was no market value at place of destination, evidence of hog's value in Berkshire market of Texas would be sufficient in absence of other evidence to sustain a verdict, but was not so conclusive as to exclude other competent evidence—such as to the cost of the hog. *Pa-*

cific Exp. Co. v. Lothrop, 20 Tex. Civ. App. 339, 341, 49 S. W. 893.

12. **Evidence of value of unborn colt inadmissible.**—*Texas, etc., R. Co. v. Randle*, 18 Tex. Civ. App. 348, 352, 44 S. W. 603.

13. **Evidence of actual value.**—*Missouri, etc., R. Co. v. Chittim* (Tex. Civ. App.), 40 S. W. 23.

14. *Texas, etc., R. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 598, 87 S. W. 362, affirmed in 101 Tex. 663, no op.; *Texas, etc., R. Co. v. Dishman*, 41 Tex. Civ. App. 250, 251, 91 S. W. 828, affirmed in 101 Tex. 663, no op.; *Missouri, etc., R. Co. v. Chittim* (Tex. Civ. App.), 40 S. W. 23; *Texas, etc., R. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188; *Hutchison on Carriers*, § 770b; 1 *Sedgwick on Damages*, § 244.

15. **Evidence of cost and selling price.**—*Missouri, etc., R. Co. v. Garrett* (Tex. Civ. App.), 96 S. W. 53, affirmed in 101 Tex. 648, no op.; *Texas, etc., R. Co. v. Dishman*, 41 Tex. Civ. App. 250, 91 S. W. 828, affirmed in 101 Tex. 663, no op.; *Missouri, etc., R. Co. v. Dilworth*, 95 Tex. 327, 67 S. W. 88, affirming 65 S. W. 502; *Galveston, etc., R. Co. v. Tuckett* (Tex. Civ. App.), 25 S. W. 150.

16. *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 515, 32 S. W. 920.

ceived for live stock is not conclusive of the market value, and when it is not in fact the fair value of the animals it is error to consider it to be such in estimating the amount of damages.¹⁷

Of Other Animals.—In a suit against a carrier for the negligent death of an animal in transit, which had no market value at the place of destination, it is competent to show actual sales of similar animals and the value thereof at other times near the date of sale of the animal killed.¹⁸

Evidence of Offers.—In action for injury to live stock in shipment to a market, evidence as to their cost, as to offers made for them at places other than their destination is inadmissible to prove damages,¹⁹ and evidence of a previous unaccepted offer to purchase the live stock is inadmissible even as evidence of their value.²⁰

§ 1867. Evidence of Nature and Pedigree.—In a suit against a carrier for the negligent death of an animal, which had no market value at the place of destination, evidence of the animal's pedigree is admissible in determining its value.²¹

§ 1868. Evidence as to Damages Per Head.—In an action for injuries to live stock in transportation, admission of testimony of a witness that, when the animals arrived at their destination, they were damaged to a certain amount per head, was reversible error, where there was no evidence as to their value.²²

§ 1869. Weight and Sufficiency.—In an action for damages to race horses caused by delay in transit, evidence that there had been a few individual sales of race horses at the destination of the horses in question, when accompanied by an express statement of the witness that there was no market for such horses at their destination, did not show that the horses had a market value at their destination in such sense as to preclude a recovery for depreciation in actual value.²³

§ 1870. Instructions as to Damages.—Where the existence of a market value for live stock at their destination is controverted, it is error to give an instruction which states that the measure of damages is the difference between the market value of the live stock when they arrived in their injured condition

17. *Cleveland, etc., R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804.

In an action against a carrier for injuries to thoroughbred colts, shipped for sale at an auction by alleged negligent transportation, the measure of damages was the difference between the fair market value of the colts in the condition they would have been in if they had been transported with ordinary care and within a reasonable time and the condition they were actually in when delivered, and it was therefore error for the court to authorize the jury to award the difference between the value of the colts as they would have been if properly transported and the amount they sold for at the public sale. *Southern Railway v. Graddy*, 109 S. W. 881, 33 Ky. L. Rep. 183.

18. **Of other animals.**—*Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 341, 49 S. W. 898.

19. **Evidence of offers.**—*Texas, etc., R. Co. v. Barber* (Tex. Civ. App.), 30 S. W. 500.

In action for injury to cattle in ship-

ment testimony that a man had told witness some time before shipment that he would give seventeen dollars a head for the cattle, is not evidence of value and inadmissible. *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298, 300.

In an action for damages to cattle shipped over defendant's railroad, testimony that a person told witness before the shipment that he would give a certain amount for the cattle is no evidence of their value, and is inadmissible. *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

20. *Texas, etc., R. Co. v. Randle*, 18 Tex. Civ. App. 348, 352, 44 S. W. 603.

21. **Evidence of nature and pedigree.**—*Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 342, 49 S. W. 898.

22. **Evidence as to damage per head.**—*Gulf, etc., R. Co. v. Staton* (Tex. Civ. App.), 49 S. W. 277.

23. **Weight and sufficiency.**—*Texas, etc., R. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 87 S. W. 362.

at their destination and their market value at the place had they been transported with reasonable dispatch and safety, as it assumes that there was a market value at such place.²⁴

§ 1871. Payment of Freight as Prerequisite to Recovery.—Where a person contracts with a railroad company for a car in which to ship stock by a certain time, he will not be precluded from recovering damages for the failure to furnish the car because he did not tender to the company the freight charges in advance.²⁵

§§ 1872-2054. Limitation of Liability of Carriers of Live Stock—
§§ 1872-1968. Limitation of Common-Law Liability as Insurer—
§§ 1872-1875. Power to Limit and Validity—§ 1872. In General.—A common carrier may, by special contract for the transportation of live stock, if based upon a sufficient consideration, and if not unreasonable, immoral, or contrary to public policy,²⁶ limit its liability, but can not, by special agreement, divest itself of its character and general liability as a common carrier; in respect to stock which it receives for transportation.²⁷

Connecting Carrier.—See post, "Limitation of Liability," chapter 32.

§§ 1873-1874. Effect of Statutory and Constitutional Provisions—
§ 1873. Federal Statutes.—A railroad company may not, by contract with the shipper, limit its liability for loss resulting in case of interstate shipment of stock.²⁸

Statute Forbidding Confining Stock in Car over 28 Hours.—That the injury to live stock shipped was caused by confining the stock in a car for more than 28 hours, in violation of a federal statute, does not relieve the shipper from the limitation of liability in contract of shipment.²⁹

§ 1874. State Statutes.—Stipulation limiting the common-law liability of carriers of live stock are void under the statutes of Iowa,³⁰ Texas³¹ and of Washington;³² and the constitution of Kentucky.³³

§ 1875. Conflict of Laws.—Where a contract for the carriage of an ani-

24. Instructions as to damages.—San Antonio, etc., R. Co. *v.* Fisher (Tex. Civ. App.), 99 S. W. 1042.

25. Payment of freight as prerequisite to recovery.—Cleveland, etc., R. Co. *v.* Perishow, 61 Ill. App. 179.

26. Power to limit and validity.—Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Central R., etc., Co. *v.* Bryant, 73 Ga. 722; Cincinnati, etc., R. Co. *v.* Disbrow & Co., 76 Ga. 253; Georgia R., etc., Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934; Georgia R. Co. *v.* Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia, etc., R. Co. *v.* Greer, 2 Ga. App. 516, 58 S. E. 782.

Florida.—Summerlin *v.* Seaboard, etc., Railway, 56 Fla. 687, 47 So. 557, 19 L. R. A., N. S., 191.

Indiana.—Terre Haute, etc., R. Co. *v.* Sherwood, 31 N. E. 781, 132 Ind. 129, 17 L. R. A. 339, 32 Am. St. Rep. 239; Cleveland, etc., R. Co. *v.* Heath, 53 N. E. 198, 22 Ind. App. 47; Cleveland, etc., R. Co. *v.* Kennedy, 53 N. E. 1135, 22 Ind. App. 698.

Michigan.—Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165.

Missouri.—St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634, 46 Am. Rep. 13.

Utah.—Houtz *v.* Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

27. Atchison, etc., R. Co. *v.* Washburn, 5 Neb. 117.

28. Federal statutes.—St. Louis, etc., R. Co. *v.* Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

29. Statute forbidding confining stock in car over twenty-eight hours.—Pierson *v.* Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509.

30. State statutes.—Siemonsma *v.* Chicago, etc., R. Co., 137 Iowa 607, 115 N. W. 230, Iowa Code, § 2074.

31. Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 316, 4 S. W. 567, 2 Am. St. Rep. 494; Missouri Pac. R. Co. *v.* Cornwall, 70 Tex. 611, 612, 8 S. W. 312.

32. Carstens Packing Co. *v.* Northern Pac. R. Co., 64 Wash. 256, 116 Pac. 625.

33. Kentucky Constitution, § 196. Adams Exp. Co. *v.* Walker, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412; Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 862, 18 Ky. L. Rep. 974.

mal made in Ohio, limiting the carrier's common-law liability, would have been invalid in Kentucky, under Const. § 196, forbidding carriers to contract away their common-law liability, the carrier should show, in order to protect itself under such contract, not only that the contract was valid under the law of Ohio, but that the loss of the animal, constituting the nonperformance of the contract, also occurred there.³⁴

§ 1876. Extent of Limitation Generally.—A railroad company engaged in the business of transporting cattle can limit its responsibility only to the same extent that it can limit the responsibility it is under for the proper transportation of other property.³⁵

§§ 1877-1905. Duties and Losses Which May Be Limited or Restricted—§ 1877. In General.—A carrier may, by special contract, limit its liability in respect to the carriage of live stock, except as to losses resulting from its negligence.³⁶ Thus it may exempt itself by contract from liability for injuries occurring to the stock, apart from the operation of the train, such as injury from loading and unloading,³⁷ from overloading,³⁸ crowding,³⁹ heating,⁴⁰ suffocation,⁴¹ and the like, or from the weakness,⁴² escape,⁴³ or viciousness,⁴⁴ of the stock,⁴⁵ or in consequence of injury to each other.⁴⁶

§§ 1878-1881. Negligence of Carrier—§ 1878. In General.—The general rule is that a carrier of live stock can not by contract relieve itself from liability for its own negligence;⁴⁷ in whole or in part,⁴⁸ either as to the right or the amount of recovery,⁴⁹ or for loss or damage caused by the negligence or misconduct of its servants;⁵⁰ and that, so far as a live stock shipment contract undertakes to exempt the carrier from liability for negligence, it is a nullity.⁵¹ This is the rule in Alabama,⁵² Arkansas,⁵³ Colorado,⁵⁴ Illinois,⁵⁵ Indiana,⁵⁶

34. Conflict of laws.—*Adams Exp. Co. v. Walker*, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412.

35. Extent of limitation generally.—*Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

36. Duties and losses which may be limited or restricted.—*Louisville, etc., R. Co. v. Crozier*, 13 Ky. L. Rep. 175.

37. Loading and unloading.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

38. Overloading.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

39. Crowding.—*Steiger v. Erie R. Co. (N. Y.)*, 5 Hun 345.

40. Heating.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104; *Steiger v. Erie R. Co. (N. Y.)*, 5 Hun 345.

41. Suffocation.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104. See post, "Loss by Suffocation," § 1901.

42. Weakness.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

43. Escape.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

44. Viciousness.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

45. St. Louis, etc., R. Co. v. Copeland, 23 Okla. 837, 102 Pac. 104.

46. Steiger v. Erie R. Co. (N. Y.), 5 Hun 345.

47. Negligence of carrier.—*Peck v.*

Chicago, etc., R. Co., 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883.

48. Chicago, etc., R. Co. v. Witty, 32 Neb. 275, 49 N. W. 183.

49. Boehl v. Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

50. Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

51. Estes v. Denver, etc., R. Co., 49 Colo. 378, 113 Pac. 1005.

52. Louisville, etc., R. Co. v. Smitha, 145 Ala. 686, 40 So. 117.

While a carrier of live stock may by special contract with a shipper qualify its common-law liability, both as to risk of accident and as to the amount of damages, if the limitation is made to secure a reasonable and just proportion between liability and compensation, it can not contract for immunity from liability for the loss of, or injury to, property resulting from its own or its servant's negligence. *Atlantic, etc., R. Co. v. Dothan Mule Co.*, 161 Ala. 341, 49 So. 882.

53. St. Louis, etc., R. Co. v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

54. Estes v. Denver, etc., R. Co., 49 Colo. 378, 113 Pac. 1005.

55. Wabash R. Co. v. Thomas, 122 Ill. App. 569, judgment affirmed in 222 Ill. 337, 78 N. E. 777, 7 L. R. A., N. S., 1041.

56. Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Cleveland,*

Iowa,⁵⁷ Kentucky,⁵⁸ Minnesota,⁵⁹ Mississippi,⁶⁰ Missouri,⁶¹ Nebraska,⁶² Ohio,⁶³ Oregon,⁶⁴ Texas,⁶⁵ Utah,⁶⁶ Virginia,⁶⁷ Washington,⁶⁸ West Virginia,⁶⁹ Wis-

etc., *R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *Cleveland, etc., R. Co. v. Kennedy*, 22 Ind. App. 698, 53 N. E. 1135.

Though the contract of shipment of live stock by a common carrier purported to relieve the carrier from all liability and cast all risk on the owner, the carrier was liable for the value of animals which escaped and were lost by reason of the negligence of the carrier. *Indianapolis, etc., R. Co. v. Allen*, 31 Ind. 394.

57. *Peck v. Chicago, etc., R. Co.*, 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883.

A carrier can not plead, as against his own negligent act in the transportation of live stock, a contract providing in advance for exemption from liability. *Colsch v. Chicago, etc., R. Co. (Iowa)*, 117 N. W. 281.

58. Act 1870, authorizing the L. railroad company to contract specially for the transportation of live stock, conferred no greater right in that regard than the company already had; a carrier can not by contract relieve himself from liability for negligence. *Louisville, etc., R. Co. v. Hedger (Ky.)*, 9 Bush 645, 15 Am. Rep. 740.

59. *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, 46 N. W. 323; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

60. *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

61. *Davis v. Wabash R. Co.*, 122 Mo. App. 637, 99 S. W. 17.

62. A carrier of live stock can not by contract relieve itself, in whole or in part, from liability for injury or loss from its own negligence. *Miller v. Chicago, etc., R. Co.*, 123 N. W. 449, 85 Neb. 458; *Chicago, etc., R. Co. v. Witty*, 32 Neb. 275, 49 N. W. 183; *Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

63. *Welsh v. Pittsburgh, etc., R. Co.*, 10 O. St. 65, 75 Am. Dec. 490; *Pittsburgh, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; *Ambach v. Baltimore, etc., R. Co.*, 4 O. Dec. 467.

64. A common carrier can not, even in part, exempt itself from liability for injury from its negligence to stock shipped, even in consideration of a lower tariff. *Normile v. Oregon R., etc., Co.*, 69 Pac. 928, 41 Ore. 177.

65. Provisions in a contract for the shipment of live stock which arbitrarily fix the amount of the damages and which relieve the carrier from damages resulting from certain named risks, and from "any and all other causes whatever," are void as contrary to public policy. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

Duty can not be shifted to another.—This court has before held, that the care and duty imposed upon the carrier to safely carry and care for the animals intrusted to its custody for shipment can not by contract be shifted to some one else so as to relieve the carrier from the consequences of its negligence; and especially is this so when it appears, that the negligence of the servants of the carrier was the direct cause of the loss. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 122, 26 S. W. 161.

66. Provisions in a contract with a carrier that a shipper of sheep assumed all risk of damages from delay in transportation, or loss or damage from any other cause than willful or gross negligence, and other provisions exempting the carrier from or limiting its liability for loss or damage from failure to exercise a proper degree of care, contravene public policy and are void. *Houtz v. Union Pac. R. Co.*, 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

67. *Virginia, etc., R. Co. v. Sayers*, 67 Va. (26 Gratt.) 328.

68. A carrier of live stock may not exempt itself from liability for any negligent act in transporting the same. *Bartlett v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

69. *Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290; *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871. But see, *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116.

B. shipped twenty-four head of cattle at Rollyson station, in Braxton county, over the B. & O. railroad, to Baltimore, Md. On the day of shipment, B. and the company made and signed a contract which, among other things, provided, "that in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damages, sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained." Held, that the company could not, by the contract, or any of the provisions thereof, exempt itself from any liability for loss or damage occasioned to the plaintiff which was in any degree caused by the negligence or misfeasance of itself or its servants. *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871.

consin,⁷⁰ and formerly in Georgia.⁷¹

§§ 1879-1881. Injury Caused by Fraud or Gross Negligence—

§ 1879. In General.—An exception imposed by a carrier of live stock, limiting its liability to such loss or injury as results from⁷² its fraud⁷³ or gross,⁷⁴ wanton,⁷⁵ or willful⁷⁶ negligence is invalid, such stipulations being contrary to public policy;⁷⁷ and the carrier is liable for damages arising from its own or its servant's negligence, though shippers agree to release it from liability for all loss or damage to such stock which is not the result of the willful, etc., negligence of its agents.⁷⁸ This doctrine prevails in Alabama,⁷⁹ Colorado,⁸⁰ Mississippi,⁸¹ Utah,⁸² and Washington.⁸³

§ 1880. Jurisdiction Allowing Exemption.—In some jurisdictions, among which are Georgia,⁸⁴ Illinois,⁸⁵ and Oklahoma,⁸⁶ the carrier's liability may be so limited that he will be liable only in the event he is guilty of "gross negligence," but the exemption can not cover loss or injury to stock from any causes arising through the fraud or gross negligence of the carrier.⁸⁷ This was formerly the

70. *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55.

71. *Central R., etc., Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Dec. 75; *Mitchell v. Georgia R. Co.*, 68 Ga. 644; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

72. Injuries caused by fraud or gross negligence.—*East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

73. *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

74. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

75. *Alabama, etc., R. Co. v. Thomas*, 83 Ala. 343, 3 So. 802.

76. *Louisville, etc., R. Co. v. Grant*, 99 Ala. 325, 13 So. 599; *Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A., N. S., 412.

77. *Alabama, etc., R. Co. v. Thomas*, 83 Ala. 343, 3 So. 802.

78. *Louisville, etc., R. Co. v. Grant*, 99 Ala. 325, 13 So. 599.

79. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Louisville, etc., R. Co. v. Grant*, 99 Ala. 325, 13 So. 599; *Alabama, etc., R. Co. v. Thomas*, 83 Ala. 343, 3 So. 802.

80. *Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 13 Pac. 1010, 36 L. R. A., N. S., 412.

81. *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

82. A contract exempting carrier of live stock from liability except for willful or gross negligence, and then only on presentation of a claim, is void. *Houtz v. Union Pac. R. Co.*, 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

83. *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A., N. S., 975.

84. Jurisdiction allowing exemption.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *Georgia, etc., R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782.

"A live stock contract of shipment whereby the shipper agreed to release the carrier from liability in case of loss or injury to the stock by reason of overloading, heat, suffocation, freight, viciousness * * * and from all other damages incidental to railroad transportation which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railway, having the stock in charge, and the owner or shipper is to look to the company on whose line damage occurred for compensation for such damage," is valid under the laws of Georgia, and the shipper is bound by its terms. *Georgia, etc., R. Co. v. Greer*, 2 Ga. App. 516, 518, 58 S. E. 782.

85. Railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or willful misfeasance. *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136.

86. *St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

87. Georgia.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934. See, also, *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219.

Illinois.—*Chicago, etc., R. Co. v. Calumet Stock Farm*, 96 Ill. App. 337, judgment affirmed in 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68.

Oklahoma.—*St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104.

South Dakota.—Under the direct provisions of Civ. Code, of South Dakota, § 1583, a carrier can not be exonerated

rule in Kentucky.⁸⁸

Rule Will Not Be Extended.—The rule limiting liability except for gross negligence in contracts for transportation of live stock will not be extended so as to include the transportation of goods generally by carriers.⁸⁹

§ 1881. Conflict of Laws.—When a limitation by contract of the liability of a carrier of live stock to gross negligence is clearly against the public policy of the state of the forum as declared in a statute, providing that no contract shall exempt from liability a carrier of live stock which would exist had no contract been made, it will not be recognized though valid in the state where the contract was made.⁹⁰

§§ 1882-1886. Requiring Shipper to Load and Unload Stock—

§ 1882. In General.—A stipulation in a contract for the shipment of live stock that the shipper will load, unload, and reload the stock at his own risk⁹¹ and expense⁹² is valid and binding on the shipper, and the carrier does not become liable for the stock until they are loaded on its train;⁹³ although prohibited from limiting its liability.⁹⁴

§§ 1883-1885. Under Federal Statutes—§ 1883. Hepburn Act.—The Hepburn Act (Act June 29, 1906, c. 3591, § 7; 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), prohibiting a carrier by contract or regulation to exempt itself from liability for injury caused by its servants or connecting carriers, etc., does not prevent a carrier of cattle from one state to another to exempt itself by contract from liability until the cattle are loaded on its cars, since a carrier need not take possession of property before the same is placed on its cars for transportation.⁹⁵

§ 1884. Liability for Overloading.—Under Rev. St. 1883, § 1678, providing that "no railroad company, in the carrying or transportation of animals, shall overload the cars," the company is not relieved from that duty, as against

by any agreement, made in anticipation thereof, for gross negligence. *Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

88. *Mount v. Louisville, etc., R. Co.*, 2 Ky. L. Rep. 221.

89. **Rule will not be extended.**—*Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 68 S. E. 1039.

90. **Conflict of laws.**—*Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A., N. S., 975, so holding under Washington Laws 1907, C. 240.

91. **Requiring shipper to load and unload stock.**—*Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Southwestern R. Co. v. Thornton*, 71 Ga. 61; *Central R. Co. v. Bryant*, 73 Ga. 722; *Cincinnati, etc., R. Co. v. Disbrow & Co.*, 76 Ga. 253; *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711; *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Comer v. Stewart*, 97 Ga. 403, 24 S. E. 845; *New England, etc., Co. v. Paige*, 108 Ga. 296, 33 S. E. 969; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Central, etc., R. Co. v. Rodgers*, 111 Ga. 865, 36 S. E. 946; *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566; *White Live Stock Comm. Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330; *Bartlet v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

Defective chutes.—One of plaintiff's steers was injured while being unloaded from a car of the defendant company, by reason of a defective chute. The cattle were shipped under a uniform live-stock contract, which allowed plaintiff a lower rate in consideration that he would load and unload the cattle at his own risk. Held, that a charge that, if the jury found that plaintiff had entered into the uniform live-stock contract, he could not recover, was proper. *Candee v. New York, etc., R. Co.*, 49 Atl. 17, 73 Conn. 667.

92. *St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

93. *St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

94. A carrier, though prohibited from limiting its liability, is not deprived of the right to make a special contract with the owner of live stock tendered for transportation, requiring such owner to see that the stock is properly loaded. *Cleveland, etc., R. Co. v. Patterson*, 69 Ill. App. 438; *Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *Lewis v. Pennsylvania R. Co.*, 71 N. J. L. 339, 59 Atl. 1117, affirming judgment, 56 Atl. 128, 70 N. J. L. 132; *Texas, etc., R. Co. v. Edins*, 36 Tex. Civ. App. 639, 83 S. W. 253.

95. **Hepburn Act.**—*St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

a shipper whose cattle are killed in transit, by a clause in the contract of shipment to the effect that he is, at his own risk, to load, transfer, and unload said stock, with the assistance of the company's agents, when such agents assisted in loading the cars.⁹⁶

§ 1885. Unloading for Food, Rest and Water.—A provision in a contract of shipment of live stock from one state to another, exempting the carrier from liability for a loss by reason of a violation of its duty to unload the stock for rest, water, and food, as required by Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], is void,⁹⁷ and a company failing to perform said duties is not relieved from liability to the shipper for injury to stock in transit by reason of the shippers' failure to keep a special contract under which he should ride on the transporting train and look after such loading and unloading,⁹⁸ and feeding and watering,⁹⁹ and it is not necessary, in order to render the carrier liable for confining the animals for more than 28 hours without food (Rev. St., § 1678), to show that the failure of the carrier to furnish the necessary facilities to enable the shipper to perform his duty was wanton.¹

§ 1886. Loss by Negligence of Carrier.—A carrier can not exempt itself from liability for its negligent failure to unload live stock at a certain place by contract with the shipper made before or after the stock was delivered for transportation.² A provision in a contract that a shipper of cattle is, at his own risk, to load, transfer, and unload them, with the assistance of the carrier's agents, exempts the company from liability for its own negligence, and is therefore void, although in pursuance of it the cattle are loaded exclusively by the shipper.³

§§ 1887-1891. Requiring Shipper to Accompany and Care for Stock—**§ 1887. In General.**—A carrier may stipulate, in a contract for the transportation of live stock, that the shipper or his representative shall accompany the stock and assume the duty and responsibility of the care thereof.⁴

§ 1888. Under Constitutional and Statutory Provisions.—A condition in a shipping contract providing that the cars are to be in charge of the shipper while in transit, and that the shipper assumes the duty of caring for the stock at his own expense, and risk, is not in violation of Code of Iowa, § 2074, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, where the shipper has assumed control, unless the carrier seeks by said condition to escape liability for injury caused by its failure to furnish proper facilities,⁵ but a contract for the shipment of live stock, attempting to limit the carrier's liability by providing that the owner should assume all risk and expenses of feeding, watering, bedding, etc., and that the carrier should be exempt from liability for loss or damage arising from heat, suffocation, crowding, etc., is in violation of the statute, and does not relieve the carrier

96. Liability for overloading.—*Crawford v. Southern R. Co.*, 56 S. C. 136, 34 S. E. 80.

97. Unloading for food, rest and water.—*Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

98. Crawford v. Southern R. Co., 56 S. C. 136, 34 S. E. 80; *Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

99. A carrier is not relieved from liability for confining a shipment of animals for more than twenty-eight hours with-

out food (Rev. St., § 1678) by the fact that the shipper assumed the duty of unloading and feeding. *Comer v. Columbia, etc., R. Co.*, 29 S. E. 637, 52 S. C. 36.

1. Comer v. Columbia, etc., R. Co., 52 S. C. 36, 29 S. E. 637.

2. Loss by negligence of carrier.—*St. Louis, etc., R. Co. v. Mitchell*, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546.

3. Crawford v. Southern R. Co., 56 S. C. 136, 34 S. E. 80.

4. Power and validity.—*Colsch v. Chicago, etc., R. Co. (Iowa)*, 117 N. W. 281.

5. Under Iowa statute.—*Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192. Iowa Code, § 2074.

from liability.⁶ And a contract stipulating that the stock is not to be transported or delivered at any particular time, nor in season for any particular market, and that the shipper shall assume the risk and expense of feeding and watering and caring for the stock while in cars, yards, etc., and shall load and unload the same at his own expense and risk, is invalid.⁷

Under Statute of Kansas.—Under the Act of Kansas Legislature, March 6, 1883, § 13, providing that no railroad company shall be permitted, except by order of the railroad commissioners, to limit its common-law liability; and an order by the commissioners that any railroad company having in force two rates, the lower one to apply when such liability is limited, may limit its common-law liability in the manner specified in the contract, except to relieve itself from liability on account of negligence. A contract by a railroad company, having two rates, to carry stock at the carrier rate, and to carry the shipper or his agents free to care for the stock and limiting its liability to injuries arising from gross negligence is valid, and the company is not responsible for injuries to the cattle from the owner's failure to care for them.⁸

Under Constitution of Kentucky.—Under Const., § 196, prohibiting common carriers from contracting from any liability imposed on them by law, provisions in a bill of lading for stock that the shipper should feed, water, and attend to the stock at his own risk while in transit do not relieve the carrier of its duty to look after the stock.⁹ Prior to the adoption of this section of the constitution the rule was otherwise.¹⁰

Under Constitution of Nebraska.—An agreement that shipper shall accompany the stock and be responsible for its care, when proper facilities are supplied, is not a limitation of the carrier's liability, forbidden by Const., art. 11 § 4.¹¹

§ 1889. Loss by Negligence.—Provisions in a contract between a carrier and a shipper of live stock, who is to accompany the shipment, whereby the carrier exempts itself from liability for injury to the live stock, resulting from its negligence or the negligence of its servants, are void; as against the policy of the law.¹²

§ 1890. Watering and Feeding.—A carrier of live stock may enter into a valid contract with the shipper imposing upon the shipper the duty of watering and feeding the stock;¹³ but such carrier can not contract to avoid liability for its negligent failure to feed, and water at such times and places as the law requires.¹⁴

§ 1891. Estoppel of Shipper to Deny Validity.—The use by a shipper of a contract for transportation of animals, providing that he shall accompany them, and feed, water, and attend them, and his compliance with such provision

6. *Powers v. Chicago, etc., R. Co.*, 130 Iowa 615, 105 N. W. 345.

7. *Wisecarver v. Chicago, etc., R. Co.*, 141 Iowa 121, 119 N. W. 532.

8. *Under statute of Kansas.*—*Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335, 75 N. W. 192.

9. *Under constitution of Kentucky.*—*Cincinnati, etc., R. Co. v. Sanders*, 119 Ky. 115, 25 Ky. L. Rep. 2333, 80 S. W. 488.

10. *Mount v. Louisville, etc., R. Co.*, 2 Ky. L. Rep. 221.

11. *Under constitution of Nebraska.*—*Chicago, etc., R. Co. v. Schuldt*, 66 Neb. 43, 92 N. W. 162.

12. *Loss by negligence.*—*Blatcher v. Philadelphia, etc., R. Co.*, 31 App. D. C. 385.

13. *Watering and feeding.*—*Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Southwestern R. Co. v. Thornton*, 71 Ga. 61; *Central R. Co. v. Bryant*, 73 Ga. 722; *Cincinnati, etc., R. Co. v. Disbrow*, 76 Ga. 253; *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711; *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Comer v. Stewart*, 97 Ga. 403, 24 S. E. 845; *New England, etc., Co. v. Paige*, 108 Ga. 296, 38 S. E. 969; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Central, etc., R. Co. v. Rodgers*, 111 Ga. 865, 36 S. E. 946; *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566; *Bartlett v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

14. *Ward v. Chicago, etc., R. Co.*, 87 Kan. 824, 126 Pac. 1083.

does not estop him from denying the validity of a provision therein limiting the carrier's common-law liability.¹⁵

§ 1892. Requiring Shipper to Select or Inspect Cars.—A carrier can not relieve itself of its failure to provide a suitable car by a stipulation in the bill of lading devolving upon the shipper the duty of selecting a suitable car,¹⁶ or by requiring him to inspect the car furnished and providing that loading the stock shall be acknowledgment and acceptance by him of the sufficiency and suitability of the car,¹⁷ unless he accepts it with full knowledge of the defect,¹⁸ especially where the carrier knew the car selected to be defective.¹⁹ Such provision is against the policy of the law.²⁰

§ 1893. Loss from Size and Mode of Construction of Cars.—A shipper who delivers live stock to a carrier to be laden and transported under the immediate charge of himself or his agent, in cars which he has an opportunity to examine, may agree to bear the risk of injury resulting from the size and mode of the construction of the cars and the manner of loading the stock.²¹

§ 1894. Loss Resulting from Defective Cars.—A carrier of live stock is liable for damage resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary.²²

Limitation to Loss Resulting from Defective Trucks, Wheels or Axles.—A railroad can not, in consideration of a reduced rate, exempt itself from all liabilities of a carrier of live stock not resulting from defective trucks, wheels, or axles.²³

15. Estoppel of shipper to deny validity.—*Atchison, etc., R. Co. v. Rodgers*, 16 N. Mex. 120, 113 Pac. 805.

16. Requiring shipper to select or inspect cars.—*Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; *Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 559; *Trout v. Gulf, etc., R. Co.* (Tex. Civ. App.), 111 S. W. 220.

17. Provisions of a carrier's live-stock contract that the shipper should inspect the cars in which the stock was to be transported, and that the shipper's loading the stock into the cars should be an acknowledgment and acceptance by him of their sufficiency and suitability in every respect, and that the carrier should not be liable for damages caused by delay, etc., were unreasonable, as an attempt by the carrier to limit its liability for its own negligence. *Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A., N. S., 412.

18. A carrier is liable for injury to animals shipped, from a defect in the car, which a reasonably careful inspection by an experienced person would have disclosed, but which was not obvious or such as would ordinarily be discovered by an inexperienced person, notwithstanding a stipulation that the shipper examine the car, and assume the risk of its suitability, unless he accepted it with full knowledge of the defect. *Leonard v. Whitcomb*, 70 N. W. 817, 95 Wis. 646.

19. Carrier knowing at time that car defective.—A special contract by a railroad with a shipper of stock provided that the latter was to select his car, and

to release the railroad from all liability for damages resulting from a defective condition of the car, even though valid, if the road knew at the time that the car selected was unsafe, and the shipper failed to discover such unsoundness by reason of the defects being hidden, proof of these facts would charge the road with damages accruing therefrom. *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

20. Blatcher v. Philadelphia, etc., R. Co., 31 App. D. C. 385.

21. Loss from size and mode of construction of cars.—*Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

Where the drover in charge of plaintiff's hogs allowed them to be loaded in an overcrowded manner, on insufficiently ventilated cars, and then signed, without reading, a contract, on behalf of plaintiff, stipulating that the hogs should be shipped at owner's risk, in consideration of reduced freight rate, plaintiff can not recover for hogs smothered in transit. *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

22. Loss resulting from defective cars.—*Welsh v. Pittsburgh, etc., R. Co.*, 10 O. St. 65, 75 Am. Dec. 490; *Pittsburgh, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

23. Limitation to loss resulting from defective trucks, wheels, or axles.—*Union Pac. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986.

§ 1895. Loss from Failure to Provide Suitable Yards and Chutes.—A carrier of live stock can not contract to avoid liability for its negligent failure to provide suitable yards.²⁴

Chutes.—See ante, "Requiring Shipper to Load and Unload," §§ 1882-1886.

§ 1896. Limitation to Loss Caused by Collision or Derailment.—A contract by a shipper of live stock that in consideration of a free pass for himself over the road, he would assume all risk of loss or damage to the stock, except such as might be caused by collision or running off the track, is neither unreasonable nor contrary to public policy.²⁵

§§ 1897-1899. Injury Resulting from Inherent Vice, Propensities or Defect of Animals—§ 1897. In General.—A contract with a carrier of animals is valid which provides that the owner shall take the risk of injuries to the animals in consequence of their own intrinsic defects.²⁶ A common carrier is not an insurer of animals from injuries arising from their vicious nature and propensities, and which could not have been prevented by the exercise of foresight, vigilance, and care. An express company is entitled to limit its liability in that respect.²⁷

§ 1898. Injuries Caused by Fright.—It seems that a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as insurer of live animals liable to get unruly from fright and to injure themselves in that state, when such animals become injured without the fault or negligence of the company or its agents.²⁸

§ 1899. Loss by Jumping from Cars.—In an action against a railroad company to recover the value of a horse which was killed by jumping from defendant's car, on which it had been shipped, under a contract which provided that defendant should not be liable for loss "by jumping from the cars," but omitted the rate to be charged for transportation, whether a rate was expressly agreed on or defendant was to receive what the services might be worth, or was to do the carrying gratuitously, it still might, by agreement, restrict its liability, and such contract was properly admitted in evidence.²⁹

§ 1900. Failure to Drench Hogs.—A railroad company can not by any custom or special contract limit its liability for loss of hogs by reason of its failure to properly drench them while in transit.³⁰

§ 1901. Loss by Suffocation.—See ante, "Loss from Size and Mode of Construction of Cars," § 1893; post, "Loss by Suffocation," § 1939.

§ 1902. Loss by Mobs and Strikers.—See post, "Waiver or Estoppel to Rely on Exemption," § 1950; "Negligence of Carriers," § 1957; "Presumptions and Burden of Proof," §§ 1954-1959.

24. Loss from failure to provide suitable yards and chutes.—*Ward v. Chicago*, etc., R. Co., 87 Kan. 824, 126 Pac. 1083.

25. Limitation to loss caused by collision or derailment.—*Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81.

26. Injuries resulting from inherent vice, propensities or defects of animals.—*Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

27. *Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450, Ann. Cas. 1913D, 972.

28. Injuries caused by fright.—*Virginia*, etc., R. Co. *v. Sayers*, 67 Va. (26 Gratt.) 328.

29. Loss by jumping from cars.—*Hutchinson v. Chicago*, etc., R. Co., 37 Minn. 524, 35 N. W. 433.

30. Failure to drench hogs.—In an action to recover for the loss of hogs in transit, the allegation being that the hogs died from the heat by reason of failure to drench them properly, the railway company can not absolve itself from liability by showing it was not its practice to throw water on hogs in the night time or at all unless so ordered by the shipper. *Lake Shore*, etc., R. Co. *v. Gibson*, 8 O. C. C., N. S., 345, 18-28 O. C. D. 538.

§ 1903. Stipulation against Loss by Delay.—A contract with a carrier of animals which provides that the owner shall take the risk of loss or damage by delay,³¹ is valid, unless prohibited by statute.³²

§ 1904. Nondelivery.—A common carrier can not, by a special contract relating to the transportation of stock, defeat an action in tort for their nondelivery, based on his common-law obligation to use due diligence in transportation of the same. The liability of defendant, in such case, does not arise upon contract, but in spite of it.³³

§ 1905. Loss Occurring Prior to Execution of Contract.—A contract for shipment of live stock exempting a carrier from liability for damages which have already occurred is void.³⁴ And the execution and delivery to the carrier, after the animal shipped was dead, of a paper called "Limited Liability Live Stock Contract," which does not purport to be a release of damages, does not affect the shipper's right to recover for the loss.³⁵

§§ 1906-1913. Mode, Form and Requisites—§ 1906. Express Contract.—It is competent for a railroad company to limit its liability for live stock shipped over its road, if done by express contract, in every respect.³⁶

§ 1907. Custom.—A custom of railroads not to receive for transportation any live stock unless certain conditions modifying their common-law liability is not a good usage but contrary to public policy. Such a custom would be bad because railroads can not legally refuse to ship live stock. If such a custom should be ever so common and uniform it could not be sustained because it, the custom, would be against the law.³⁷

Requiring Owner to Feed and Water Stock.—A common carrier can not by custom require the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier can not transfer it to the shipper by custom. The shipper might agree to go with his stock and to feed and water them at his own expense, but he could not be compelled to do so by custom because the law requires this duty of the carrier.³⁸

Custom as to Loss by Delay.—A custom which required the owner of the stock to hold the railroad harmless against ordinary delays in taking up freight is void. If the law held the railroad harmless for such delays, a custom would not be necessary; if the law held it liable, a custom could not repeal or suspend the law.³⁹

§ 1908. Fairness and Reasonableness.—Though common carriers of live stock may, as a general rule, limit their liability as insurers, the limitation must be fair and reasonable.⁴⁰

31. **Stipulation against loss by delay.**—*Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Steiger v. Erie R. Co.* (N. Y.), 5 Hun 345.

32. Under Code of Iowa, § 2074, where live stock is accepted for shipment, the shipper is not debarred from a recovery for an unreasonable delay, because the contract of shipment stipulated that the carrier should not be responsible for damages arising out of any delay. *Siemonsma v. Chicago, etc., R. Co.*, 137 Iowa 607, 115 N. W. 230.

33. **Nondelivery.**—*Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440.

34. **Loss occurring prior to execution of contract.**—*Missouri, etc., R. Co. v. Sneed*, 85 Ark. 293, 107 S. W. 1182.

35. *Southern Exp. Co. v. Ramey*, 164 Ala. 206, 51 So. 314.

36. **Express contract.**—*Betts v. Farmers' Loan, etc., Co.*, 21 Wis. 80, 91 Am. Dec. 460; *Morrison v. Phillips, etc., Constr. Co.*, 44 Wis. 405, 28 Am. Rep. 599.

37. **Custom.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 131, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75. See post, "Custom," § 1961.

38. **Requiring owner to feed and water stock.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 131, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

39. **Delays.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

40. **Fairness and reasonableness.**—*Houtz v. Union Pac. R. Co.*, 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

§ 1909. Knowledge and Assent of Shipper.—A shipper, in the absence of fraud or misrepresentation, is bound by a live stock shipping contract limiting liability, though he did not read it.⁴¹ That a contract limiting the liability of a carrier was not explained to the shipper of live stock, that he asked no questions, and that the contract was signed hurriedly, does not relieve the shipper from its obligations.⁴²

Illinois Rule.—Limitations of liability contained in a bill of lading of live stock will not defeat recovery where it does not appear that the terms of such bill of lading were assented to by the shipper.⁴³

Contract Signed by Shipper While En Route to Secure Rights Guaranteed by Original Contract.—Where a shipper ordered and the railroad company furnished cars for the shipment of stock, under a contract signed by the agent of the company, and the stock was received and shipped by the company under such contract, but another contract was presented to the shipper while he was en route with the stock, with a request that he sign it, which he did in order to secure a right guaranteed by the original contract, but under protest, making it clear that he did not assent to its terms, the original contract must control and the second was not binding on the shipper.⁴⁴

§ 1910. Power of Agent to Bind Shipper.—A drover sent by the purchaser of live stock to the place of purchase to attend to and care for them to the place of destination, has authority to bind the owner by agreeing to a contract limiting the liability of the carrier, as where he allows them to be loaded into unsuitable cars, and signs a contract relieving the company from loss by heat or suffocation.⁴⁵

§ 1911. Choice between Full and Limited Liability Contracts.—Before a shipper of live stock can be bound by a limited liability contract, it must appear that it was known to him that the carrier was willing to ship under the common-law liability, and that a rate was fixed therefor.⁴⁶ A limited live stock shipping contract, though reciting that the shipper might ship at the rates established by it therefor, or, in consideration of risks assumed by the shipper, at greatly reduced rates, is not sufficient to give notice to a shipper that he has an option to ship at rates imposing a common-law liability on the carrier, where there is nothing in the contract showing what the established rate of the company was.⁴⁷

Conclusiveness of Recitals as to Choice of Shipper.—Where a contract limiting the carrier's liability for damages to a shipment of live stock is extorted from the shipper by a refusal to ship on any other terms, he may show the falsity of recitals in the contract that opportunity was given him to ship on more

41. **Failure to read contract.**—Louisville, etc., R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866; Pierson v. Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509.

42. **Contract executed without due care.**—Pierson v. Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509.

A shipper of live stock can not, in the absence of fraud, avoid limitations of liability of carrier in bill of lading or shipping contract by showing that he executed the contract without due care. St. Louis, etc., R. Co. v. Ladd, 33 Okla. 160, 124 Pac. 461.

43. **Illinois rule.**—Toledo, etc., R. Co. v. Boaz, 130 Ill. App. 17.

Where, in an action for injury to horses shipped on defendant's railway, defendant contends that its liability was limited by a bill of lading which in its entirety

constituted both a receipt and contract, but there was no evidence in the record that the plaintiff assented thereto, he could not be held bound thereby. Judgment, 96 Ill. App. 337, affirmed. Chicago, etc., R. Co. v. Calumet Stock Farm, 61 N. E. 1095, 194 Ill. 9, 88 Am. St. Rep. 68.

44. **Contract signed by shipper while en route to secure rights guaranteed by original contract.**—Wabash R. Co. v. Lannum, 71 Ill. App. 84.

45. **Drover sent by owner to place of purchase to attend and care for hogs to destination.**—Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

46. **Choice between full and limited liability contracts.**—Louisville, etc., R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866.

47. Louisville, etc., R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866.

favorable terms, but that he elected to accept the restrictive contract upon a lower rate.⁴⁸

Right of Shipper to Refuse to Sign Limited Liability Contract.—Where preliminary negotiations as to a shipment of cattle have not resulted in a valid agreement that it should be under a special written contract limiting the carrier's common-law liability, the shipper may rightfully refuse to sign such a contract, though he knows the custom of the carrier to require written contracts, and in the course of a long experience as a shipper has always signed written contracts and following the negotiations intended to sign a contract of the kind he had been using, for the shipment in question.⁴⁹

Shipper Required by Carrier's Rules to Accept Bill of Lading Containing Restrictions.—Restrictions upon the common-law liability of a carrier, contained in a bill of lading for the shipment of live stock, are unreasonable and void, notwithstanding it is recited therein that the limitations were agreed to by shipper in consideration of a reduced rate, if the carrier's rules, printed on the bill of lading, would not have permitted the live stock to be shipped unless the shipper accepted the bill of lading with its restrictions.⁵⁰

Only One Form of Contract in Use at Station.—Where a contract was prepared by a carrier's agent on one of the carrier's forms and tendered the shipper of a car load of live stock, and that is the only form of contract that is in use at the station from which he shipped, and the agent at such station had no authority to make any other contract for the shipment at a different consideration whereby the risk would not be assumed, such contract may be disregarded in determining the liability of the carrier.⁵¹

Contract Extorted by Refusal to Carry.—A special written contract limiting the carrier's common-law liability which has been extorted from a shipper rightfully declining to sign the same by refusal to transport cattle already in the carrier's possession, unless such a contract was signed, is voidable at the shipper's election.⁵²

§ 1912. Consideration.—A reduced rate for carriage⁵³ and a free passage to the shipper⁵⁴ or his employees is a sufficient consideration to support a contract relieving a carrier of live stock from damages for injuries from specified causes. Where the contract of shipment recites that a named rate is a reduced rate in consideration of an agreed valuation of the freight in the event of loss, it will be accepted *prima facie* as stated,⁵⁵ but it is not conclusive.⁵⁶ Thus a

48. **Conclusiveness of recitals as to choice of shipper.**—*St. Louis, etc., R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534.

49. **Right of shipper to refuse to sign limited liability contract.**—*St. Louis, etc., R. Co. v. Gorman*, 79 Kan. 643, 100 Pac. 647, 28 L. R. A., N. S., 637.

50. **Shipper required by carrier's rules to accept bill of lading containing restrictions.**—*St. Louis, etc., R. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914.

51. **Only one form of contract in use at station.**—A contract limiting a carrier's liability for damages to a live stock shipment is void where the agent tells the shipper that he could make no other kind of a contract. *St. Louis, etc., R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Cleveland, etc., R. Co. v. Hollowell*, 172 Ind. 466, 88 N. E. 680; *Bingham v. San Pedro, etc., R. Co.*, 39 Utah 400, 117 Pac. 606.

52. **Contract extorted by refusal to carry.**—*St. Louis, etc., R. Co. v. Gorman*, 79 Kan. 643, 100 Pac. 647, 28 L. R. A., N. S., 637.

53. **Consideration—Reduced rate.**—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81. See, also, *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Hancock v. Chicago, etc., R. Co.*, 131 Mo. App. 401, 111 S. W. 519; *Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138; *Shelton v. St. Louis, etc., R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *George v. Chicago, etc., R. Co.*, 214 Mo. 551, 113 S. W. 1099.

54. **Free pass.**—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Simms & Sons v. New Orleans, etc., R. Co.*, 122 La. Ann. 268, 47 So. 602; *In re New Orleans, etc., R. Co.*, 122 La. 268, 47 So. 602.

55. *Hancock v. Chicago, etc., R. Co.*, 131 Mo. App. 401, 111 S. W. 519.

56. **Stipulation against loss by delivery.**—A contract signed by a shipper of stock, whereby the company was not to be liable for delay in transportation, was not

contract of shipment of horses, providing that the carrier would transport the horses "at the rate of Trf. per cwt.," that rate being less than the rate charged for transportation at the carrier's risk, or when the valuation was declared to be greater than that given therein, names no rate as a reduced rate; for, if the expression, "at the rate of Trf. per cwt.," be interpreted as at the tariff rate per hundred pounds, it is still not a named rate, where there is nothing to show the tariff rate,⁵⁷ and a contract containing such provision can not be made to apply to a shipment of horses as such, without regard to weight, so as to support the defense of agreed valuation, in the event of loss, in consideration of a reduced rate.⁵⁸

Regular Rate Charged.—A carrier being required to have a reasonable rate at which it will transport freight on a common-law liability contract, a contract of limited liability for a shipment for which plaintiffs paid the regular tariff rate is unenforceable for want of consideration.⁵⁹

Bill of Lading Required after Shipment under Verbal Contract.—Where a shipment of live stock is made under a verbal contract a subsequent written contract limiting the carrier's liability, without any consideration to support it, is void;⁶⁰ although it includes a free pass over the road to the men who were to accompany the stock.⁶¹ Such a written contract, executed by the shipper when the train was ready to start with his cattle, and because the railroad agent refused to transport them until it was signed, is without considera-

binding upon the shipper, where there was no consideration for the agreement, though the contract recited that the rate charged was less than that charged for shipments at the carrier's risk. *George v. Chicago, etc., R. Co.*, 214 Mo. 551, 113 S. W. 1099.

57. *Hancock v. Chicago, etc., R. Co.*, 131 Mo. App. 401, 111 S. W. 519.

58. *Hancock v. Chicago, etc., R. Co.*, 131 Mo. App. 401, 111 S. W. 519.

59. **Regular rate charged.**—*St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

60. **Bill of lading required after shipment under verbal contract.**—*Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 997, affirmed in 93 Tex. 673, no op.

In an action to recover for loss by negligent delay in transporting cattle to market, where the contract of transportation provided that notice of any claim for damage should be given before the cattle were unloaded for destination as a condition precedent to recover, and recited that the freight rate was less than the usual rate for carrying cattle, the stipulations were not binding unless there was an actual reduction from the ordinary freight rate; and there being evidence tending to show that the cattle were shipped on a verbal contract in which nothing was said about a reduction in freight rate and no reduction made, a charge that the written stipulations were not binding if the shipment was made on a verbal contract, and no reduction in the freight rate was made under either contract, was proper. *St. Louis, etc., R. Co. v. Boshear* (Tex. Civ. App.), 108 S. W. 1032, 1033.

Stipulation increasing rate and limit-

ing liability.—A railroad company whose agent has orally, and without limitation of its common-law liability, contracted to transport cattle at a specified rate per car, on the faith of which agreement the cattle are loaded on the cars, can not, as a condition of transporting the cattle, afterwards require the shipper to execute a written contract increasing the price of the cars and diminishing the carrier's liability. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 997, affirmed in 93 Tex. 673, no op.

61. A common carrier can not claim that a written shipping contract, demanded of the shipper after loading his cattle on its cars under an oral contract, is binding on the shipper because there was included as part of such contract a free pass over the road with the cattle, where the shipper was required by the contract, in consideration of such free pass, to have charge of loading, unloading, watering, and feeding the cattle, and otherwise discharging the duties of the carrier toward them. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 997, affirmed in 93 Tex. 673, no op.

Where horses were received for shipment under an agreement with the shipper fixing the point of destination and price per car, a written contract purporting to limit the carrier's liability to its own line signed by the shipper after his live stock was received for shipment under an agreement fixing the destination and price per car; is without consideration and void, although the shipper was required to sign it in order that passes might issue to the men who accompanied the stock. *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147.

tion and void because executed under duress;⁶² but where after the cars were loaded, the shipper who knew that a written contract was customary, and that one was to be signed on this occasion, went to the company's office and signed such contract without reading it, there was sufficient consideration for the written contract.⁶³

Animals Already Shipped without Notice to Owner.—A contract for the shipment of live stock stipulating that the owner was to assume all risk of injury done by the cattle to each other, and be permitted to pass on the train to take charge of them, but not signed until after four of the cattle had been shipped, without notice to him, is nudum pactum, and will not relieve it from the necessity of exercising ordinary care.⁶⁴

§ 1913. Fraud, Misrepresentation and Duress.—Where a shipper made a verbal contract with a railway company to transport certain live stock, and after the stock had been loaded on the cars the company's agent presented several contracts for signature, stating they were vouchers to be shown the conductors, and the shipper signed them without examination, having no opportunity to do so, the written contracts were void and the verbal contract would control.⁶⁵

Duress.—See ante, "Consideration," § 1912.

Proof of Circumstances.—See post, "Fraud," § 1964.

§§ 1914-1942. Construction, Operation and Effect—§ 1914. Rules of Construction.—A contract between a common carrier and a shipper of stock, drawn by the common carrier and for his benefit, is, so far as limiting his liability is concerned, to be liberally construed in favor of the shipper.⁶⁶

General words of exemption, in a contract for the carriage of live stock, when used after a designation of specific exemptions and risks, will be presumed to include only those of a similar character, unless a different intention is manifest.⁶⁷

§§ 1915-1942. Duties Restricted and Losses and Injuries Covered—§ 1915. In General.—A contract for the carriage of live stock, which exempts a railroad company from responsibility for losses and damages "in loading, unloading, conveyance and otherwise," whether arising from negligence, misconduct, or otherwise, does not exempt them from the necessity of furnishing suitable cars; and the exemptions must be confined to risks in the use of proper means of transportation which every one is entitled to assume are possessed by a carrying company.⁶⁸

62. Duress.—Texas, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

63. Shipper knowing whether contract customary.—Ft. Worth, etc., R. Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846.

An agent of shippers of cattle, on their request, made an arrangement with the company's agent for cars for shipment to a certain point, but nothing was said as to rates or service, except a possible statement by the company's agent that his road would give as good service as any other. After the cars were loaded, one of the shippers, who knew that written contracts were customary, and that one was to be signed on this occasion, went to the company's office, and signed such a contract without reading it. The company's agent testified that the company never shipped cattle except on writ-

ten contract. Held insufficient to support a finding of a verbal contract, so as to leave no consideration for the written contract, which limited the company's liability. Houston, etc., R. Co. v. Smith, 44 Tex. Civ. App. 299, 97 S. W. 836.

64. Animals already shipped without notice to owner.—German v. Chicago, etc., R. Co., 38 Iowa 127.

65. Misrepresentation of nature of instrument.—Southern Pac. R. Co. v. Anderson, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

66. Rules of construction.—Welch v. Northern Pac. R. Co., 14 N. Dak. 19, 103 N. W. 396.

67. Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

68. Losses and injuries covered.—Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

§ 1916. Loss from Negligence of Carrier Generally.—A railway company carrying live stock under a bill of lading containing a stipulation exempting the company from liability for any one of certain specified injuries or causes of injury is still liable for any injury caused by want of ordinary care on its part.⁶⁹ In some jurisdictions the liability is limited to loss from willful or gross negligence.⁷⁰

Degrees of Negligence Not Recognized.—Where degrees of negligence are not recognized, the terms "willful misconduct" and "actual negligence," as used in a bill of lading exempting the carrier from loss caused by acts of its servants, not amounting to willful misconduct or actual negligence, should be construed as a stipulation for exemption from ordinary negligence.⁷¹

§ 1917. Injuries from Inherent Vice or Defect of Animals.—Where injury to live stock, transported under a contract stipulating that the shipper assumed risk of injury arising through the natural propensities of the animals, occurred from the negligent operation of the train,⁷² from the company's servants driving the animals loose instead of leading them separately into the stock pens,⁷³ a liability of the carrier arose which was not covered by the limitations of contract, and an action based on the negligence was maintainable.

§§ 1918-1921. Requiring Shipper to Load and Unload Stock—
§ 1918. In General.—Where the contract provided that the shipper should load and unload the stock, the carrier is not responsible for injuries the animals do each other by crowding⁷⁴ or by trampling each other,⁷⁵ for damages from

69. Loss resulting from negligence of carrier.—*Welch v. Boston, etc., R. Co.*, 41 Conn. 333.

"Loss by fire or any account whatever."—A stipulation in a bill of lading or contract of shipment of live stock whereby the shipper assumed "the risk of loss or injury to the mules by fire or any account whatever" does not relieve the common carrier from his common-law liability for negligence. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

Gross or ordinary negligence.—A failure to exercise the care due from a railroad company as a common carrier is negligence, without any legal distinction as being gross or ordinary. *Summerlin v. Seaboard, etc., Railway*, 56 Fla. 687, 47 So. 557, 19 L. R. A., N. S., 191.

Where mules were shipped under a contract by which the shipper assumed all risks of injury or damage from certain causes and all other damages not caused by the fraud or gross negligence of the railroad, and one of the mules was injured during transit in some unexplained way, proof that the carrier was not negligent in any respect in handling the car was a sufficient defense. *Simms & Sons v. New Orleans, etc., R. Co.*, 47 So. 602, 122 La. Ann. 268.

70. When there is a special agreement between a carrier and a shipper of stock, the carrier's liability will be governed by it, but he can only be held to the duties therein specified, or for injuries resulting from willfulness or negligence. *Penn v. Buffalo, etc., R. Co.*, 49 N. Y. 204, 10 Am. Rep. 855.

71. Degree of negligence not recognized.—*Adams v. Colorado, etc., R. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A., N. S., 412.

72. Injuries resulting from inherent vice or defect of animals.—*Bartlet v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

73. The provision that the company shall not be liable for the acts of the animals themselves, or injuries to each other, such as biting, kicking, and smothering, nor for loss or damage arising from unloading them, does not relieve it from liability for injury to one of them occasioned by his own act of kicking; it being caused by the negligence of the company's servants in driving them loose, instead of leading them separately, into a pen for rest or food. *Loeser v. Chicago, etc., R. Co.*, 69 N. W. 372, 94 Wis. 571.

74. Requiring shipper to load and unload stock.—*Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540.

75. Where twenty horses have been loaded loose in one car, and on arrival at the place of shipment some of them were found dead, and witness testified they looked as if they had been trampled to death, and that the loss was caused by putting too many horses on one car, or leaving them loose in the car, the carrier was not liable, where the contract provided that the shipper should load and unload the horses at his own risk, and would not be liable for any injury caused by overloading, or from fright of animals, or from crowding on one another. *Morse v. Canadian Pac. R. Co.*, 53 Atl. 874, 97 Me. 77.

overloading or lack of bedding,⁷⁶ for loss from suffocation⁷⁷ or for loss or injury caused by fright.⁷⁸

§ 1919. Failure to Furnish Cars in Reasonable Time.—A live stock shipping contract, which stipulates that a shipper shall assume the risk and care of the stock until they are loaded, does not change the duty of the carrier to furnish cars within a reasonable time after demand therefor, and it is liable for damages incurred by the shipper because of the failure to furnish cars within such reasonable time.⁷⁹

§ 1920. Failure to Furnish Proper Facilities for Unloading.—A contract for shipment of live stock, providing that the shipper should load and unload the stock at his risk, would not exempt the carrier from liability for failure to prepare proper chutes for unloading the stock, especially where it waived the provision by unloading the stock itself and without insisting upon its performance by the shipper.⁸⁰

Where a shipper of live stock did not know that there were no yards at the place of destination for unloading, the provision in the contract of shipment that he should unload at his own risk must be construed as made with reference to unloading where there are proper facilities.⁸¹

Agent of Carrier Assists in Unloading in Unsafe Way.—Under a special contract making it the duty of a shipper to unload a horse, if the agent of the carrier is present and assisting in unloading the horse in an unsafe way, and the horse is injured, the carrier is liable.⁸²

§ 1921. Carrier's Unloading without Notice to Shipper.—Notwithstanding stipulation in bill of lading that the shipper shall unload the stock, the carrier undertaking to do this without notice to the shipper is liable for negligence therein.⁸³

§§ 1922-1930. Requiring Shipper to Accompany and Care for Stock

—**§ 1922. Operation and Effect in General.**—Where a carrier stipulates, in a contract for the transportation of live stock, that the shipper or his representative shall accompany the stock and assume the duty and responsibility of the care thereof, to the extent that the responsibility is thus assumed the carrier can not be made liable; but the assumption of responsibility on the part

76. Injury from overloading or lack of bedding.—A stipulation, in a cattle transportation contract, that in consideration of a reduced freight rate the shipper released the railroad company from liability for damages arising from loading and want of bedding was valid. *St. Louis, etc., R. Co. v. Butler*, 82 Ark. 459, 102 S. W. 378.

Where shippers of cattle did the loading, and the transportation contract provided that they assumed the risk arising from loading and exempted the carrier from all liability for loss and damage arising therefrom and from want of bedding, the carrier was not liable for damages to the cattle by reason of overloading and lack of bedding. *St. Louis, etc., R. Co. v. Butler*, 82 Ark. 469, 102 S. W. 378.

77. A carrier, accepting for transportation hogs loaded on its cars by the shipper himself under a contract whereby the latter agrees to at all times feed, water, and care for the stock at his own expense, and exempting the road from liability for any injury the hogs may do

each other, or damage caused by heat or suffocation, or not arising from the road's negligence, is not responsible for any injury from suffocation by reason of their being crowded in the car. *Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540.

78. *Morse v. Canadian Pac. R. Co.*, 97 Me. 77, 53 Atl. 874.

79. Failure to furnish cars in reasonable time.—*St. Louis, etc., R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

80. Failure to furnish proper facilities for unloading.—*Atlantic, etc., R. Co. v. Dothan Mule Co.*, 161 Ala. 341, 49 So. 882.

81. *Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

82. Agent of carrier assists in unloading in unsafe way.—*Frasier v. Charles-town, etc., R. Co.*, 73 S. C. 140, 52 S. E. 964.

83. Carrier's unloading without notice to shipper.—*Normile v. Oregon R., etc., Co.*, 41 Ore. 177, 69 Pac. 928.

of the shipper can not be extended beyond the terms of the contract express or reasonably to be implied.⁸⁴

§ 1923. Injury by Negligence of Carrier.—Where stock is transported under a contract requiring the shipper or his agent to accompany and care for the stock, etc., the carrier is liable if the stock is injured by the negligence of its agents, while if the injury is caused by the conduct of the shipper's agents, the carrier is not liable.⁸⁵ In some jurisdictions the liability is limited to loss from willful or gross negligence.⁸⁶

§ 1924. Escape of Stock.—Where Cars Are Defective.—A special contract devolving on the owner the personal care of the live stock, with the risk of their escaping or being injured through their own restiveness or viciousness, does not exonerate the company from responsibility for damages resulting from a failure to provide a safe car for their transportation,⁸⁷ but where the shipper refused to use the carrier's cars and selected and used those of another company, the former was not liable for the escape of the stock by reason of defective door fastenings.⁸⁸

§ 1925. Watering and Feeding.—Where a carrier enters into a valid contract with a shipper of live stock imposing upon the latter the duty of feeding and watering the stock, the carrier is not liable for failure to feed or water the stock during the transportation, unless it fails to furnish the caretaker proper facilities therefor.⁸⁹

84. Operation and effect in general.—*Colsch v. Chicago, etc., R. Co. (Iowa), 117 N. W. 281.*

85. A contract for the shipment of horses stipulating that they are to be accompanied by their grooms is no waiver of the strict responsibility of the carrier any further than it may be modified by the fact that persons are to be sent by the owner with the property, and, if the property is injured through the negligence of the agents of the carrier, it is liable, while, if the injury is caused by the conduct of the shipper's servants, the carrier is not liable. *Bowie v. Baltimore, etc., R. Co. (8 D. C.), 1 MacArthur 609.*

86. Where plaintiff contracted with a railroad company to carry certain cattle at a lower rate than usual, and in consideration thereof stipulated to assume the risk of transportation, and an agent of the plaintiff accompanied them, and had them in charge, there was no complete delivery to the company, and they were not liable except for gross negligence or willful misfeasance. *Illinois Cent. R. Co. v. Morrison, 19 Ill. 136.*

87. Where cars are defective.—*Rhodes v. Louisville, etc., R. Co. (Ky.), 9 Bush 688.*

88. Where hogs were shipped in the owner's care, the railroad company not to be liable for loss from their jumping off except by collision, or by the cars being thrown from the track, and the owner, refusing to use the shipping company's cars, selected and used those of another company, the former company was not liable for hogs escaping by reason of a defect in the door fastening the latter's cars, unknown to the former when the

shipper selected them. *Illinois Cent. R. Co. v. Hall, 58 Ill. 409.*

89. Watering and feeding.—Although the shipper by rail of live stock under a special written contract was by its terms bound in case of accident or delay from any cause whatever to feed, and water the stock at his own expense, yet where such agreement further stipulated that the carrier's employees should provide the owner or person in charge of the stock all proper facilities on train and at stations for taking care of the same, if injuries to the stock resulted from want of food, water and attention because of the carrier's failure to furnish such facilities at the proper time upon the arrival of the stock at destination, the carrier would be liable for such injuries. *Bryant v. Southwestern R. Co., 68 Ga. 805; Southwestern R. Co. v. Thornton, 71 Ga. 61; Comer v. Stewart, 97 Ga. 403, 24 S. E. 845.*

Iowa.—*McMillan v. Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069.*

Kentucky.—Though the shipper of stock agrees to accompany and feed and water it, the carrier is liable for damage thereto from failure to furnish proper facilities for feeding and watering. *Illinois Cent. R. Co. v. Elben, 71 S. W. 919, 24 Ky. La. Rep. 1609, 114 Ky. 817.*

Texas.—*Texas, etc., R. Co. v. Byers Bros. (Tex. Civ. App.), 73 S. W. 427.*

A carrier can not limit its liability for failing to provide, as required by law, proper facilities for feeding and watering live stock, and to give an opportunity to the shipper to feed and water the same when requested; and, though a contract of shipment binds the company to stop

Duty to Place Cars Where Stock Can Be Unloaded.—A contract of live-stock shipment, which provides that the owner shall bear the expense of feeding and watering the stock, does not relieve the carrier of the duty of placing the cars where the stock can be unloaded by the persons in charge, if it is impossible to feed and water it on the cars.⁹⁰

Duty to Unload Where Feeding on Cars Impossible.—The fact that a drover is given free transportation to look after the stock does not relieve the railway company from the obligation of unloading it, preparatory to feeding and watering, on request of the drover, if it is impossible to do so on the cars.⁹¹

Effect of Delay in Transportation.—Where the contract of a shipper of live stock with the carrier places upon the shipper the responsibility of attending, feeding and watering the stock and relieves the carrier from liability for all injury, loss or damage arising from the character of the freight, it is the shipper's duty to extend such care to the stock until they reach their destination, even though they have been delayed in transportation.⁹² But this rule does not relieve the carrier from liability for negligent delay in transporting the stock, which the caretaker may not prevent in the exercise of ordinary care.⁹³

Stock Carried Beyond Destination.—Though a shipper of live stock contracted with the transporting railroad that it was not to be responsible for attention, feeding or watering of the stock, but that it should afford the shipper reasonable facilities for those purposes, yet if the railroad carried the stock beyond the destination fixed by the bill of lading and there detained them for several days before their return, it would not be relieved from liability for failure to care for the stock after passing the proper destination.⁹⁴

Injuries Caused by Feeding Improper Food.—A carrier, accepting for transportation hogs loaded on its cars by the shipper himself under a contract whereby the latter agrees to at all times feed, water, and care for the stock at his own expense, and exempting the road from liability for any injury the hogs may do each other, or damage caused by heat or suffocation, or not arising from the road's negligence, is not responsible for any injury to the hogs from their eating cockle burrs.⁹⁵

for watering and feeding when requested to do so in writing by the shipper, the shipper may make a verbal request, and may recover damages resulting from a noncompliance with such request. *Gulf, etc., R. Co. v. Kimble*, 49 Tex. Cr. App. 622, 109 S. W. 234.

90. Duty to place cars where stock can be unloaded.—*Burns v. Chicago, etc., R. Co.*, 104 Wis. 646, 80 N. W. 927.

91. Duty to unload where feeding on cars impossible.—*Burns v. Chicago, etc., R. Co.*, 104 Wis. 646, 80 N. W. 927.

92. Effect of delay in transportation.—*Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Southwestern R. Co. v. Thornton*, 71 Ga. 61; *Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422, 41 S. E. 653.

Where, by a special contract for the shipment of live stock, the carrier is only bound for damages caused by the negligence of its servants or agents, and the duty of feeding, watering and caring for the stock is assumed by the shipper to whom free transportation is furnished for that purpose, the shipper can not recover for injury to the stock by reason of want of food or water, even though the damage from this cause arose during a delay from an accident to the train of his

carrier. *Central R. Co. v. Bryant*, 73 Ga. 722.

The shipper of live stock by railway, under a special contract in which he agrees that "in case of accidents to or delays of time from any cause whatever" he "is to feed, water and take proper care of the stock at his own expense," can not recover damages resulting from his own failure to perform his part of the contract, although the company may have consumed more time than necessary in effecting the transportation. There might be damage from such delay by increasing the expense of the shipper or by some loss to him in consequence of the change of market value but the deterioration in the condition of the animals from lack of food, water and attention, would not result from the delay, but from the negligence of the shipper. *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711.

93. McMillan v. Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069.

94. Stock carried beyond destination.—*Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Southwestern R. Co. v. Thornton*, 71 Ga. 61.

95. Injuries caused by feeding improper food.—*Illinois Cent. R. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540.

§ 1926. Failure to Drench Hogs.—The external watering or drenching of hogs is part of the actual duty of transportation, and failure of the shipper to accompany the car is not the cause of the neglect of such duty, and it is for the jury to say whether the carrier was negligent or not.⁹⁶ Provisions in a shipping contract for transportation of live hogs by rail, requiring them to be "watered" by the owner, and restricting the liability of the railroad to losses from causes which would exclude loss occasioned by want of water, do not release the company from the duty of throwing water over the hogs upon notice from the owner that they are becoming overheated, the means of relief at hand being solely under its control.⁹⁷

§ 1927. Care of Stock While in Stock Yards.—A stipulation in a contract for the shipment of live stock that the shipper tend the same at his own risk, while the same are in any stockyard, is binding on the shipper.⁹⁸

§ 1928. Duty to Care for Stock after Unloading.—Where, by the terms of a contract for the shipment of live stock, the shipper, in consideration of reduced rates, is to care for them while in transit, and attend to loading and unloading them, and assume all risks incident thereto, and of all injuries from any cause, he can not cast the duty upon the carrier of caring for the stock after being unloaded at their destination, although its stock yards were too small to hold them all.⁹⁹

§ 1929. Carriers Allowing Shipper to Ride on Passenger Train.—Where a railroad company agreed, in consideration of being released from all liability except for fraud and gross negligence, to transport live stock at a reduced rate, the shipper to have free passage on the train with the stock, and to care for them through the route, it is not liable for injury to the stock caused by want of proper care on the route, though it allowed the shipper to ride on its passenger train.¹

96. A shipper sought to recover against a railroad company damages arising out of its alleged failure to transport and deliver in reasonable dispatch a car load of hogs, and to water them externally while in transit, by reason of which neglect a number of them died. Plaintiff did not accompany the car as required by the bill of lading, and such fact was known to the defendant's conductor. The evidence tended to show that an agent accompanying the hogs could do nothing in showering them, and the conductor testified that the man in charge of the train operated the appliances for showering, and it further appeared that defendant's superintendent had issued orders to drench all hogs. Held, that the watering of the hogs was a part of the actual duty of transportation, and that, as plaintiff's failure to accompany the car was not the occasion of the neglect of such duty, there was a case for the jury on the question of defendant's negligence. *Wallace v. Lake Shore, etc., R. Co.*, 95 N. W. 750, 133 Mich. 633.

97. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85.

98. *Care of stock while in stock yards.*—*Bartlet v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

99. *Duty to care for stock after un-*

loading.—*Meyers v. Wabash, etc., R. Co.*, 90 Mo. 98, 2 S. W. 263.

In an action against a railroad company to recover damages for the loss of sheep, caused by the negligence of defendant, where it appears that, in consideration of a reduction of freight rates, plaintiff agreed to take all risks of transportation, and to load and unload the sheep at his own expense and risk, and that the loss occurred by reason of the sheep being kept in the cars overnight after reaching their destination, held, that defendant is not liable, although the sheep were kept in the cars because the defendant refused to furnish men to herd the sheep during the night, and the stock pens were too small to hold them, when it further appears that defendant consented to ship the cars over a transfer track of another road, to the stock pens of such other road, so that plaintiff could unload the sheep there, if the plaintiff would get the consent of the officers of that road to the use of the track for that purpose, and, on plaintiff's failure to get such consent, offered to haul the cars up to its own stock pens, so that plaintiff could unload the sheep there. *Meyers v. Wabash, etc., R. Co.*, 90 Mo. 98, 2 S. W. 263.

1. *Carriers allowing shipper to ride on passenger train.*—*Central R., etc., Co. v. Smitha*, 85 Ala. 47, 4 So. 708.

§ 1930. Failure to Deliver.—Where live stock is transported under a special contract wherein the shipper agrees to send with the stock one or more men as may be necessary to care for the stock while in transit, and to load, unload, feed, and water the animals, there is no unrestricted common-law liability of the carrier though the carrier agreed to furnish the necessary labor to assist while the stock was in transit over its lines under the direction and control of the person put in charge of the stock by the shipper; and, in an action to recover for injury to the stock, the plaintiff can not recover solely on the evidence of a failure to deliver.²

§ 1931. Loss While in Cars.—A contract exonerating a railroad company from all claims which may arise for injury to the stock shipped while in the cars of the company does not relieve it from liability for the loss of stock in the cars caused by the negligence of the company.³

§ 1932. Requiring Shipper to Inspect Cars and Stockyards.—A provision that the shipper shall inspect the cars and stockyards and satisfy himself that they are sufficient, and report visible defects, and that the fact of his loading his stock or occupying the yards, shall be an acknowledgment of their suitability, to be valid can only be construed as requiring the shipper to use reasonable diligence to discover visible defects; and, where a shipper was taken to yards at night, and but one pen was unoccupied, and he walked about this one and observed the sufficiency of the fence, and that the gate was fastened, such contract did not require such careful inspection as would reveal that the hook fastening the gate was bent so that it might not hold against pressure.⁴

§ 1933. Injury from Use of Defective or Unsuitable Cars.—Though a railroad company by contract stipulated for exemption from liability for any injury or damage to live stock shipped, however caused, it is liable for the non-delivery thereof caused by its failure to furnish proper facilities for transportation.⁵ Thus, where a shipper shipped live stock under a bill of lading providing that the carrier should be exempt from all damage that "may happen to stock," the carrier was liable for injuries to them resulting from their being carried in an unsuitable car;⁶ so also where the shipper undertook all risk of loss and injury to the animals shipped in loading, unloading, conveyance and otherwise.⁷

Suffocation or Crowding.—Suffocation is not a risk assumed by a shipper of live stock under a stipulation: "And the said party of the second part, having examined the same, hereby accepts for such transportation the cars provided, * * * and assumes all risk * * * in consequence of suffocation or other ill effects of being crowded in the cars."⁸

2. **Failure to deliver.**—*Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239.

3. **Loss in cars.**—*Powell v. Pennsylvania R. Co.*, 32 Pa. 414, 75 Am. Dec. 564.

4. **Construction of stipulation.**—*Buck v. Oregon R., etc., Co.*, 53 Wash. 113, 101 Pac. 491.

5. **Injuries resulting from use of defective or unsuitable cars.**—*Goldey v. Pennsylvania R. Co.*, 30 Pa. 242, 72 Am. Dec. 703.

6. *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

7. In an action against a railroad company it appeared that by special contract the shipper undertook all risk of loss and injury to the animals shipped in loading, unloading, conveyance, and otherwise,

whether arising from the negligence, default, or misconduct on the part of defendant's servants, agents, or officers. Held that, notwithstanding such contract, defendant was liable for injury resulting from defective cars furnished. *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179.

8. **Suffocation or crowding.**—Appellee agree to ship a "jack" and four mules over appellant's line in a box car if the doorway thereto was slatted and not closed. As the train was leaving, appellee signed a special contract containing this clause: "And the said party of the second part, having examined the same, hereby accepts for such transportation the cars provided, * * * and assumes all risk * * * in consequence of suffocation or other ill effects of being crowded in the cars." The car doors were not slatted, and the jack

§ 1934. Arbitrary Deviation from Route.—Where a carrier contracts for exemption from certain of its common-law liabilities, and then without necessity due to unforeseen emergencies materially deviates from the route agreed on, the special exemptions in the contract terminate, and the common-law liability attaches; the contract for exemptions applying only to the agreed route.⁹

§ 1935. Refusal to Allow Shipper to Feed and Water Stock.—A stipulation in a contract for the shipment of live stock that the carrier shall not be liable for injuries to the stock, though caused by the negligence of its servants, since it is void does not prevent liability on the part of the company for injury to the stock caused by the refusal of the train servants to allow the person in charge of the stock an opportunity to feed and water them for the space of 34 hours.¹⁰

§ 1936. Collisions.—A stipulation in a special contract for carriage of a horse that the carrier shall not be liable for injury to the animal from certain causes specified, including "being injured by the burning of hay, straw, or any other material for feeding the stock, or in any way," does not exempt the carrier from liability for the killing of the horse by collision of an engine, improperly managed by the carrier, with the car containing the horse; such cause of injury not being specifically mentioned in the contract, as the general words "in any way" may be construed to mean burning in any way.¹¹

§ 1937. Derailment.—Under a contract limiting the liability of a carrier who undertook to transport plaintiff's horses, the carrier was liable for injury to the horses occasioned by the train leaving the track as a result of its running over a drover who fell from the train because he was not furnished with a suitable place to ride.¹²

§ 1938. "Breaking" and "Chafing."—The breaking of an animal's leg is not such a "breaking" as is contemplated by a bill of lading, signed by a shipper of live stock, releasing the railroad from damage or loss from "breaking, chafing, weather, fire, or water, except where collision or running from the track resulting from negligence" of defendant's agents shall cause the same, and the shipper can recover under defendant's common-law liability as a carrier of livestock.¹³

§ 1939. Loss by Suffocation.—Suffocation Caused by Unnecessary Delay.—A special contract exempting a railroad company from liability for the suffocation of animals in transportation will not exempt it if the suffocation was caused by its unnecessary delay.¹⁴

§ 1940. Loss by Strikers.—See post, "Waiver or Estoppel to Rely on Exemption," § 1950.

§ 1941. Stipulation against Loss by Delay.—Carrier is not relieved

died from suffocation in consequence thereof. Held, that the acceptance of the box car by the shipper went no further than the acceptance of one with an open door properly slatted, and that suffocation for want of ventilation was not one of the risks assumed when the shipper signed the contract. *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351, 8 So. 516.

9. Arbitrary deviation from route.—*Davis Bros. v. Blue Ridge R. Co.*, 81 S. C. 466, 62 S. E. 856; *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

10. Refusal to allow shipper to feed and water stock.—*Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55.

11. Collisions.—*Zimmer v. New York, etc., R. Co.*, 16 N. Y. S. 631, 62 Hun 619, 42 N. Y. St. Rep. 63.

12. Derailment.—*Goldey v. Pennsylvania R. Co.*, 30 Pa. 242, 72 Am. Dec. 703.

13. "Breaking" and "chafing."—*Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

14. Suffocation caused by unnecessary delay.—*Ball v. Wabash, etc., R. Co.*, 83 Mo. 574.

from liability for loss by fall of market, in case of delay of transportation of cattle, by provisions of the contract of transportation that the shipper assumes "all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming, or killing themselves or each other, or from delays," etc., "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from or in the loading or unloading the stock;" for this stipulation refers to injuries to the cattle caused by delay, etc., and to loss or damage by reason of delay in loading or unloading, and has no reference to other losses which the delays of the carrier may cause to the shipper.¹⁵

Stock Loaded on Cars Unreasonable Time before Departure of Train.

—Where animals were injured because they were kept in the cars for an unreasonable number of hours, owing to the misstatement of carrier's agent that they could be shipped immediately,¹⁶ or where a carrier reloads the animals at an intermediate point an unreasonable time before the departure of the train,¹⁷ a provision in the transportation contract that the shipper would release the carrier from all liability on account of delay in shipping the stock after delivery to defendant's agent, and from any delay in receiving the stock after tender of delivery, was irrelevant to the carrier's liability for the loss sustained.¹⁸

Delay Caused by Derailment.—Under a bill of lading of live stock which stipulated that the carrier should "not be liable for loss by delay of trains, or any damage said property may sustain except such as may result from a collision of a train, or when cars are thrown from the track in course of transportation," where, one car was thrown from the track by reason of a broken rail, but the cars containing the stock remained on the track; the carrier was liable for the shrinkage and losses resulting from whatever delay was fairly attributable to the accident.¹⁹

Delay Caused by Flood.—Where a shipment contract exempted the carrier from liability for damages due to delays in transportation, and required the shipper to unload the cattle, and a delay occurred, the train being stopped by a

15. Losses covered.—*Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252.

In a contract between a carrier and a shipper of live stock, the following agreement was made by the shipper: That he "does hereby agree to take, and hereby does assume, all and every risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, unruly, etc., or from delay," "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in, or incident to or from or in, loading or unloading the stock." Held, that this agreement refers to loss or damage to the party by reason of injuries to the stock caused by delay, etc., upon the cars, and to loss or damage by reason of delay in loading or unloading, and has no reference to other losses which the delay of the carrier may cause to the shipper. *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252.

"There are good reasons for an agreement of this description, growing out of the manner in which cattle are usually transported, the owner or his agent accompanying and taking charge of them, and being on hand to prevent injuries of

the kind specified, while no care of the owner could prevent other delays, or protect against losses which might follow incidentally from other delays. The stipulation appears to us carefully worded to cover such injuries and losses as the owner might guard against, while it studiously avoids including losses like the one complained of here." *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252.

16. Stock loaded on cars unreasonable time before departure of train.—*St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035.

17. Where a common carrier unloads a shipment of horses at an intermediate point in the morning, and then reloads them late in the afternoon, but twelve hours before the departure of the train by which they are to be shipped, and against the owner's protest, and the horses are injured while thus waiting, the carrier is liable, though, by its contract, not responsible for unusual or unreasonable delay. *Alabama, etc., R. Co. v. Sparks*, 71 Miss. 757, 16 So. 263.

18. *St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035.

19. Delay caused by derailment.—*Illinois Cent. R. Co. v. Owens*, 53 Ill. 391.

flood; the refusal of the conductor, on being notified of the high water, to place the cars where the shipper could unload them, as requested, rendered the carrier liable, if the conductor did not have reason to believe that he could run through the high water without serious delay.²⁰

Delay at Terminal or Connecting Points.—Under a contract for shipment of live stock by railroad, it being agreed that the shipper “assume all risks of transportation,” and that “the company shall not be responsible for any delays at terminal points, nor for delays at points where stock is to be delivered to connecting lines,” the company is not responsible for a delay caused by a riot at the terminal point on its road, whereby some of the stock fell sick and died.²¹

Shipper Unable to Obtain Food and Water.—A provision in a contract for the shipment of live stock to the effect that, in the event of any unusual delay owing to the carrier’s negligence, the shipper shall accept as full compensation the amount expended in the purchase of food and water, does not prevent recovery in a case where the shipper during the period of delay was unable to obtain food and water, and in consequence of the delay some of the cattle died, but only contemplates a case where the shipper can feed and water the cattle during the delay, and thereby save them, and does so.²²

§ 1942. Injuries Occurring Prior to Execution of Contract.—A contract exempting a carrier from liability for loss or injury to a shipment of live stock, containing no release from past liabilities, does not apply to an injury which had occurred before the execution of the contract,²³ and where such contract, contains a cause of action for damages that had accrued prior to its execution in consideration of a reduced rate, it does not cover injuries resulting from the carrier’s negligence in the performance of duties imposed upon it by law.²⁴

20. Delay caused by flood.—*Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

21. Delay at terminal or connecting points.—*Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281.

22. Shipper unable to obtain food and water.—*Galloway v. Erie R. Co.*, 102 N. Y. S. 25, 116 App. Div. 777.

23. Where a shipper applies to a carrier for a car in which he can place horses in one end and his household furniture in the other, and is told that he can have one, and that it will be set out for him, and that he can commence loading at a certain time, and is given the rate, approximately, and it is arranged that the contract shall be signed after the loading, but there are then no negotiations as to the classification of the outfit, which finally settled the rate, or as to the conditions or limitations of the contract, the provision in the contract, executed after the loading, that the loading shall be at the shipper’s risk, does not apply to an injury to one of the horses which had already occurred, during the loading, owing to the carrier’s negligence in furnishing a defective platform. *St. Louis, etc., R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161.

A verbal contract was made with defendant to ship plaintiff’s horse on the next day, and on such day the animal was injured by reason of the rottenness of the gangway, as it was being loaded on a

car. It was held that the fact that by a subsequent arrangement, the horse was put upon the car from the depot platform, and thereafter a contract of shipment was signed exempting defendant carrier from liability for any loss, damage or injury to the horse while being loaded, etc., but containing no release of defendant from past liability, did not relieve defendant from liability for such injury. *McCullough v. Wabash, etc., Co.*, 34 Mo. App. 23.

In an action against a carrier for injury to a horse shipped, where the carrier sets up a special contract limiting its liability, the consignee may show the contract was not binding on him because not signed by the shipper until after the injury, and on agreement that it should not affect the rights of the consignee. *Frasier v. Charlestown, etc., R. Co.*, 52 S. E. 964, 73 S. C. 140.

24. A contract for the transportation of live stock provided that, in consideration of a reduced rate, the shipper released all causes of action for any damages that had accrued to him by any prior written or verbal contract concerning the stock. Held, that an action to recover for injuries to stock sustained while in the carrier’s stock pens awaiting transportation arrangements, and on the day before the execution of the contract set out, being based on the carrier’s negligence in the performance of duties imposed upon it by

§§ 1943-1947. Failure of Shipper to Comply with Contract—§ 1943. Shipper Required to Load and Unload Stock.—The provision of a contract for the shipment of live stock that the shipper shall unload the stock with the assistance of the company's agents at his own risk places upon the shipper the duty of being present at the unloading of the stock. His failure to be present will not, however, of itself, prevent him from recovering unless the loss or damage to the stock was the result of his absence.²⁵

Overloading.—See ante, "Losses Covered," § 1991; "Requiring Shipper to Load and Unload Stock," §§ 1918-1921.

Effect of Texas Statute.—Article 320, Tex. Rev. Stat., prohibiting common carriers from limiting their liability as at common law, renders nugatory a provision in a contract for the shipment of live stock exempting the carrier from liability for injuries in overloading.²⁶

§§ 1944-1947. Failure of Shipper to Accompany and Care for Stock—§ 1944. In General.—If the shipper of live stock fails to comply with a condition of the contract requiring that he shall accompany the stock on the route and attend to loading, unloading and watering and feeding them, he can not recover for injuries to the stock resulting from his failure to comply with the stipulations of the contract.²⁷

§ 1945. Duty of Carrier.—A common carrier is not relieved from its responsibility to care for animals transported by it because of a written contract wherein the shipper agreed to accompany the stock, where the carrier, with knowledge of the failure of the shipper to accompany the stock, proceeds under the contract,²⁸ but is liable for any loss resulting from its failure to provide the stock with proper care and protection.²⁹ A carrier aware that no one is

law, and without regard to the will or contract of the carrier, was not affected by the release contained in the subsequent freight contract. *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

25. Where no injury is caused thereby.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240.

When in such a contract it is provided that the shipper shall "unload (the) stock (with the assistance of the company's agent or agents) at his * * * own risk," it is the duty of the shipper either to be present himself, or have someone representing him present at the unloading of the stock; and in the trial of a suit in which the carrier relies on such a contract as a defense, it is not error to so charge the jury, if they are also instructed that a failure of the shipper to be present or have some one present in his behalf would not defeat a recovery by him unless it appears that the damages claimed resulted from such failure. *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240.

26. Effect of Texas statute.—*International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066.

27. Failure of shipper to comply with contract.—*Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Southwestern R. Co. v. Thornton*, 71 Ga. 61; *Central R. Co. v. Bryant*, 73 Ga. 722; *Cincinnati, etc., R. Co. v. Disbrow & Co.*, 76 Ga. 253; *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711; *Geor-*

gia R., etc., Co. v. Reid, 91 Ga. 377, 17 S. E. 934; *Central, etc., R. Co. v. Rodgers*, 111 Ga. 865, 36 S. E. 946; *Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422, 41 S. E. 653; *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

In an action against a carrier of live stock for failure to deliver where the plaintiff failed to comply with the provision of the contract requiring that either he or his agent should accompany the stock, and there is evidence from which the jury could find that if he had complied therewith the stock would not have been lost and freight is found for the defendant, a judgment refusing a new trial will not be interfered with in the absence of an error at law. *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

28. Duty of carrier.—Where a contract for the shipment of live stock required the shipper or his agent to ride on the freight train on which the animals were being transported, the shipper's failure so to do was no defense to the carrier's liability for injuries to the stock, unless such failure contributed thereto. *Louisville, etc., R. Co. v. Smitha*, 40 So. 117, 145 Ala. 686; *Chicago, etc., R. Co. v. Slattery*, 76 Neb. 721, 107 N. W. 1045.

29. Chicago, etc., R. Co. v. Williams, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289.

Where horses were injured in shipment, an instruction that, if the shipper failed to feed and rest them during shipment according to his contract, he could not

accompanying live stock must give the necessary attention, regardless of the agreement of the shipper in the transportation contract that he or his agents would care for the live stock, and tend to the feeding and watering.³⁰

§ 1946. Cars Stopped En Route by Carrier.—A shipper of stock, who by the contract agrees to accompany and care for the stock, is not guilty of a breach of the contract because, when by reason of the breaking of one car it is stopped on the way by the carrier, he proceeds with the remaining cars, leaving the one left behind to the care of the railroad company.³¹

§ 1947. Injuries from Defect in Cars Unknown to Shipper.—Where a railroad's special contract provided that a shipper was to inspect and select his own car, to send an attendant with the stock shipped, and to release the road from all liability for damages to the stock, including those resulting from a defective condition of the car, and the stock was injured by reason of defects in the car known to the road, but not to the shipper, the latter's failure to send an attendant did not relieve the road from liability.³²

§§ 1948-1949. Breach or Refusal of Carrier to Perform Contract—
§ 1948. In General.—Where contract is made in Arkansas for the shipment of sheep from that state to Texas contained conditions limiting the common-law liability of the carrier, and the carrier refuses to perform his part of the contract, he has no right to claim the advantage of the restrictions and limitations in his favor, but becomes liable to the full extent of the law, the same as if there had been no special contract.³³

§ 1949. Shipper Required to Load and Unload Stock.—Although a carrier stipulates in a contract for the transportation of live stock that the owner should undertake "all risk of loss, etc., in loading, unloading, conveyance and otherwise," such stipulation does not exempt the carrier from liability for any entire and intentional abandonment of all effort to perform its contract for the time.³⁴

§ 1950. Waiver or Estoppel to Rely on Exemption.—Directing Agents to Receive Shipments during Strike.—The fact that during a railroad strike the company directs its agents to receive shipments of stock, which fact is known to a shipper, does not estop the company from defending an action for

recover, was properly refused, since, if the shipper failed to feed and rest them, it was the duty of the railroad company to do so, and charge the expenses to the shipper. *Milam v. Southern R. Co.*, 36 S. E. 571, 58 S. C. 247.

30. *Patterson v. Missouri, etc., R. Co.*, 24 Okla. 747, 104 Pac. 31.

31. *Car stopped en route by carrier.*—*Union Pac. R. Co. v. Langan*, 52 Neb. 105, 71 N. W. 979.

32. *Injuries from defects in cars unknown to shipper.*—*Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

33. *Breach or refusal of carrier to perform contract.*—*Texas, etc., R. Co. v. Davis*, 2 Texas App. Civ. Cas., § 191. Such contracts are valid in Arkansas but void in Texas.

34. *Breach or abandonment of contract by carrier.*—Stipulations in a contract by common carriers to transport a quantity of cattle that the own-

ers should undertake "all risks of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise," and that the carriers "do not undertake to forward the animals by any particular train, or at any specified hour; neither are they responsible for the delivery of the animals within any certain time or for any particular market," held not to exempt the carriers from liability for damages resulting from a discrimination in favor of other freight, by which the cars containing the cattle were detached and placed upon a side track, where they could not be unloaded nor fed and watered, and where they remained for two or three days. Such an act was not negligence in the performance of the contract, but an entire and intentional abandonment of all effort to perform it for the time, which constituted a breach of the contract. *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525, affirming 59 Barb. 104.

damages to the stock caused by the strikers, under a provision of the shipment contract relieving it from liability except for damages caused by its negligence.³⁵

Shipper Required to Accompany and Care for Stock.—The delivery to the shipper by an agent of the carrier of a pass upon a train other than that on which the stock is shipped does not constitute a waiver of the requirement of the contract that the shipper or his agent should accompany the stock, even though the delivery of the pass was accompanied by an express oral agreement, entered into at the time the contract was made, that the shipper need not accompany the stock.³⁶

§§ 1951-1968. Enforcement—§§ 1951-1952. Pleading—§ 1951. Petition or Complaint.—Performance of Stipulations.—Where a special contract for the shipment of live stock provides that the shipper shall go with the stock and care for it while in transit, he can not recover for a failure to carry safely, without alleging and showing that the loss was not due to a breach of his own stipulations.³⁷

§ 1952. Plea or Answer.—Necessity.—A special contract limiting a carrier's liability must be pleaded as defense, when the carrier is sued for damages for negligent delay in carriage and delivery of stock,³⁸ otherwise it will be treated as waived.³⁹

Right to Plead Where Negligence Basis of Action.—In an action against a common carrier for the loss of live stock transported by him, it is competent for it to set up a special contract binding the plaintiff to accompany and take care of the stock, and exempting the carrier from loss thereof, and also the plaintiff's breach of such contract, even though negligence is charged as the foundation of plaintiff's action.⁴⁰

Facts When Mob or Strike Causes Delay.—Where a carrier of live stock, by contract, exempts itself from liability for loss from specified risks, "and for loss or damage to said animals from any cause or thing whatever not resulting from the negligence of the agents or servants of the company," the exemption as to the specified risks is not unconditional, but applies only to such as are not occasioned by the negligence of the company's agents or servants; therefore, though mobs and strikes are among the specified risks, if the carrier seeks to excuse the particular delay on the ground that it was occasioned by a mob or strike, the facts should be averred so that the court may determine from them, whether the mob or strike was such as occasioned unavoidable delay.⁴¹

Failure of Shipper to Care for Animals.—Where, in an action against a carrier of live stock for negligent failure to provide watering and feeding facilities, the carrier claims that the contract of carriage exempted it from such duty, it should not only refer to the contract, but specifically set forth the terms thereof limiting its liability.⁴² An averment in a plea in an action for injuries to live stock while being transported, that the injuries resulted from plaintiff's

35. Directing agents to receive shipments during strike.—*Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281.

36. Waiver of stipulation by carrier.—*Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

37. Performance of stipulation.—*Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339.

38. Necessity.—*St. Louis, etc., R. Co. v. Wilson*, 85 Ark. 257, 107 S. W. 978.

39. Exemption from loss by delay.—Where a carrier sued for damages for

negligent delay in shipping stock failed to allege in its answer the existence of a special contract limiting its liability, the defense will be treated as abandoned or waived. *Kansas City, etc., R. Co. v. Pace*, 63 S. W. 62, 69 Ark. 256.

40. Right to plead where negligence basis of action.—*Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629.

41. Facts when mob or strike causes delay.—*Louisville, etc., R. Co. v. Thompson*, 13 Ky. L. Rep. 973.

42. Failure of shipper to care for animals.—*Missouri, etc., R. Co. v. Pullen*, 90 Ark. 182, 118 S. W. 702.

carelessness in failing to care for the animals en route, as he was required to do by special contract, states a sufficient defense.⁴³

§ 1953. Issues, Proof and Variance.—Proofs under General Issue.—Under the general issue, a carrier of live stock, sued for injury thereto, could show contracts limiting or avoiding liability.⁴⁴

Foreign Laws.—In an action for the loss of live stock shipped from Arizona to Oklahoma, where defendant pleaded provisions of a shipping contract as a defense and alleged that they were valid under the laws of Arizona, the exclusion of evidence of the laws of Arizona was error.⁴⁵

Choice between Full and Limited Liability Contracts.—In an action for damages against a common carrier for injuries to stock in the course of transportation, where plaintiff avers that defendant refused to ship the stock under any other than a special contract limiting its liability, it is error to exclude the testimony of defendant's agent that it was ready and willing to ship upon fair and reasonable terms, without a limitation of liability, because it was not shown that such was tendered, it being admitted by both parties that none was demanded.⁴⁶

Variance Existence of Contract.—That plaintiff sued a carrier for injury to live stock, and that proof under the carrier's claim of limitation of liability to a fixed amount and a requirement for notice of a claim for damages showed existence of the contract for the shipment, does not show variance.⁴⁷

Waiver of Stipulation.—Under a contract stipulating that the owner was to take care of the cattle at his own expense, and assume all risk of injury that they might do to themselves or each other, proof that the carrier had been in the habit of carrying cattle for him without his presence on the train does not tend to show a waiver of such stipulation.⁴⁸

§§ 1953-1966. Evidence—§§ 1954-1959. Presumptions and Burden of Proof—§ 1954. As to the Contract.—In an action against a carrier for breach of duty in carrying stock, the burden of showing a contract limiting the carrier's common-law liability rested on defendant.⁴⁹

Assent of Shipper.—A shipper of live stock having executed a contract, containing a limitation of the liability of the carrier, is, in the absence of fraud or mistake alleged, presumed to have known and consented to its terms.⁵⁰ But in Illinois the burden is on a railroad to show that the terms of a contract of carriage, relied on in defense to an action for injury to live stock, were assented to by the consignor.⁵¹

As to Consideration.—A contract for the shipment of live stock, stipulating that, in consideration of a special reduced rate, the shipper agrees to load, unload, and reload stock at his own risk, and feed, water, and tend the same in any stock yards at his own expense and risk, and that he assumes risk of injury due to the natural propensities of the animals, is prima facie binding as supported by a valid consideration, and the burden of proving absence of consideration in the way of a reduction in freight rates is on the shipper.⁵² A recital in

43. *Webster v. Union Pac. R. Co.*, 200 Fed. 597.

44. *Proofs under general issue.*—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

45. *Foreign laws.*—*Atchison, etc., R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428.

46. *Choice between full and limited liability contracts.*—*Louisville, etc., R. Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

47. *Variance existence of contract.*—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

48. *Waiver of stipulation.*—*Chicago, etc., R. Co. v. Van Dresar*, 22 Wis. 511.

49. *As to the contract.*—*Schaeffer v. Philadelphia, etc., Railroad*, 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884.

50. *Assent of shipper.*—*St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

51. *Judgment*, 104 Ill. App. 550, affirmed in *Cleveland, etc., R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804.

52. *As to consideration.*—*Bartlet v. Oregon R., etc., Co.*, 57 Wash. 16, 106 Pac. 487.

a contract, framed as a limitation of the liability of a carrier of live stock, that the rate is a reduced rate is prima facie evidence of that fact.⁵³

Permission of Railway Commission.—In an action against a carrier by a shipper of animals for loss thereof during transportation, where plaintiff introduced an applicable foreign statute providing that no such carrier should be permitted, except as otherwise provided by regulation of the board of railway commissioners, to limit its common-law liability as a carrier, the burden is not upon the shipper to show that no such condition existed but is upon the carrier to show that permission was given it to make such a contract.⁵⁴

§§ 1955-1959. As to the Loss or Injury—§ 1955. Cause of Loss.—Under a complaint against a carrier released from liability as an insurer, for loss of a stallion stated to have been thrown down and injured by the violent "bumping" of the cars, the burden is on the plaintiff to show the "bumping" alleged, and the resulting injury, and it then devolves on the carrier to disprove negligence.⁵⁵

§ 1956. Showing Loss within Exception.—In an action against a carrier for loss or injury to stock shipped under a special contract containing exemptions from liability, the burden is on the carrier to show that the loss or injury resulted from an excepted cause.⁵⁶ It has been so held as to damages caused by defective cars or in consequence of the escape of cattle through the doors of the cars, or from fright, crowding, etc.;⁵⁷ as to damages by failure to provide water for the stock;⁵⁸ and as to injuries resulting from the inherent nature or propensities of the animals carried.⁵⁹

§ 1957. Negligence of Carrier.—Where a contract by the shipper of live stock provides that the railroad company shall not be liable for any damage not resulting from its own negligence, the burden of proof, in an action for injury thereto, is on the company to show that the injury did not result from its negligence.⁶⁰ Negligence is presumed⁶¹ and the carrier has the burden of disproving

53. *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

54. **Permission of railway commission.**—*Atchison, etc., R. Co. v. Rodgers*, 16 N. Mex. 120, 113 Pac. 805.

55. **Cause of loss.**—*Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, 46 N. W. 333.

56. **Showing loss within exception.**—*Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534; *Kansas City, etc., R. Co. v. Heard*, 87 Miss. 378, 39 So. 1011.

57. *Kansas City, etc., R. Co. v. Heard*, 87 Miss. 378, 39 So. 1011.

58. A railway company seeking to exempt itself from liability for damages to stock during transportation, from its failure to provide water for the stock, has the burden of proof to establish such exemption. *Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393.

59. *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

60. **Negligence of carrier.**—*Alabama.*—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

North Carolina.—A shipper of live stock by rail signing a bill of lading excepting damages not resulting from the railroad

company's negligence from the risk, does not have the burden of proving that a loss in process of transportation occurred by the company's negligence, where he had no means of ascertaining how the loss occurred. *Mitchell v. Carolina Cent. R. Co.*, 32 S. E. 671, 124 N. C. 236, 44 L. R. A. 515.

South Carolina.—Under a contract for interstate shipment of stock exempting the carrier from its usual liability, the burden is on it to exempt itself by showing that injury thereto resulted, not from its negligence, but from the breach of contract or negligence of the owner or shipper. *Gilliland v. Southern Railway*, 67 S. E. 20, 85 S. C. 26.

Texas.—*St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

Washington.—*Jolliffe v. Northern Pac. R. Co.*, 52 Wash. 433, 100 Pac. 977.

61. In an action by a shipper against a railroad company to recover the value of hogs killed in transit, under a contract releasing the company from liability for loss from overloading, heat, suffocation, fright, viciousness, or fire, and from all other damages incidental to railroad transportation, "which shall not be established by positive evidence to have been caused by the negligence of some officer or agent," plaintiff is entitled to a recov-

it; as, for instance, when the cattle are damaged by bumping,⁶² or by delay⁶³ occasioned by a mob or strike.⁶⁴ And it is proper to refuse to charge that if defendant has shown that its car, track, and equipments were adequate, and that there was no negligence on its part, the fact that it does not appear how the injury occurred is not sufficient to fix liability on defendant, but that the burden of proof is on plaintiff to show that the injury resulted from defendant's act.⁶⁵

Gross Negligence.—The fact that there is a special contract limiting the liability of a carrier of live stock to injuries or loss caused by its gross negligence does not take it out of the rule that a proof of loss or injury while the stock is in the possession of the company raises the presumption that the company is at fault. In such a case the presumption arises and the burden is on the carrier to show that it has exercised the degree of care called for by the contract.⁶⁶ But in Maryland⁶⁷ and Pennsylvania,⁶⁸ where a railroad company contracted for the transportation of live stock and for release from injuries to stock while in the car, except such as might arise from gross negligence, the burden was imposed on plaintiff of proving, not only that the stock was injured, but that the injury was caused by the gross negligence of defendant's agent.

ery where it does not appear from what cause the hogs died. *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 17 S. E. 512.

62. Bumping.—Under a complaint against a carrier released from liability as an insurer, for loss of a stallion stated to have been thrown down and injured by the violent "bumping" of the cars, the burden is on the plaintiff to show the "bumping" alleged, and the resulting injury, and it then devolves on the carrier to disprove negligence. *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, 46 N. W. 333.

63. Delay.—Where a shipper, suing a carrier for damages resulting from failure to seasonably transport and safely deliver cattle, shows that they were delivered in a damaged condition, and after an unreasonable delay, the burden is on the carrier, if the shipment was under a special contract, to bring the injury within its exception, and to show that it was not caused by its own negligence. *Hinkle v. Southern R. Co.*, 36 S. E. 348, 126 N. C. 932, 78 Am. St. Rep. 685.

Where horses were shipped under a written contract, whereby the shipper assumed all risk of damage from delay, the burden was on the railroad of proving that delay was not due to its own negligence. *Jolliffe v. Northern Pac. R. Co.*, 100 Pac. 977, 52 Wash. 433.

64. Delay caused by mob or strike.—Where a carrier of live stock, by contract, exempts itself from liability for loss from specified risks, "and for loss or damage to said animals from any cause or thing whatever not resulting from the negligence of the agents or servants of the company," the exemption as to the specified risks is not unconditional, but applies only to such as are not occasioned by the negligence of the company's agents or servants; therefore, though mobs and strikes are among the specified risks, if the carrier seeks to excuse the particular delay on the ground

that it was occasioned by a mob or strike, the burden is on the carrier to show, not only that fact, but the further fact that the mob or strike was without the fault of the company. *Louisville, etc., R. Co. v. Thompson*, 13 Ky. L. Rep. 973.

65. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

66. Presumption and burden of proof of negligence.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia, etc., R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782.

Where an animal shipped in a healthy condition arrived at its destination forty-six hours later in a dying condition, the carrier transporting it under a contract limiting its liability for gross negligence was prima facie guilty of gross negligence, and, to escape liability, it had the burden of showing that the death of the animal was not occasioned by such negligence, though the shipper did not accompany the animal, and though under the contract he assumed the duty of accompanying, feeding, and watering the animal, since the shipper's agreement did not relieve the carrier from the duty of properly caring for the animal during transportation which proper care involved feeding and watering. *Mering v. Southern Pac. Co.*, 161 Cal. 297, 119 Pac. 80.

67. *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197, 6 Am. Rep. 321.

68. Where it was sought to recover for the loss of a horse shipped under a bill of lading specially relieving the carrier from loss in transit except through gross negligence, and it appeared that the horse died on the way, and there was no proof from plaintiff, or in the case, of the cause of the death of the horse, it was held that no presumption of negligence arose from the fact of the loss, and the plaintiff was not entitled to recover. *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670.

Rebutting Presumption.—In an action upon a special contract of shipment of live stock limiting the carrier's liability to loss or damage caused by gross negligence on its part, where the carrier shows that it has exercised the degree of care and diligence called for by the contract, the presumption of negligence is rebutted and the plaintiff can not recover.⁶⁹ Thus where it appears that the cars in which the stock was carried were suitable; that the track was in good condition; that the equipments and appliances of the train were adequate, and that there was no fault or negligence in any respect on the part of the carrier in handling the stock, or in the running and management of the train, or in the exercise by the servants of the carrier of that degree of care demanded by the terms of its contract and required by the nature of the stock, any presumption of negligence would be fully rebutted, and the carrier would not be liable for loss or damage to the stock while in transportation.⁷⁰ And where in such action the evidence shows that the stock was properly loaded under the shipper's supervision in a car containing sufficient room, that the car arrived at its destination in a reasonable time and was inspected upon its arrival and the animals found apparently sound, the shipper can not recover for an injury the cause of which was unknown and which was such as might have resulted from other causes than the fault of negligence of the carrier.⁷¹

§ 1958. Shipper Required to Inspect Car.—Where stock was injured by a defect in a car which the shipper was required to inspect and had accepted as suitable, the burden is upon the shipper to show that such defect was not patent when he examined the car.⁷²

§ 1959. Shipper Required to Care for Stock.—Where a shipper assumes the care of his stock en route, and the stock is injured by his failure to feed and water them as he had assumed to do, the burden is upon him to show that his failure was caused by failure of the company to furnish facilities.⁷³

§§ 1960-1965. Admissibility and Competency.—**§ 1960. Contract Itself.**—In an action against a railroad company to recover the value of an animal killed by jumping from defendant's car, on which it had been shipped under a contract exempting defendant for liability for loss "by jumping from the cars,"

69. Rebuttal presumption.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240.

Injury due to violence of hurricane.—Where a special written contract between a carrier and the shipper of live stock provided that the carrier should supply the stock with water and that the shipper should, at his own expense, provide stalls and food and proper grooms to take charge of the stock and exempted the carrier from liability for any accident to the stock in the course of shipment by reason of the perils of the sea, sickness, disease or any cause whatever, the carrier can not be held liable for the death of the stock caused by the rolling and pitching of the ship during a violent hurricane, where no negligence on the part of the carrier or its servants is shown but the death appears to have resulted either from the violence of the storm or from the failure of the shipper to provide proper attendance and proper stalls. *New England, etc., Co. v. Paige*, 108 Ga. 296, 33 S. E. 969.

70. *Georgia, etc., R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782.

71. *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

72. Defect not patent where shipper required to inspect car.—A shipper of live stock contracted with the carrier, in consideration of a reduced freight rate and free passage for himself, to release the carrier from loss by animals injuring each other, or from fright or viciousness. The contract recited that the shipper had examined the car, and found it in good order, and sufficient for the intended purposes. Held, in an action for the value of an animal, which died from injury received by getting his foot in a crack, that the burden was on the shipper to show that such defect was not patent when he examined the car. *Williams v. Central, etc., R. Co.*, 43 S. E. 980, 117 Ga. 830.

73. Shipper required to care for stock.—*Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192; *Louisville, etc., R. Co. v. Harned*, 23 Ky. L. Rep. 1651, 66 S. W. 25; *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

but omitting the rate to be charged for transportation, such contract is admissible in evidence.⁷⁴

Contract of Transportation in Suit for Wrongful Acceptance of Live Stock.—In a suit for wrongful acceptance of live stock for transportation, a contract offered in evidence contemplating carriage and transportation, modifying and limiting defendant's ordinary obligations, was wholly immaterial.⁷⁵

§ 1961. Custom.—Evidence of a custom of a carrier in issuing contracts for the transportation of live stock is inadmissible to impose a limitation of the carrier's liability not provided for in the contract of shipment.⁷⁶ As a custom must be legal before being admissible in evidence, it is not error to exclude testimony that it was the universal custom of railroads not to ship any live stock or receive any for shipment unless upon the owner's agreeing to numerous stipulations which are not allowed to be the subject of contract.⁷⁷

§ 1962. Carrier's Course of Business.—In an action against a carrier, where stock is shipped under a special contract, evidence of the carrier's course of business and the rate charged other persons is only admissible to show the shipper's knowledge of the legal and special rates.⁷⁸

§ 1963. Choice between Full and Limited Liability Contract.—Evidence of shippers of live stock that a carrier had never offered them any contract of shipment except one containing a limitation of its liability is admissible to

74. **Contract itself.**—*Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, 35 N. W. 433.

75. **Contract of transportation in suit for wrongful acceptance of live stock.**—*Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

76. **Custom.**—*McMillan v. American Exp. Co.*, 123 Iowa 236, 10 R. R. R. 453, 33 Am. & Eng. R. Cas., N. S., 453, 98 N. W. 629. See ante, "Custom," § 1907.

77. **Custom of carrier to care for stock after arrival at destination.**—Testimony of one of plaintiffs as to a custom of defendant of delivering stock to third persons at shipping stations, for the purpose of showing that plaintiffs were relieved from care of their horses when they arrived at their destination, was improperly admitted, in an action for injuries to horses shipped by plaintiff; it not being shown that the custom was uniform, reasonable, and notorious, or that witness was experienced in such transactions. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

It was error to permit a witness to testify "it was customary for railroad companies to turn over stock at shipping stations and at destination of stock, just as his were turned over to Jones & Co. at Memphis," it being shown that at Memphis Jones & Co. took the stock in question from the cars to a stock yard and held them for the railroad for the freight—there being no other testimony to the extent of the custom nor to the means of knowledge of the witness. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to

show that it was the duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiffs seek to recover in this action; but the object was to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that they did. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 130, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

Shipper to accompany and care for stock.—Evidence of a custom of railroads and of defendant to refuse to receive or ship stock unless the shipper will accompany the stock, and tend them himself, and agree to hold the railroad company harmless against ordinary delays, and in case of total loss of stock that the damages shall not be more than their actual cash value, is properly excluded, in an action for injury to horses shipped by plaintiff; the custom being unreasonable, and a limitation of the duties and responsibilities imposed upon a carrier by law. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

Shipper to bed cars.—In an action against a carrier of cattle, evidence of a custom by which the shipper is to "bed" the car is admissible. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489.

78. **Carrier's course of business.**—*Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524, 56 S. W. 453.

show that the carrier did not hold itself ready to make a contract of shipment in which it assumed common-law liability.⁷⁹ And in an action against carriers for injuries to animals during transportation, it is not error to admit evidence that one of the defendants had not quoted witness any other rate than that he paid, as a foundation for the position that, as there was only one rate, there was no consideration for a release from liability except for the carrier's negligence, though the testimony contradicted the written contract of shipment, where defendant had not introduced the written contract.⁸⁰

§ 1964. Fraud.—Proof of Circumstances.—Where in an action by the shipper of stock against a railway company to recover damages for negligence and delay in transportation, a special written or printed contract is set up to defeat the action for noncompliance with its terms and conditions, the shipper may show the circumstances under which he executed the instrument, when he claims that he was intentionally deceived by the carrier's agent and induced to sign it without having time to examine its contents, under the fraudulent assurance that it was only a pass.⁸¹

§ 1965. Negligence.—Where the issue is whether the live stock was injured by the negligence or misconduct of the carrier, although a special contract for transportation had the effect of limiting the carrier's common-law liability, evidence bearing upon a question of negligence is pertinent to the issue; as, for instance, where the contract contains an exemption from liability for injuries incurred from delay of trains, testimony that the shipper had requested the carrier's agent to telegraph ahead to the agent of a connecting line that stock was coming, is admissible.⁸²

Trampling Caused by Cattle's Being Tired by Delay.—Though a live stock shipment contract exempted the carrier from liability for loss caused by natural vice of the stock, such as trampling upon each other, etc., the shipper suing for loss in transit could testify that delays during transportation caused some of the cattle to become tired and lie down, and that they were trampled upon by other cattle and injured.⁸³

§ 1966. Weight and Sufficiency.—Evidence of Contract.—Where, in an action against a railroad company for damages to stock resulting from defendant's negligence and delay, the plaintiff alleges that the shipment was made through reliance on representations made by the defendant company, and the latter pleads a written contract of shipment, but such contract is not introduced in evidence, defendant can not claim that its liability is limited by such contract.⁸⁴

Assent of Shipper.—Where a railroad company, accustomed to carry live stock at the owner's risk, delivered to a shipper of certain horses a receipt therefor marked "O. R.," the presumption of the owner's assent to the risk, raised by his possession of such receipt, is not overcome by his testimony that he did

79. Choice between full and limited liability contract.—Nashville, etc., R. Co. v. Stone, 79 S. W. 1031, 112 Tenn. 348, 105 Am. St. Rep. 955.

80. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 S. E. 856.

81. Proof of circumstances.—Black v. Wabash, etc., R. Co., 111 Ill. 351, 25 Am. & Eng. R. Cas. 388, 53 Am. Rep. 628.

82. Negligence.—Defendant railroad company agreed to ship plaintiff's cattle over its road, and deliver them to a connecting line, but stipulated that it was not to be liable for any injury caused by delay of trains. When the cattle reached the point at which they were to be transferred to the connecting road, the train on the latter line had departed, and the

cattle were left in defendant's cars for twenty-four hours without food or water. Held, in an action for damage to the stock, that it was permissible for plaintiff to show that, before defendant's train started, he had requested defendant's agent to telegraph to the agent of the connecting line that the stock was coming, but that the agent failed to comply with the request. *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268.

83. Trampling caused by cattle's being tired by delay.—*Estes v. Denver, etc., R. Co.*, 49 Colo. 378, 113 Pac. 1005.

84. Evidence of contract.—*Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304, 58 S. W. 842.

not "see" the letters "O. R.," not that he did not understand their meaning to be "owner's risk."⁸⁵

Consideration.—Where plaintiff and his agent were in the habit of shipping stock over defendant's line, for which they always signed written contracts, and plaintiff, prior to the shipment in question, inquired of defendant's agent the rate, and plaintiff's agent afterwards signed a written contract limiting defendant's liability to its own line, which he did not have time to read prior to leaving with the stock, the contention that such written contract was void for want of consideration and as signed under duress was without merit, since the evidence tended to show that plaintiff knew it was defendant's custom to require such a contract.⁸⁶

Choice of Rate.—Instances in which the evidence has been held insufficient to show that the shipper was given choice between a full and limited liability contract⁸⁷ will be found in the footnotes.

Negligence for Delay Unaccounted.—Evidence that there was a delay of seven hours unaccounted for in the shipment of hogs from Nashville to Louisville, that the weather was very warm and the hogs were left exposed to the sun, that while they were in the carrier's possession they had been in transit for over 28 hours without being fed or watered as required by act of congress in interstate shipments, and that when they were delivered nearly a third of the hogs were dead, is sufficient to show negligence on the part of the carrier, so as to render it liable for the loss, notwithstanding a special contract limiting its liability.⁸⁸

§ 1967. Question for Jury.—Whether the shipper knowingly assented to the provisions of the contract signed by him;⁸⁹ whether a contract limiting a carrier's liability for negligence in the transportation of live stock was executed by plaintiffs in ignorance of its contents and after shipment;⁹⁰ whether a cattle shipper bound himself by preliminary negotiations as to a shipment to sign a special written contract limiting carrier's common-law liability;⁹¹ what constitutes the shipping contract;⁹² or which contract controls the shipment;⁹³ or

85. Assent of shipper.—Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599.

86. Consideration.—Ft. Worth, etc., R. Co. v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846.

87. Choice between full and limited liability contract.—In an action for injuries to horses in transit, evidence held insufficient to show that the shipper was notified that the carrier would ship under the common-law liability at a rate fixed therefor, so as to make valid a limited liability contract. Louisville, etc., R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866.

88. Negligence for delay unaccounted.—Nashville, etc., R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955.

89. Knowing assent of shipper.—In an action against a carrier for delay in shipping live stock under a special contract, whether the shipper knowingly assented to the provisions of the contract signed by him, which limited the carrier's common-law liability, held a question of fact as to which the determination of the Appellate Court is final. Kirby v. Chicago, etc., R. Co., 90 N. E. 252, 242 Ill. 418.

90. Olds v. New York Cent., etc., R. Co., 94 N. Y. S. 924, 107 App. Div. 26.

91. St. Louis, etc., R. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A., N. S., 637.

92. Oral contract—Subsequent bill of lading.—In an action to recover damages for the death of hogs which had been transported over the appellant railroad, the shipper claimed and testified that an oral contract was made for transportation, to a point beyond the line of the contracting railroad, in which there was no limitation of the carrier's liability and that the stock was shipped under such contract; that after the stock was loaded and had left the station, he signed a paper which he could not well read, but which he supposed to be a receipt containing nothing inconsistent with such oral contract. The railroad offered testimony to show that the only contract made with the shipper was the written one embodied in the bill of lading signed by the shipper, and which, to a great extent, limited the liability of carrier. It was held that the court was warranted in submitting to the jury the question of what constituted the shipping contract. St. Louis, etc., R. Co. v. Clark, 48 Kan. 321, 29 Pac. 312.

93. Where carrier accepted cattle for shipment under parol contract with ship-

where the shipper testifies that live stock was shipped under an oral contract and the carrier's testimony tends to show that the contract was embodied in the bill of lading, are questions for the jury.

§ 1968. Instructions.—Request, Shipper Required to Load and Unload.—Where, in an action against a carrier for negligence in the shipment of stock, it appeared that there was a contract whereby the shipper assumed the duty of loading and unloading the stock at his own risk, but there was evidence that the carrier in fact had charge of such matters, the shipper's employees merely assisting, an instruction that plaintiff might recover for injuries resulting from the failure of the carrier to use ordinary care in the loading was not objectionable, in the absence of a request for a more specific instruction, as holding the carrier liable for any negligence except its own.⁹⁴

As to Evidence in Explanation Where Validity Questioned for Want of Consideration.—In an action against a railway company for injury to live stock in transit, where defendant pleaded a provision of the shipping contract, whereby plaintiff, in consideration of reduced rates and free transportation for two persons, had agreed to care for, feed, and water such stock, and where such persons testified that they at no time asked for an opportunity so to do, because they considered that such duty devolved on defendant, and that there was no consideration for such contract, it was error to charge that, if the validity of such contract had been called in question for want of consideration, the oral testimony offered in explanation thereof might be considered, as the practical effect of such instruction, in view of such evidence, was to annul the provision making it the duty of plaintiff to feed and water such stock.⁹⁵

Issues Not Fully Submitted—Contract Executed after Prior Verbal Contract.—Where plaintiff, who was in the habit of shipping stock over defendant's line, for which he always signed written contracts, made a verbal contract with defendant's agent as to the rate, and plaintiff's agent afterwards signed a written contract limiting defendant's liability to its own line, an instruction, in an action for damages occurring beyond defendant's line, "that if the verbal contract was entered into prior to the execution of the written agreement, and such agreement was signed by plaintiff's agent without said plaintiff or his agent knowing its contents, and without their having time to read it before the train carrying said stock left the depot, such contract was without consideration and void," was erroneous, as not fully submitting the issues to the jury.⁹⁶

As to Statutory Duty to Feed and Water.—Where, in an action against a railroad for damages because of its delay in furnishing cars for the transportation of plaintiff's cattle, whereby the cattle suffered loss in weight, owing to the fact that there was no food nor water for them at the point where they were driven to meet the cars, it appeared that plaintiff had himself undertaken to feed and water the cattle, an instruction that the law makes it the duty of common carriers to feed and water during the conveyance and that the liability of the carrier attaches when the shipper has done all that is required of him to prepare the property for shipment, and has delivered the property, was erroneous.⁹⁷

per, and after they were on its cars, and just before the train started procured a shipper to sign a written contract limiting its liability, which the shipper signed at its request, without reading, for want of time, it is proper to submit to jury as to which contract controlled carrier's liability. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

94. Request, shipper required to load and unload.—*San Antonio, etc., R. Co. v. Dolan* (Tex. Civ. App.), 85 S. W. 302.

95. As to evidence in explanation where validity questioned for want of consideration.—*Texas, etc., R. Co. v. King* (Tex. Civ. App.), 45 S. W. 33.

96. Issues not fully submitted—Contract executed after prior verbal contract.—*Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

97. As to statutory duty to feed and water.—*St. Louis, etc., R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673.

Charge as to Presumption of Negligence.—Where cattle are shipped on a railroad, and by the contract of shipment are to be loaded, unloaded, and cared for by the shipper, a charge that an injury to the stock while being shipped raises a presumption of negligence against the carrier should be qualified by excepting injuries resulting from the negligence of the shipper or the vice of the animal.⁹⁸

§§ 1969-1998. Limitation of Amount of Liability and Agreed Valuation—§§ 1969-1974. Power to Limit—§ 1969. In General.—A carrier may by special contract for transportation of live stock, in consideration of a reduced rate, provide that, in case of loss, the carrier's liability shall not exceed a maximum valuation where the stipulation in the contract is reasonable and just and fairly entered into by the shipper.⁹⁹

§§ 1970-1972. Effect of Statutory and Constitutional Provisions—§ 1970. Federal Statutes.—Interstate Commerce Act, Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), requiring freight rates to be uniform, does not prevent a shipper from recovering the actual loss to a live stock shipment, though the stock was shipped on a stipulated valuation per head.¹ Under that act an interstate contract for the carriage of live stock, which limits liability in case of loss to a maximum sum, is void.²

§§ 1971-1972. State Statutes—§ 1971. Application to Interstate Commerce.—Const. Neb. art. 11, § 4, which provides that "the liability of railroad corporations as common carriers shall never be limited," applies to contracts involving interstate commerce, and under such provision, as construed by the Supreme Court of the state, contracts made in Nebraska for the shipment of horses to another state, in which, in order to obtain the rate of freight named in the tariff schedules of the company, based on such valuation, the shipper is obliged to agree that the liability of the company shall, in case of loss, be limited to \$100 per head, regardless of actual value, are void as to such attempted limitation, and the shipper may recover the actual value.³

§ 1972. Statutes of Particular States.—Under the statutes of Iowa,⁴

98. Charge as to presumption of negligence.—*Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

99. Power to limit.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *S. C.*, 97 Ala. 341, 11 So. 781; *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220.

A stipulation in a bill of lading for shipment of live stock at reduced rates, fixing values of the respective animals, is not an unlawful limitation upon the carrier's liability; but, if fair and reasonable in itself, and based upon a sufficient consideration, and freely and understandingly assented to by the shipper, is valid, although the values agreed upon are much below those proved. *Louisville, etc., Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

1. Federal statutes.—*Betts v. Chicago, etc., R. Co.*, 150 Iowa 252, 129 N. W. 962,

2. St. Louis, etc., R. Co. v. Dunn, 94 Ark. 407, 127 S. W. 464.

3. Application to interstate commerce.—*Latta v. Chicago, etc., R. Co.*, 97 C. C. A. 198, 172 Fed. 850.

4. Sections 2074, 3136, of the Code of

Iowa prohibiting limitation of a carrier's liability, can not be avoided by a stipulation limiting liability to a fixed valuation in consideration of a lower rate; the shipper being entitled to recover his actual loss, less the difference between freight charges collected and charges under true valuation. *Betts v. Chicago, etc., R. Co.*, 150 Iowa 252, 129 N. W. 962.

A limitation, in a contract of shipment of a horse, of the carrier's liability to \$100, the "released value of the horse" named in the contract, is void, under Code § 2074, notwithstanding the fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse. *Lucas v. Burlington, etc., R. Co.*, 112 Iowa 594, 84 N. W. 673.

Under Code, § 1308, providing that no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting property by railway from liability of a common carrier which would exist had no contract, a receipt, rule, or regulation been made, in an action against a railroad company for injuries to a thor-

Nebraska,⁵ Texas,⁶ and Virginia,⁷ and the constitution of Kentucky,⁸ a carrier may not limit its liability for loss or injury to live stock.

Washington.—Railroad Commission Act of Washington (Laws 1905, c. 81) § 23, as amended in 1907 (Laws 1907, c. 249), providing that no contract shall exempt a carrier of live stock from liability which would otherwise exist, prevents avoidance of the carrier's common-law liability, but does not invalidate provision in a shipping contract limiting the value of the stock carried in consideration of the rate given, where a higher rate would be charged at a higher valuation.⁹

Oklahoma.—See post, "Loss by Gross Negligence," § 1974.

§ 1973. Loss by Negligence of Carrier.—The doctrine prevailing in most jurisdictions is that a special contract for transportation of live stock in consideration of a reduced rate, providing that, in case of total loss of any of the stock, the carrier's liability should not exceed a maximum valuation of the stock stipulated in the contract, is not an attempt to exempt the carrier from liability for negligence, where the contract is reasonable and just and fairly entered into by the shipper, and it will be upheld as a proper manner of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives; and assuming that a contract for transportation of live stock containing an agreed value of the amount was fairly made, the sums named being approximately the average values of ordinary domestic animals, the recovery of the owner would be limited to the sums named, though the loss occurred through the negligence of the carrier's servants.¹⁰ This is the rule in the United States courts¹¹ and in Alabama,¹² Florida,¹³ Massachu-

oughbred cow defendant can not show a rule of the railroads of the state to limit their liability in the shipment of such stock to the value of common stock, or that plaintiff, in previous shipments, had signed contracts releasing the company from any liability above the value of common stock, and that he shipped the cow under the same arrangement. *McCune v. Burlington, etc., R. Co.*, 52 Iowa 600, 3 N. W. 615.

5. See ante, "Application to Interstate Commerce," § 1971.

6. Article 320, Texas, Rev. Stat., prohibiting common carriers from limiting their liability as at common law, renders nugatory a provision in a contract for the shipment of live stock, that the nature of the stock at the place of shipment shall be the basis of value in recovering the damages for injury in the shipment. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607, limiting *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545, in so far as it apparently sanctions a contract which limited the damages for stock lost to the value at the place of shipment.

7. Under Va. Code 1904, § 1294c (24), providing that no contract shall exempt any common carrier from the liability of a common carrier, which would exist had no contract been entered into, a carrier of live stock may not limit its liability for loss or injury to the cattle to less than their true value, whether the loss or injury is caused by its negligence, or not, if

it is not caused by the vis major, or the inherent qualities of the cattle or the fraud of the shipper. *Chesapeake, etc., R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35.

8. Under the Kentucky Const., § 196, providing, that "no common carrier shall be permitted to contract for relief from its common-law liability," and an agreement that the value of the stock did not exceed a certain sum per head, are illegal and void. *Ohio, etc., R. Co. v. Tabor*, 98 Ky. 503, 36 S. W. 18; *Adams Exp. Co. v. Walker*, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412.

9. *Carstens Packing Co. v. Northern Pac. R. Co.*, 64 Wash. 256, 116 Pac. 625.

10. **Loss by negligence of carrier.**—*Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

11. *Jennings v. Smith*, 45 C. C. A. 249, 106 Fed. 139.

12. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *S. C.*, 97 Ala. 341, 11 So. 781.

Where stock is received by a common carrier for transportation, it may stipulate, in consideration of reduced rates, and a free passage to the owner of the stock or his agent, that, upon damages to the stock for which the carrier would be liable, the value at the place and date of shipment shall govern in the settlement, in which the amount claimed shall not exceed \$150 for a horse or mule, \$50 for cattle, and \$25 for other animals. *South, etc., R. Co. v. Henlein*, 56 Ala. 606, 23 Am. Rep. 578.

13. Provisions, in contracts for the car-

setts,¹⁴ Minnesota,¹⁵ New York,¹⁶ Oklahoma,¹⁷ Oregon,¹⁸ Tennessee,¹⁹ Wisconsin,²⁰ and others.

Right to Limit Liability.—In some states, mainly because of the local statutes, it held that a carrier of live stock can not, by an agreement fixing the value of the stock, though in consideration of a reduced freight rate, limit its liability for injury to the stock resulting from its negligence.²¹ Among the latter states are Kansas,²² Kentucky,²³ Mississippi,²⁴ and Texas.²⁵ A provision in a contract

riage of live stock, limiting the amount for which the carrier is to be liable in any event for loss or injury to such stock, are valid and binding on the parties. *Atlantic, etc., R. Co. v. Dexter*, 39 So. 634, 50 Fla. 180, 111 Am. St. Rep. 116.

14. A carrier of animals may lawfully limit his liability by express agreement, so as not in any case to be liable for injury to or loss of any single animal beyond a certain sum named. *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

15. *Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

A contract for the transportation of horses provided "that the value of the live stock to be transported under this contract does not exceed the following mentioned sums to wit: Each horse, \$100; each ox, \$50; * * * such valuation being that whereon the rate of compensation to the company for its services and risk connected, with said property is based." Held that, assuming that the contract was fairly made for the purposes expressed, the sums named being approximately the average values of ordinary domestic animals, it was a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which he receives, and of protecting himself against extravagant valuation in case of loss. *Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

16. *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642, affirmed 62 Hun 619, 16 N. Y. S. 631, 42 N. Y. St. Rep. 63.

17. *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 254, 109 Pac. 220; *Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

A limitation of liability of a carrier of live stock to a maximum valuation stipulated, in consideration of a reduced freight rate, is not a contract attempting to exempt the carrier from liability for its negligence; and where the contract is reasonably and fairly entered into by the shipper, it will be upheld. *Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

18. A contract of shipment of live stock, providing that the stipulated tariff is less than that for transportation at carrier's risk, and is given in part consideration of shipper's agreement to limitation

of the carrier for injury to any animal the value of the stock does not exceed \$100 per head, does not make a partial exemption from liability for negligence, but a valid valuation; it not being shown that it was not entered into freely by the shipper, or whether he could have obtained other terms on a higher valuation. *Normile v. Oregon R., etc., Co.*, 69 Pac. 928, 41 Ore. 177.

19. *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

20. *Willard v. Chicago, etc., R. Co.*, 150 Wis. 234, 136 N. W. 646.

21. **Right to limit liability.**—*Cincinnati, etc., R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961.

22. A carrier of live stock can not, by contract, limit to a certain sum its liability for injury, caused by its own negligence, to an animal accepted for shipment. *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104.

23. *Cincinnati, etc., R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961.

A clause in a contract for the shipment of live stock which fixes a value on each animal, and stipulates that the liability of the carrier for injury to any animal shall not exceed the value so fixed, attempts to limit the common-law liability of the carrier, and is therefore void, though it may have been consented to by the shipper in consideration of a reduced rate. *Illinois Cent. R. Co. v. Radford*, 64 S. W. 511, 23 Ky. L. Rep. 886.

A stipulation in a shipping contract that the value of the amount delivered for transportation should not, in case of injury, be considered as exceeding a certain sum, is invalid as against an injury resulting from the negligence of the carrier. *Louisville, etc., R. Co. v. Owens*, 93 Ky. 201, 19 S. W. 590, 14 Ky. L. Rep. 118.

24. A common carrier can not escape liability for the full amount of the damage caused by its negligence by a special contract limiting its liability to a certain amount. *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017.

25. *Taylor, etc., R. Co. v. Montgomery*, 4 Texas App. Civ. Cas., § 238, 16 S. W. 178; *Taylor, etc., R. Co. v. Sublett* (Tex. Civ. App.), 16 S. W. 182; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691.

A carrier can not limit its liability for the full value of stock lost, through its negligence, by a contract to pay "the

with a carrier for the shipment of live stock, limiting the shipper's damages, in case of loss or partial loss, to the value of the cattle at the place of shipment, can not affect the shipper's right to recover the true value, if loss is caused by the carrier's negligence.²⁶

§ 1974. Loss by Gross Negligence.—California.—A contract of carriage of horses, which stipulates that the carrier shall not be liable for any damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the declared value, based on a consideration of a rate of transportation lower than the rate otherwise would have been, is not in conflict with Civ. Code, § 2175, providing that a carrier can not be exonerated from liability for gross negligence, and the contract, if freely made, limits the recovery for damages resulting from gross negligence.²⁷

Oklahoma.—A limitation of the liability of a carrier of live stock to a maximum valuation, stipulated in consideration of a reduced freight rate, is not in violation of Wilson's Rev. & Ann. St. 1903, § 706, forbidding a carrier, by contract, to exonerate itself from liability for gross negligence.²⁸

§§ 1975-1987. Form, Requisites and Validity—§ 1975. Form and What Constitutes.—Request of Shipper.—Where a shipper requested a carrier to accept a shipment of horses of the value of a named sum each, and stated that he desired to procure a certain contract of shipment, which referred to the request with the valuations therein and limited the liability of the carrier for loss to an amount not in excess of such declared value; the request of the shipper must be deemed a part of the contract of carriage.²⁹

Agreement Must Be Outside Printed Bill of Lading.—See post, "Acceptance of Bill of Lading," § 1980.

Custom.—A custom requiring the shipper to agree, as a condition to the right to ship his stock on a railroad, that in case of total loss of stock, the measure of damages should not be more than the cash value of the same at the place of shipment, is illegal. The carrier can not require that the shipper should make such a special contract.³⁰

§ 1976. Consideration.—Necessity.—An agreement in a shipping contract limiting the liability of the carrier to a stated valuation of the property is valid if supported by a valid consideration, but not without a special consideration.³¹

Limiting Damages to Cost of Extra Food—Loss by Delay.—A condition in a shipping contract that, in case of unusual delay, the shipper's damages should be restricted to the amount spent for food and water for the cattle, did not relieve the company of its common-law liability for negligently permitting such delay, in the absence of a special consideration for such provision.³²

actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head," in case of total loss of said stock. *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815. See *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

26. *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834, followed in *International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

27. *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

28. *Chicago, etc., R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

29. **Request of shipper.**—*Donlon Bros. v. Southern Pac. Co.*, 91 Pac. 603, 151 Cal. 763, 11 L. R. A., N. S., 811, 12 Am. & Eng. Ann. Cas. 1118.

30. **Measure of damages.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75, citing *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

31. **Necessity.**—*Van Buskirk v. Quincy, etc., R. Co.*, 143 Mo. App. 707, 128 S. W. 216.

32. **Limiting damages to cost of extra food.**—*Rice v. Wabash R. Co.*, 106 Mo. App. 370, 8 S. W. 974.

Reduced Rate.—A contract for the shipment of animals limiting the liability of the carrier to a stated valuation is valid if supported by a reduced rate, as a consideration.³³ But a contract which fixes no charge to be paid therefor, leaving the schedule rate to govern, and which states that the animal's value does not exceed a stated sum, and the carrier shall not be liable beyond that amount in case of loss or damage through its negligence, is not such a contract as fixes an agreed value on which to base both a rate of transportation and the liability for loss, but, in case of loss, leaves the actual value of the animal to be shown by extrinsic proof; and the provision limiting the liability of the carrier is void for want of consideration.³⁴

§ 1977. Reasonableness—Undervaluation.—A clause in a contract for transportation of live stock which limits the carrier's liability to a stipulated sum for each animal lost, to be valid, must be reasonable.³⁵ Where the bill of lading issued by a railroad company on receipt of a shipment of live stock for transportation contains a stipulation that, in consideration of reduced rates, liability of the carrier shall be limited to the value of the animals expressed therein, such stipulation is void as against public policy in case the value so stated is greatly below the true value, whether the carrier is informed of the true value or not.³⁶ Where the value agreed upon for horses shipped was so out of harmony with their actual value as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, such value will be considered as a mere attempt by the carrier to secure partial exemption from liability, and of no effect in relieving it from the obligation of responding for the real value of the horses.³⁷

33. Reduced rate.—*South, etc., R. Co. v. Henlein*, 56 Ala. 606, 23 Am. Rep. 578.
Arkansas.—*St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236.

Missouri.—*Van Buskirk v. Quincy, etc., R. Co.*, 143 Mo. App. 707, 128 S. W. 216.

North Carolina.—A stipulation in a bill of lading for the carriage of live stock that, in case of loss the liability of the carrier shall not exceed \$100 per head, made in consideration of a reduction in freight rate, is valid. *Winslow Bros. & Co. v. Atlantic, etc., R. Co.*, 151 N. C. 250, 65 S. E. 965.

34. *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

35. Instances where valuation reasonable.—A common carrier and the owner of live stock made a special contract, wherein it was agreed that, in consideration of reduced rates and a free pass to the owner, the latter should attend the stock and care for it, at his own expense, in case of accidents, and that the value at the time and place of shipment, not to exceed \$50 per head for ordinary beef cattle, should be the measure of recovery for any loss for which the carrier might be liable. Held, that the contract was reasonable and valid. *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

A stipulation in a contract for the shipment of a car load of mules that, in consideration of a reduced rate of freight, the carrier shall in no case be liable for

more than \$100 for a mule, is valid. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *S. C.*, 97 Ala. 341, 11 So. 781.

A clause in a bill of lading of live stock which limits the carrier's liability to the sum of \$50 for each animal lost, when based on reduced charges for their transportation, is reasonable, and will be made the measure of damages, though the animal killed was worth from \$600 to \$800. *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

36. *Southern R. Co. v. Jones*, 132 Ala. 437, 31 So. 501.

37. *Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

Instances of unreasonable valuation.—A live stock shipping contract, containing a limitation of liability, in case of stallions, to a specific amount, is unreasonable and of no force, where the stallions actually shipped and injured by the carrier's negligence are worth at market value two or three times as much as the amount limited, as such contract is a mere cloak to avoid liability for the carrier's negligence. *Louisville, etc., R. Co. v. Smith*, 123 Tenn. 678, 134 S. W. 866.

The stipulation in a contract of carriage of horses limiting their value to \$20 a piece as a basis for liability of the carrier in case of their loss is unreasonable, and so not binding; the carrier's agent having been informed that they were worth \$200 a piece. *Bingham v. San Pedro, etc., R. Co.*, 39 Utah 400, 117 Pac. 606.

§ 1978. Arbitrary Valuation.—In the absence of an agreed valuation, a contract for transportation of live stock by a railroad company providing “that the liability of the company shall not, in any event, exceed a named sum per head” for damages resulting from its negligence, is void.³⁸ The stipulation can not be one arbitrarily limiting the amount of the recovery without regard to the value of the property.³⁹

§§ 1979-1981. Assent of Shipper—§ 1979.—Necessity.—If by rule of the carrier or a published schedule of tariff rates its liability is fixed by the freight rate paid, to obtain a certain freight rate the shipper reports to the carrier a valuation on stock shipped, having notice of such terms at the time or before delivery of the stock to the carrier and assenting thereto, the carrier's liability will be fixed by such agreement; but if the shipper has no notice of the rule or tariff rates, and does not assent thereto, the carrier's liability will not be so fixed.⁴⁰

Regulation of Railroad Commission.—Where a carrier receiving horses for shipment without inquiry and without representations by the shipper as to value sought to impose on the shipper conditions contained in the regulations of the Railroad Commission governing intrastate shipments, providing for classification of freight with a maximum valuation of live stock shipments at a specified rate, it must show the shipper's assent to the regulations.⁴¹

§ 1980. Acceptance of Bill of Lading.—In Kentucky the acceptance of a printed bill of lading by a shipper of live stock with the amount printed in it does not constitute an agreed valuation.⁴² Thus, where a shipper of pedigreed horses paid a reduced rate, and accepted a bill of lading which provided that in consideration thereof the value of the horses in case of loss should be a certain sum printed in the bill, but there was no agreement, outside the bill, that the amount so stated should be treated as the value of the animals, the shipper was not limited to such amount in an action for injury to the animals caused by the carrier's negligence.⁴³

38. A contract limiting the liability of a carrier to \$675 in case of total loss of horses in unreasonable when the freight charges were \$675 reduced on adjustment to \$600. *Blair v. Wells Fargo & Co.* (Iowa), 135 N. W. 615.

Arbitrary valuation.—*Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55.

39. Where a horse was shipped by rail, and the bill of lading was signed by the carrier and the agent of the shipper, and provided, among other things, “value not to exceed \$100,” which was arbitrarily inserted in the bill of lading by the carrier, and through the carrier's negligence the horse was injured, held, in an action by the shipper for damages, that his recovery was not limited by the words “value not to exceed \$100.” *Kansas City, etc., R. Co. v. Simpson*, 2 Pac. 821, 30 Kan. 645, 46 Am. Rep. 104.

By a contract by a railroad company for the transportation for a car load of horses the shippers agreed to assume all risk of damage from any cause not resulting from the willful negligence of the agent of the railway company; and it was further agreed that, in case of total loss, the damage should in no case exceed the sum of \$100 per head, and, in case of partial loss, damage should be measured in the same proportion. A printed regulation of

the railroad company, attached to the contract, provided that it would not assume any liability over \$100 per head on horses and value live stock, except by special agreement. Held, that the regulation was of no effect, so far as regarded the negligence of the carrier, being plainly opposed to the law; that the contract was, in effect, an agreement for absolute exemption from liability except for willful negligence, and, in case such contract of exemption should not be sustained, then the liability of the defendant should be limited to the sum named; and that such contract was not valid, as exempting the company, in whole or in part, from liability for its own negligence. *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

40. Necessity.—*Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

41. Regulation of railroad commission.—*Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383.

42. Absence of agreement outside bill of lading.—*Louisville, etc., R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 6 R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22, 71 S. W. 437.

43. *Louisville, etc., R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437, 6 R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22.

§ 1981. Authority of Person Shipping to Bind Owner.—If the owner of live stock entrusts them to another for the purpose of having them delivered to a carrier for transportation, the person to whom they are so entrusted will be presumed to have authority to agree with the carrier upon the terms of the shipment, and this authority would include the right to enter into a reasonable agreement on behalf of the owner fixing the value of the animals;⁴⁴ but this rule has no application where the animals were not entrusted to the person who shipped them, for the purpose of having them delivered to a carrier for transportation, as where under the terms of a contract of hiring of horses, they were to be returned to the owner at the expense of the hirer, and the latter shipped them by rail to the owner.⁴⁵

§ 1982. Choice of Full and Limited Liability Contracts.—The stipulation in a contract of carriage of horses limiting the value of each to \$20, such valuation to be the basis of recovery in case of injury, is one as to which there was no meeting of minds, the shipper not having assented thereto, but objected to its insertion by the carrier's agent, and signed the contract only after stating that he would sooner pay a higher rate and have the horses put at their proper value, and after the agent had stated not only that such valuation was only a matter of form, but that he had no other contract which he could give.⁴⁶

§ 1983. Fraud or Duress.—Shipper Obligated to Sign to Obtain Reduced Rate—Remarks of Carrier's Clerk.—The fact that a shipper of live stock is compelled to sign a contract purporting to limit the carrier's common-law liability in order to obtain a reduced rate does not establish duress, and a remark of the shipping clerk at the time when the shipment was tendered, that the valuation was merely a form, did not constitute fraud in procuring the contract.⁴⁷

44. Authority of persons shipping to bind owner.—*Schlusser v. Great Northern R. Co.*, 20 N. Dak. 406, 127 N. W. 502.

Agent employed by owner to attend to care, and transportation of cattle.—Cows belonging to A. were delivered to a common carrier by an agent of A., who was employed to attend to the care and transportation of the cattle, and who signed an agreement for their carriage by railroad, in which the value of each animal was estimated at a certain sum, and which provided that the owner of the stock should assume the risk of all loss or damage from any cause except from collision of trains, in which case the carrier should not be held liable for a greater sum than that specified in the agreement; that the freight rates were based upon and intended for cows only of the value specified, and that an additional rate would be charged for cows of greater value. One of the cows was killed by the negligence of the carrier, and not by a collision of trains. It was held that there could be a recovery only of the value of the cow as specified in the agreement, and that A. was bound by the agreement made by his agent. *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836.

45. Plaintiff hired horses to a logging company under a contract obligating the company to return the horses at the end of the term to plaintiff free of charge. An

employee of the company shipped the horses by rail, executing a live stock shipping contract in plaintiff's name, without authority. The rate charged was based on a valuation of \$75 a head, and some of the horses were killed by the carrier. Held, that plaintiff was not a party to the contract between the company and the carrier, and could recover the full value of the horses killed. *Schlusser v. Great Northern R. Co.*, 20 N. Dak. 406, 127 N. W. 502.

46. Choice of full and limited liability contracts.—*Bingham v. San Pedro, etc., R. Co.*, 39 Utah 400, 117 Pac. 606.

47. Duress—Shipper obliged to sign to obtain reduced rate—Fraud—Remarks of carrier's clerk.—A shipper applied to the general freight agent of a railroad for the same reduced rate on live stock which he had previously received, and was granted it, on the same conditions as before, one of which was that he executed the written contract usual in such cases. When the shipment was ready, the shipper was tendered, by a clerk, a written contract for his signature, in which the valuation of the stock was limited to a much smaller amount than its true value. The shipper objected that the value was not right, but was told by the clerk that it was merely a form, whereupon the shipper executed the contract. There was no evidence that the clerk had any authority to vary the

Fraud of Shipper as Estoppel to Deny Valuation.—Under the Code of Iowa, § 2074, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the animals shipped.⁴⁸

§ 1984. Fairness and Good Faith.—A contract for the shipment of live stock stating the value of each animal must be freely and fairly entered into.⁴⁹ Where a shipper of live stock and carrier fairly agree on a valuation of property to ship with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract should be upheld as simply fixing the freight rate and liquidating the damages, which is a proper mode of securing a true proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting itself against extravagant and fanciful valuation.⁵⁰

Good Faith.—Stipulation in a live stock shipment contract, limiting the carrier's liability for negligence to an inadequate valuation, without good faith intent to arrive at the actual value, is unenforceable, though the classification and rate made in the bill of lading has been approved by the Interstate Commerce Commission.⁵¹

§ 1985. Permission of Railroad Commissions.—A stipulation, in a contract for the shipment of live stock, limiting the amount for which the railroad company shall be liable in case of loss or injury, made without the permission or order of the board of railroad commissioners, is invalid, under Kansas Gen. St. 1897, c. 69, § 17, which prohibits railroad companies from changing or limiting their common-law liability, except by regulation or order of the board of railroad commissioners.⁵²

§ 1986. Partial Invalidity.—The stipulation in a contract of carriage of horses that, in case of injury thereto, their value at place of shipment, instead of destination, shall govern, can not be enforced; it being impossible to segregate it from the invalid stipulation limiting their value to a stipulated sum each.⁵³

§ 1987. Estoppel by Receiving Benefit of Reduced Rate.—Regulations of the railroad commission governing intrastate shipments, and providing a classification of freight with a maximum valuation of live stock shipments at a designated rate, and stipulating that the reduced rates will apply only on the property shipped subject to the conditions of the carrier's bill of lading, and that, where the classification provides for reduced rates based on a fixed valuation, a special release containing the valuation must be signed by the shipper, etc., make his assent a prerequisite to the limited value clause, and under, a statute providing that no public notice shall limit a carrier's common-law liability, the shipper is not estopped from recovering the real value of a shipment on the ground that he received the benefit of reduced rates based on a particular val-

contract, and the contract expressly stated that he had none. Held, in an action for injuries to the live stock from the carrier's negligence, that an instruction that the shipper was bound by the limitation of liability in the contract was proper, since the fact that the shipper was obliged to sign the contract in order to obtain the remarks of the clerk at the time of the execution did not constitute fraud in procuring the contract. *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249.

48. *Lucas v. Burlington, etc., R. Co.*, 112 Iowa 594, 84 N. W. 673.

49. *Fairness and good faith.*—*Pierson v.*

Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509.

50. *Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

51. *Good faith.*—*Harden v. Chesapeake, etc., R. Co.*, 157 N. C., 238, 72 S. E. 1042.

52. *Permission of railroad commission.*—*St. Louis, etc., R. Co. v. Sherlock*, 59 Kan. 23, 51 Pac. 899; *St. Louis, etc., R. Co. v. Tribbey*, 6 Kan. App. 467, 50 Pac. 458.

53. *Partial invalidity.*—*Bingham v. San Pedro, etc., R. Co.*, 39 Utah 400, 117 Pac. 606.

uation, unless he had notice of the facts and assented thereto.⁵⁴

§§ 1988-1991. Construction, Operation and Effect—§ 1988. Construction of Terms.—"Horse" Does Not Include "Jack."—In a shipping contract, the word "horse," in a clause limiting the measure of recovery for "each horse, mule," etc., does not include a "jack."⁵⁵

§§ 1989-1990. As Measure of Rights and Obligations of Parties—§ 1989. In General.—A valid contract for the shipment of live stock, stating the value of each of the animals shipped, measures the rights and obligations of the parties to the contract.⁵⁶

§ 1990. As Determining Amount of Recovery.—A contract of shipment of live stock, which recites that the animals are valued at a stated sum per head, which valuation is named for the purpose of securing a reduced rate of freight, and which binds the shipper to such valuation in case of loss, fixes the amount of recovery in case of total loss, and estops the shipper from demanding a greater sum⁵⁷ and the carrier from reducing it.⁵⁸

Valuation Per Head.—Where a contract for the transportation of live stock by a common carrier fixes a valuation on the animals per head, the measure of the liability of the carrier for damages resulting from a breach of its duties

54. Estoppel by receiving benefit of reduced rate.—*Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383, Civ. Code 1902, § 1709.

55. "Horse" does not include "jack."—*Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

The shipper's printed contract with defendant railroad company, which had undertaken to transport his jack from one town to another, provided that the railroad would not be liable in case of loss or injury in excess of \$100 for each "horse or mule," but said nothing about its liability in case the animal was a "jack," although the contract stated that the animal shipped was a "jack." It was held that the word "horse" used in the contract could not be taken in a generic sense and made to include the jack, and therefore the limited value clause of the contract did not apply, so as to prevent the recovery of the actual damage, which the jury found to be \$1,000. *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

56. As measure of rights and obligation of parties.—*Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509.

57. As determining amount of recovery.—*Indian Territory.*—*St. Louis, etc., R. Co. v. Sharrock*, 6 Ind. T. 458, 98 S. W. 158.

Massachusetts.—The plaintiff, by his agent, shipped a cow over defendant's railroad; and in a shipping agreement, signed by his agent and by the agent of the defendant, it was expressed that the cow was of a certain value, and that the defendant company assumed no liability for injuries to the animal, except from collision of trains, in which case the company was not to be liable for a greater sum than that specified in the agreement. Animals of greater value than that speci-

fied were charged at higher rate. The animal, while in transit, was injured by a fire which caught from sparks from a locomotive, and died in consequence. Held, that the liability of the defendant was limited to the valuation expressed in the agreement, and that the plaintiff was bound by the agreement as made in his behalf by his agent. *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 10 N. E. 836, 28 Am. & Eng. R. Cas. 87.

New York.—A contract for the transportation of a horse by a railroad company recited that the company transported live stock at certain prices, "carrier's risks," and at reduced prices on certain risks being assumed by the shipper, and then provided that, in consideration of the company transporting one horse, valued at not exceeding one hundred dollars, it was agreed that, in the event of loss "from causes which would make the carrier liable," its liability should not exceed such valuation. Held, that the recovery of the shipper for the killing of the horse, through the company's negligence, from liability for which the contract did not give exemption, was limited to the amount named in the contract. *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642, affirming 62 Hun 619, 16 N. Y. S. 631, 42 N. Y. St. Rep. 63.

South Carolina.—Where a bill of lading for the transportation of mules stipulated that their agreed value was one hundred dollars each, and that the carrier's liability should not exceed that sum per head in case of loss or injury, the shipper was estopped to claim for any mule a greater value than one hundred dollars. *Winslow Bros. & Co. v. Atlantic, etc., R. Co.*, 60 S. E. 709, 79 S. C. 344.

58. St. Louis, etc., R. Co. v. Sharrock, 6 Ind. T. 458, 98 S. W. 158.

causing injury to them is the amount of the actual damage not exceeding the stipulated valuation per head.⁵⁹

Where Injured Stock Nets Shipper an Excess over Valuation.—Where the valuation in a contract for the shipment of live stock is made the basis of the transportation charges, and the contract provides that in the event of injury to the shipment the carrier shall be liable only to the extent of actual damage, which shall in no event exceed the valuation declared by the shipper, damages are recoverable for negligent injury to the stock during transportation, though, on arrival at its destination, the shipment sold so as to net the shipper an excess over the valuation made.⁶⁰

Damages Limited to Market Value at Point of Destination.—In case of shipment of an animal over a railroad, under a contract providing that, in case of loss, its market value at the point of destination shall be taken as liquidated damages for such loss, it is error, in an action for its death through the railroad company's negligence, to allow as damages a greater amount than the price for which the shipper has sold it to the consignee.⁶¹

Partial Injuries.—Where a common carrier of live stock in consideration of reduced rates, lawfully stipulates for an exemption from liability beyond a specified sum, if a partial injury results to an animal, damages abate pro rata.⁶²

§ 1991. Losses Covered.—Loss by Negligence.—See ante, "Loss by Negligence of Carrier," § 1973.

Failure to Deliver at Agreed Time.—A loss in consequence of a carrier's failure to deliver animals at an agreed time is not with the operation of a clause limiting their value to a stipulated sum.⁶³

Misdelivery.—A provision in a contract for shipment of animals that, should damage occur for which the carrier might be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed a stipulated sum for each animal, has no application to a claim for damages for misdelivery, and does not prevent the shipper from recovering damages, consisting of a fall in the market price at the place of des-

59. **Valuation per head.**—Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642.

A clause in a live stock contract under which four horses were shipped and which was as follows: "And it is further agreed that should damages occur for which the railroad company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, two hundred dollars; for a horse or mule, one hundred dollars, * * * which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth." S. sued for injury to one of the horses and recovered five hundred and fifty dollars; fixes the value of each animal separately, and is, in form, a valid contract. Louisville, etc., R. Co. v. Sowell, 90 Tenn. (6 Pickle) 17, 15 S. W. 837.

60. **Where injured stock nets shipper an excess over valuation.**—United States Exp. Co. v. Joyce, 36 Ind. App. 1, 69 N. E. 1015, reversed in 72 N. E. 865, and affirmed in 76 N. E. 1117, where opinion in 72 N. E. 865 was ordered stricken from the bills.

61. **Value at destination.**—Gulf, etc., R. Co. v. Key, 4 Texas App. Civ. Cas., § 257, 16 S. W. 106.

62. **Partial injuries.**—St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236.

63. **Breach of contract as to time of delivery.**—Though the contract for carriage of horses provides that, in case of damage thereto for which the carrier is liable, recovery shall not exceed one hundred dollars for any one horse, which amount it is agreed to be the value thereof, unless a different valuation is given in the contract, which is not done, and that for every increase of one hundred per cent or fraction thereof in valuation there shall be an increase of twenty per cent in freight, yet the horses being shipped under a special contract to deliver at a certain time, and the fact that they are race horses being transported to a fair and of much greater value than ordinary animals being known to the carrier's agent making the contract, it is liable for the full value of five hundred dollars of one of the animals which dies from a cold contracted through their not being delivered at the agreed time. Virginia, etc., Training Ass'n v. Southern R. Co., 67 S. E. 748, 152 N. C. 345.

termination.⁶⁴

Loss Occasioned by Owner's Inattention.—When a contract for transportation of an animal requires the owner to care for it and limits the loss in case of accident to a stipulated sum, the carrier is not liable for losses caused by the owner's inattention to the duties undertaken by him.⁶⁵

Injuries Unconnected with Contract of Carriage.—The fact that the owner of animals had agreed in a contract of affreightment to claim only a stipulated amount for any injuries that might result to property from any failure of the carrier to discharge the duties imposed upon it by that contract, can exert no influence whatever in determining the amount of the damages to which the owner is entitled for any injury to such animal, in no wise connect it with or growing out of the contract, for which he seeks to recover in an action, not upon, or for violation of the terms of the contract, but for an entirely independent injury; as, for instance, where a horse has escaped uninjured from the car in which it was being transported under a limited liability contract, and, after wandering some distance, strayed upon the track and was killed by the carrier's train.⁶⁶

§ 1992. Modification and Rescission.—Where a contract for shipment of horses limited the value of the horses to \$75 each, in consideration for choice of alternative rates, and the carrier agreed to certain conditions, including carriage of necessary attendants to accompany the animals, but had the car load of horses transferred to a train on which the attendant could not accompany them, the shipper was entitled to rescind the contract and recover damages independently thereon.⁶⁷

§§ 1993-1997. Enforcement—§ 1993. Pleading.—Contract Must Be Specially Pledged.—In an action for injuries to live stock in transit where the petition avers facts giving plaintiff a right of action for the injuries, the carrier can not show a special contract limiting its liability to their value at the time and place of shipment without specially pleading it.⁶⁸

Averment That Stock of No Value Where Complaint Declares on Common-Law Liability.—Where a complaint declares on the common-law liability of a carrier for injuries to live stock shipped, a clause in an answer stating that the liability was limited by special contract to an amount less than that claimed in the complaint is insufficient without an allegation that the stock were of no value.⁶⁹

64. Misdelivery.—*Southern R. Co. v. Webb*, 143 Ala. 304, 39 So. 262, 111 Am. St. Rep. 45.

65. A common carrier and the owner of live stock made a special contract, wherein it was agreed that, in consideration of reduced rates and free pass to the owner, the latter should attend the stock and care for it, at his own expense, in case of accidents, and that the value at the time and place of shipment, not to exceed \$50 per head for ordinary beef cattle, should be the measure of recovery for any loss for which the carrier might be liable. Held, that the contract was reasonable and valid; and that the carrier, if not wanting in the diligence required of him, was not liable for losses occasioned by the owner's inattention to the duties undertaken by him. *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

66. Injuries after escape of animals from cars.—Plaintiff shipped a stallion in a freight car of defendant, and to insure

ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and, after wandering some distance, strayed upon the track at another point, and was killed by defendant's train. Held, that the measure of damages is the value of the horse, and is not limited by the terms of the shipping contract, which stipulated that, for any injuries resulting from a failure of the company to perform its conditions, "the amount claimed should not exceed for a stallion or jack, \$200." *Louisville, etc., R. Co. v. Kelsey*, 89 Ala. 287, 7 So. 648.

67. Modification and rescission.—*McKahan v. American Exp. Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A., N. S., 1046.

68. Contract must be specially pleaded.—*Missouri Pac. R. Co. v. Edwards*, 75 Tex. 334, 12 S. W. 853.

69. Averment that stock of no value where complaint declares on common-law liability.—*Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

§ 1994. Burden of Proof.—In General.—The burden of proof is on the shipper, suing for injuries to live stock, to show that a valuation placed on the property in the contract of shipment, on which the rates of transportation were based, was invalid and not binding on him.⁷⁰

Knowledge and Assent of Shipper.—Where a carrier of live stock seeks to avoid liability for delay in transporting and delivering cattle under a claim that plaintiff shipped the stock under a contract by which a lower rate was charged, in consideration of which defendant was exonerated from damages for negligent delay beyond the actual expense incurred, defendant had the burden of proof to show that plaintiff knew at the time of the shipment the rates charged and the conditions under which the rate was made, and that he agreed to ship at said rate.⁷¹

Negligence.—The burden of showing that the loss of an animal shipped under a contract of carriage limiting the liability of the carrier resulted from the negligence of the carrier, is upon the shipper in most jurisdictions,⁷² but in Tennessee and some other states it is upon the carrier.⁷³

§ 1995. Admissibility and Competency of Evidence.—In an action against a carrier for damages for loss or injury to live stock, where there is a valid stipulation limiting the value of the live stock to a specified sum, it is not competent for the plaintiff to prove damages in excess of the amount set out in the shipping contract.⁷⁴

Market Value of Animals.—Where a contract for the transportation of animals limited their value to a stipulated sum each, the shipper, in an action for injury thereto, is not thereby precluded from showing that the actual value of the animals injured exceeded that sum, not for the purpose of allowing a greater recovery per head, but to enable the jury to estimate the damage done to each animal within the limit specified.⁷⁵ The market value of animals lost in shipment is admissible in evidence notwithstanding a contract limiting liability for their loss to a stipulated sum each, where the validity of the contract, as to consideration and otherwise, was in issue, and the court charged that, if it was valid, the recovery should be limited to such stipulated sum each.⁷⁶ Where a contract for the shipment of stock provided that the shipper could not

70. Burden of proof.—United States Exp. Co. v. Joyce, 69 N. E. 1015, 36 Ind. App. 1, reversed in 72 N. E. 865, and affirmed in 76 N. E. 1117.

71. Knowledge and assent of shipper.—Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033.

72. Burden of proof.—See ante, "Limitation of Liability," chapter 14.

73. The shipper of a fine mare, worth \$800, accepted of the carrier a bill of lading containing a statement that its liability for loss of a "horse or mule" should not, in any case, exceed \$100. There was no agreed valuation of the mare adopted as basis for freight charges. The mare was in good condition when delivered to carrier, but died before reaching destination. It was held, that stipulation limiting carrier's liability to \$100 is invalid as to a loss caused by its negligence; and that burden of proof was upon the carrier to show that the mare died from other cause than its negligence. Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 333, 14 S. W. 311.

74. Admissibility and competency of evidence.—Plaintiff shipped five horses in one car on the defendant's railroad,

and signed the bill of lading accepting the terms and conditions thereof and admitted that they were just and reasonable. The bill of lading provided that in case horses were killed, the liability of the company for damages to each should not exceed \$200, except where shipped in a chartered car, when the liability should be limited to \$1200 on the car load. One of the plaintiff's horses was killed and others injured. On trial, plaintiff offered to show that the horses were race horses and that his damages was about \$25,000. The court sustained an objection to the testimony on the ground that it was not competent for the plaintiff to prove damage or loss in excess of that set out in the bill of lading, and there was a judgment in his favor for \$1,200. It was held that there was no error in excluding the evidence, and the judgment was affirmed. Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151.

75. Market value of animals.—Winslow Bros. & Co. v. Atlantic, etc., R. Co., 79 S. C. 344, 60 S. E. 709.

76. Nashville, etc., R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 555.

recover exceeding a certain amount for each mule, evidence of the value of one injured was admissible to show that this value was at least equal to the amount specified in the contract.⁷⁷

§ 1996. Weight and Sufficiency.—Recital in Bill of Lading to Show Reduced Rate.—A recital in a bill of lading that the shipment was carried at a special rate, in consideration of a stipulation liquidating damages in case of injury, is insufficient alone to show a carriage at a reduced rate.⁷⁸

Undervaluation.—In an action for injuries to beef cattle by delay in transit, evidence that they were valued at \$50 a head at M., and sold at an average of \$52.03 at East St. Louis, was insufficient to show that the cattle were undervalued, by reason of which a lower freight rate was secured than plaintiff would otherwise have been compelled to pay.⁷⁹

§ 1997. Questions for Jury.—Whether Rate Regular or Special Rate.—Where, in an action for damages to live stock, the contract of affreightment recites that the rate is a reduced rate, in consideration of which the carrier was not to be liable for loss in excess of a stated valuation, and the evidence in connection with the contract shows that plaintiff was charged the regular schedule rate, and the only rate then in force on live stock of the kind shipped by plaintiff, it is proper to submit to the jury whether the rate named in the contract was a special or the regular rate.⁸⁰

Whether Valuation Made as Basis for Carrier's Compensation.—Whether the limitation of the liability of a carrier of live stock to a specified sum was honestly made as a basis for the carrier's compensation is one of fact for the jury.⁸¹

Actual Agreement as to Value or Arbitrary Preadjustment of Damages.—The question whether, under the evidence, there was an actual agreement as to the value of a horse shipped, or whether the bill of lading was merely an arbitrary preadjustment of damages in case the property shipped was lost or damaged, for the purpose of limiting the liability for its own negligence, was properly submitted to the jury.⁸²

77. *Georgia R., etc., Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

78. **Recital in bill of lading to show reduced rate.**—*Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co.*, 113 Mo. App. 144, 87 S. W. 553.

79. **Undervaluation.**—*Rice v. Wabash R. Co.*, 106 Mo. App. 370, 80 S. W. 974.

80. **Whether rate regular or special rate.**—*Bowring v. Wabash R. Co.*, 90 Mo. App. 324.

81. **Whether value made as basis for carrier's compensation.**—Plaintiff delivered to defendant a car load of horses. In the contract for shipment was a stipulation that the value of the horses did not exceed the sum of \$50 each; that such valuation was the basis on which the freight charges were fixed, and limiting the liability for injury to the horses to that amount. One of the horses was killed by the alleged negligence of defendant's servants, and plaintiff sued to recover the actual value, claimed to be \$125. Held, that the question whether the limitation as to the liability of the company as to the value of the horses was honestly made as a basis for defend-

ant's compensation was one of fact for the jury. *O'Malley v. Great Northern R. Co.*, 90 N. W. 974, 86 Minn. 380.

Evidence sufficient to go to jury.—The evidence showed that at about 10 o'clock at night plaintiff paid the freight charges, whereupon the agent gave to him the contract in question, which he signed without reading. There were no previous negotiations in reference to what the contract contained, no inquiry was made as to the value of the horses, and no representations made in respect thereto. Their value was inserted in the contract by the agent of his own motion. There was no evidence that the freight charges were in any way based upon this valuation, nor that the charges would have been any higher had the value been greater. Held sufficient to go to the jury on the question of whether the limitation as to value in the contract of shipment was fairly made. *O'Malley v. Great Northern R. Co.*, 90 N. W. 974, 86 Minn. 380.

82. **Actual agreement as to value or arbitrary preadjustment of damages.**—*Southern R. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649.

§ 1998. Damages.—Where a cattle transportation contract limited the damages recoverable to \$16 a head, and it appeared that twenty of the cattle died, and two hundred and seventy-six were seriously injured, and depreciated in value to the amount of \$872, as plaintiff testified, a verdict allowing plaintiff \$734, which the court reduced to \$600, was not excessive.⁸³

§§ 1999-2051. Stipulation for Notice of Loss—§§ 1999-2004. Power and Validity—§ 1999. In General.—In the absence of a statute prohibiting the same,⁸⁴ a railroad company may, for a lawful consideration, contract with the shipper that it shall not be liable for delay in shipments or for loss or injury to stock, unless notice thereof is given within a certain time.⁸⁵

§ 2000. Public Policy.—A stipulation in shipping contract, voluntarily and understandingly entered into by the shipper, that in consideration of a reduced rate no claim for damages accruing to the shipper shall be allowed or paid by the carrier, or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the carrier, at his office, within a reasonable time from the time such stock is removed from the cars, will be binding upon the shipper, and is not void as being contrary to any law or to public policy.⁸⁶

§§ 2001-2003. Effect of Constitutional and Statutory Provisions—§ 2001. Provision Prohibiting Stipulation.—Under the constitutions of Kentucky,⁸⁷ and Nebraska,⁸⁸ and under the statutory provision of the state of

83. Damages.—*St. Louis, etc., R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W. 1035.

84. Power and validity.—An agreement in a special contract between the shipper and the carrier, executed in the Indian Territory prior to the admission of the state, that, as a condition precedent to the shipper's right to damages for injuries to live stock from the carrier's negligence, the shipper shall, within a specified time after the injury, file with the carrier his claim therefor, is not against public policy; and, in the absence of statute prohibiting the same, is valid. *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 256, 109 Pac. 223.

85. Georgia.—*Southern R. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35.

Indiana.—The condition, in a contract for the carriage of live stock, that a verified claim for damages shall be filed with the carrier's agent within five days from the date of the removal of the stock from the cars, is a valid condition precedent to the shipper's right to sue for damages. Judgment 87 N. E. 555, reversed. *Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, 89 N. E. 951.

Kansas.—*Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Missouri, etc., R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347, 8 Pac. 465, 23 Am. & Eng. R. Cas. 684.

Kentucky.—*Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 9 S. W. 698, 10 Ky. L. Rep. 554.

Missouri.—*George v. Chicago, etc., R. Co.*, 214 Mo. 551, 113 S. W. 1099.

North Carolina.—*Selby v. Wilmington,*

etc., R. Co., 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635.

Pennsylvania.—*Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571, 41 Am. & Eng. R. Cas., N. S., 475, 18 R. R. R. 475.

Texas.—*Galveston, etc., R. Co. v. Harman*, 2 Texas App. Civ. Cas., § 136; *Gulf, etc., R. Co. v. Yates* (Tex. Civ. App.), 32 S. W. 355; *Texas, etc., R. Co. v. Jackson*, 3 Texas App. Civ. Cas., § 41; *Texas Cent. R. Co. v. Morris*, 1 Texas App. Civ. Cas., § 374, 16 Am. & Eng. R. Cas. 259; *Texas, etc., R. Co. v. Scrivener*, 2 Texas App. Civ. Cas., § 328.

86. Public policy.—*Black v. Wabash, etc., R. Co.*, 111 Ill. 351, 25 Am. & Eng. R. Cas. 388, 53 Am. Rep. 628; *Missouri, etc., R. Co. v. Hancock*, 26 Okla. 265, 109 Pac. 223.

A provision of a live stock bill of lading, requiring notice of injury to or delay in transportation of stock before removal or mingling with other stock, is not contrary to public policy. *Chicago, etc., R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110.

87. Void under Kentucky Constitution § 196.—*Brown v. Illinois Cent. R. Co.*, 100 Ky. 525, 38 S. W. 862, 18 Ky. L. Rep. 974; *Illinois Cent. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511; *Ohio, etc., R. Co. v. Tabor*, 98 Ky. 503, 36 S. W. 18.

88. Nebraska constitution.—*Union Pac. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598. See, also, *Missouri Pac. R. Co. v. Vandeverter*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; *Cook v. Chicago, etc., R. Co.*, 78 Neb. 64, 23 R. R. R. 606,

Oklahoma,⁸⁹ stipulations requiring notice of a loss or injury to a shipment of stock within a given time are void.

§§ 2002-2003. Under Texas Statute—§ 2002. In General.—A clause in a carrier's contract for the shipment of live stock which requires notice of claims for injuries to the stock to be delivered before the stock is removed⁹⁰ from the cars,⁹¹ from the station,⁹² or from their place of destination and before they were mingled with other stock,⁹³ "as a condition precedent to his right to recover," is violative of Act March 4, 1891.⁹⁴

Interstate Shipments.—A contract for the carriage of live stock from one point to another in the same state which is the end of the line of the receiving carrier, is not an interstate contract, though the freight is consigned and billed to a destination in another state, and the freight contract stipulates for protection of a through rate named therein.⁹⁵

§ 2003. Conflict of Laws.—A stipulation whereby the shipper of live stock was required, as a condition precedent to any recovery for loss or injury to the live stock, to give notice in writing of such injuries, before removal of the stock from the place of destination and before the mingling of the same with other stock, such notice to be served within one day after the delivery of the stock at destination, being valid under the law of Arkansas, was enforceable in Texas, the same not being a limitation clause.⁹⁶

§ 2004. Effect of Custom.—Custom can not require that a shipper agree to give notice of claim to officer of railroad before stock is removed from point of shipment or destination as condition precedent to right to damages for loss or injury to stock, since custom can not require agreement to limitation of right to damages.⁹⁷ Evidence of custom of a carrier in issuing contracts for the transportation of live stock is inadmissible to impose a limitation of the carrier's liability not provided for in the contract of shipment.⁹⁸

46 Am. & Eng. R. Cas., N. S., 606, 110 N. W. 718.

A condition in a contract for the shipment of live stock, that unless claims for damages are presented within ten days from the unloading of live stock at its destination, and before it has been mingled with other stock, the claim shall be deemed waived, is in violation of Const., art. 11, § 4, providing that the liability of carriers shall not be limited. *Cook v. Chicago, etc., R. Co.*, 78 Neb. 64, 110 N. W. 718, 23 R. R. R. 606, 46 Am. & Eng. R. Cas., N. S., 606.

89. Oklahoma statute invalidating contracts restricting the enforcement rights thereunder.—A contract between a carrier and a shipper of live stock provided that as a condition precedent to the shipper's right to recover for injury to his stock he should give written notice of his claim to some general officer or agent as soon after the loss or damage as circumstances would permit, and that if he failed to give notice within ninety-one days from such loss or damage no liability should exist thereunder, is not a violation of Comp. Laws 1909, § 1128, providing that every condition of a contract restricting another from enforcing his rights thereunder or limiting the time for so doing, is void. *Midland Valley R. Co. v. Ezell*, 29 Okla. 40, 116 Pac. 163.

90. Notice of injury to live stock before removal.—*Gulf, etc., R. Co. v. Yates* (Tex. Civ. App.), 32 S. W. 355.

91. *Missouri, etc., R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

92. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349; *Gulf, etc., R. Co. v. Yates* (Tex. Civ. App.), 32 S. W. 355; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

93. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

94. *Gulf, etc., R. Co. v. Yates* (Tex. Civ. App.), 32 S. W. 355.

95. Interstate shipments.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

96. Conflict of laws.—*St. Louis, etc., R. Co. v. Hambrick* (Tex. Civ. App.), 97 S. W. 1072. But see *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176; *Missouri Pac. R. Co. v. Harris*, 1 Texas App. Civ. Cas., § 1257.

97. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

98. *McMillan v. American Exp. Co.*, 123 Iowa 236, 98 N. W. 629, 10 R. R. R. 453, 33 Am. & Eng. R. Cas., N. S., 453.

§§ 2005-2012. Reasonableness—§ 2005. Necessity.—A provision in a contract between a shipper of cattle and a carrier, requiring notice of a claim for damages to be filed within a specified number of days will not be enforced unless that time is a reasonable one,⁹⁹ although it is a greater number than the minimum prescribed by statute.¹

§§ 2006-2008. What Constitutes—§ 2006. In General.—Showing of Hardship in Particular Case.—A stipulation in a contract for the shipment of live stock, made in consideration of a reduced rate, requiring written notice by the shipper to some officer of the company or to the nearest station agent of the initial or delivering carrier, before the stock are removed or mingled with other stock, of any claim for loss or damage en route, is reasonable and valid in absence of a showing that it works hardship in the particular case.²

Failure to Send Copy of Contract to Consignee.—A stipulation in a contract of affreightment of live stock, requiring the owner to give notice in writing of his claim for damages to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation and binding on the owner, and he can not recover on failure to give such notice, though he did not go in person, or send an agent, with the stock, as in such cases he should have sent a copy of his contract to the consignees, in order that the latter might have complied with the stipulation.³

§ 2007. Respecting Officer or Agent to Be Notified.—Whether an agreement between a railroad company, accepting cattle for shipment beyond its line, and the shipper, requiring the latter, as a condition precedent to his right to recover for any loss or injury, to give notice to some agent of the company before the removal of the cattle, is reasonable, depends on whether the company had an agent to whom notice could be given near the place of delivery.⁴ Where the carrier has no such officer or agent at the point of destination, the stipulation is unreasonable and void,⁵ except when the agent of the terminal carrier can be regarded as the agent of the initial carrier.⁶ No presumption can be

99. Necessity.—*St. Louis, etc., R. Co. v. Dunn*, 94 Ark. 407, 127 S. W. 464; *Southern, etc., R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 99 S. W. 566.

1. Ninety-one days.—*Southern, etc., R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 99 S. W. 566.

2. Showing of hardship in particular case.—*Atchison, etc., R. Co. v. Coffin*, 13 Ariz. 144, 108 Pac. 480.

3. Failure to send copy of contract to consignee.—*St. Louis, etc., R. Co. v. Phillips*, 17 Okla. 264, 22 R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

4. Respecting officer or agent to be notified.—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Good v. Galveston, etc., R. Co. (Tex.)*, 11 S. W. 854, 4 L. R. A. 801.

5. Stock shipped beyond terminus of initial railroad—Absence of agent or officer.—*Baxter v. Louisville, etc., R. Co.*, 165 Ill. 78, 45 N. E. 1003, 7 Am. & Eng. R. Cas., N. S., 618.

A provision, in a contract for the carriage of live stock, that the shipper, as a condition precedent to recovery of damages for injury to said stock, will give notice in writing of his claim to some officer of the carrier or its nearest station agent, before said stock is removed from

the place of delivery, and before it is mingled with other stock, is void, for unreasonableness, where the contract limits the company's liability to damages sustained on its own line, and the destination of the stock was on another line, several hundred miles beyond the terminus of defendant's line, and defendant had no station agent or officer at or near the place of destination. 64 Ill. App. 130, reversed. *Baxter v. Louisville, etc., R. Co.*, 45 N. E. 1003, 165 Ill. 78, 7 Am. & Eng. R. Cas., N. S., 618; *Carpenter v. Eastern R. Co.*, 67 Minn. 188, 69 N. W. 720; *Engeseth v. Great Northern R. Co.*, 65 Minn. 168, 68 N. W. 4.

6. Where a railroad company contracts to carry stock beyond its own terminus, a stipulation in the contract, which is made a condition precedent to the shipper's right to recover for loss or injury of the stock, that he shall give written notice of his claim to an officer of the company, or its nearest station agent, before the stock is removed from the place of destination, or is mingled with other stock, is not unreasonable, though the point of destination may be at a long distance from the terminus of the contracting company's road, since the officers and agents of the connecting company must be regarded as the agents of

indulged that the carrier had an officer near the place of destination.⁷

Certainty as to Agent to Be Notified.—A contract whereby a shipper of live stock agrees that, as a condition precedent to his right to recover of a common carrier for negligent injuries to his stock by the carrier, he will give written notice of his claim to some officer of the carrier, or its nearest station agent, before said stock is removed from its place of destination or of delivery to the shipper, and before it is mingled with other stock, is void for uncertainty as to the person to whom the notice should be given.⁸

Accessibility of Agent.—It seems that a clause in a shipping contract would be unreasonable which required a shipper to leave his cattle and cross the Mississippi river into an adjoining state to search for an officer or agent of the carrier on whom to give notice of damages to his stock in transitu.⁹

Giving Name of Agent at Destination, etc.—A contract between a common carrier and a shipper, for transportation of live stock to a point outside of the state, and which seeks to make the carrier's liability depend on notice to its officers or agent of a claim for damages, ought to specify who is its officer or agent to whom notice shall be given.¹⁰

Carrier Having but One Agent at Destination.—Where delivery of live stock is to be made at a place where a carrier has only one agent, who is easily to be found, stipulation in shipping contract requiring notice of loss to station agent at such place, may not be unreasonable.¹¹

Notice at Station En Route.—Where a railroad company billed stock through to a certain town, a provision of the contract of carriage requiring notice of injuries to be given to the carrier at a certain other town en route where the stock were not unloaded was unreasonable; the shipper having had no opportunity to determine the extent of injury until it was unloaded at destination.¹²

Notice to Agent at Point of Shipment.—It would look rather unreasonable, as prescribed in the contract, that demand should be made to an agent at point of shipment, before horses could be removed from the pens at destination.¹³

Particular Stipulation Held Reasonable.—A stipulation in a bill of lading that, as a condition precedent to the right to recover for loss or injury to live

the contracting company, and notice may be given them at the point of destination. *Wichita, etc., R. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013.

7. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

8. **Certainty as to agent to be notified.**—*Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

9. **Accessibility of agent.**—*St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 633, 20 S. W. 1008.

It was not error to find that contract requiring notice of a claim by a shipper of live stock to be given the carrier in writing within one day after delivery of stock at its destination was unreasonable and void, when it appeared that there was no officer or agent of the company at the point of destination, even if the company did have a general office at another station two miles across a river, in another state. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

10. **Giving name of agent at destination, etc.**—*Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 173, 2 S. W. 574.

A stipulation in a live-stock shipping contract, making it "a condition prece-

dent" to action for damages to give notice to claim within one day after delivery of stock at destination, and not naming the officer to whom to be given, is unreasonable. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

A provision in a contract for the shipment of live stock was unreasonable where it required, as a condition precedent to the recovery of damages for injury to the stock, that notice of the damages claimed should be given to an agent of the carrier before the stock could be removed from the pens at the destination, and the names of the agents at the place of shipment and destination did not appear in the contract. *Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142.

11. **Carrier having but one agent at destination.**—*Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

12. **Notice at station en route.**—*St. Louis, etc., R. Co. v. Dunn*, 94 Ark. 407, 127 S. W. 464.

13. **Notice to agent at point of shipment.**—*Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142, 143.

stock, written notice of the claim shall be given to¹⁴ some designated general officer of the company,¹⁵ or the general freight agent,¹⁶ station agent or master at destination,¹⁷ the agent actually delivering "the stock¹⁸ before," etc., is a reasonable regulation and valid.

§ 2008. Particular Stipulations Considered.—In most jurisdictions a stipulation in a contract for the shipment of live stock, requiring "that, as a condition precedent to any right to recover any damages for loss or injury to said live stock," written notice of a claim therefor shall be given "before the stock is removed from its destination,"¹⁹ and before commingling with other stock²⁰ is prima facie reasonable and binding but it is void in Tennessee and

14. Particular stipulations held reasonable.—*Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 137, 65 S. E. 757.

15. *St. Louis, etc., R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

16. *Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

17. *St. Louis, etc., R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

In absence of a plea of want of consideration therefor, a stipulation in a contract for cattle shipment releasing a carrier from all liability for delay and making it a condition precedent for recovery for injury to the cattle to give notice thereof to station master of last-named station, is valid. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 406, 21 S. W. 80.

18. *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 137, 65 S. E. 757; *Mobile, etc., R. Co. v. Brownsville Livery, etc., Co.*, 123 Tenn. 298, 130 S. W. 788.

19. Stipulations in a contract for the carriage of live stock, requiring written notice of a claim for damages before the stock is removed, and that a failure to comply shall bar any recovery, are valid. *Atchison, etc., R. Co. v. Baldwin*, 128 Pac. 449, 53 Colo. 416; *Wood v. Southern R. Co.*, 118 N. C. 1056, 24 S. E. 704.

A shipper of live stock agreed with the railroad company that, in consideration of the reduced rates granted, as a condition precedent to his right to recover any damage for loss or injury to the stock, he would give written notice of his claim to some officer of the company or its nearest station agent before such stock was removed from the place of destination, or from the place of delivery to him, and before it was mingled with other stock. Held, that such stipulation is not unreasonable or contrary to sound legal policy, and is valid. *Selby v. Wilmington, etc., R. Co.*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635.

A stipulation in a shipping contract that in consideration of a lower rate granted him the shipper will give notice in writing of his claim before the property is removed from the place of destination is reasonable and will be enforced. *Jones-Lane Co. v. Atlantic, etc., R. Co.*, 62 S. E. 701, 148 N. C. 580; *St. Louis, etc.,*

R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470, 22 R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201.

20. *Georgia.*—*Southern R. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35; *Louisville, etc., R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308; *Arnold v. Louisville, etc., R. Co.*, 4 Ga. App. 519, 61 S. E. 1050.

A stipulation in a contract for the shipment of live stock, requiring that as a condition precedent to any right to recover for injury, to the same written notice should be given before the live stock was removed or intermingled with other live stock, is reasonable and valid. *Southern R. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799.

Kansas.—*Kansas, etc., R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515, 6 Am. & Eng. R. Cas., N. S., 628.

A stipulation in a contract of shipment of horses that the shipper, as a condition precedent to his right to recover damages for injury to the horses, shall give notice of his claim before the horses are mingled with other stock, is reasonable. *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347, 8 Pac. 465, 23 Am. & Eng. R. Cas. 684.

North Carolina.—A stipulation in a bill of lading requiring written notice of claim for damages to live stock to be given to the carrier before the stock is commingled with other stock is a reasonable regulation to protect the carrier against unjust claims by giving opportunity for examination. *Kime v. Southern R. Co.*, 69 S. E. 264, 153 N. C. 398.

North Dakota.—*Hatch v. Minneapolis, etc., R. Co.*, 15 N. Dak. 491, 107 N. W. 1087.

The contract of carriage of live stock, providing that, in case of loss or injury to them, it shall be a condition precedent to recovery therefor that a notice in writing of the claim be given to the agent of the railroad delivering the stock, wherever such delivery may be, before the stock is removed or intermingled with other live stock, being clear and reasonable, is enforceable. *Mobile, etc., R. Co. v. Brownsville Livery, etc., Co.*, 123 Tenn. 298, 130 S. W. 788. But see *Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

Texas,²¹ because it is an attempt to protect the carrier from liability for losses caused by its own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover.²²

Notice before Unloading.—A stipulation in a shipping contract requiring the shipper to give notice of his claim for damages before he unloads his stock from the cars is void as unreasonable.²³ *Aliter* in Missouri.²⁴

"Within One Day after Delivery at Destination."—A contract of carriage providing that, as a condition precedent to a recovery of any damages for delay, loss, or injury to live stock covered by the contract, the shipper must give notice in writing of his claim therefor to the railroad within one day after the delivery of the stock at destination²⁵ and before it is removed²⁶ is reasonable and binding.

Notice within Five Days from Unloading or Removal.—A provision in a bill of lading covering a shipment of live stock, making notice of injury within five days from the time²⁷ of the unloading²⁸ or removal²⁹ of the live stock a condition precedent to recovery is reasonable and valid.

Notice within Ten Days from Unloading.—A stipulation in a contract for the transportation of live stock, exempting a carrier from liability, unless a written, verified notice of the loss or injury be mailed to a designated agent of the company within ten days from the time of unloading,³⁰ and before the stock has been mingled with other stock,³¹ is *prima facie* reasonable and binding.

21. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 173, 2 S. W. 574; *Gulf, etc., R. Co. v. Vaughn*, 4 Texas App. Civ. Cas., § 182, 16 S. W. 775. But in Texas Cent. R. Co. *v. Morris*, 1 Texas App. Civ. Cas., § 374, 16 Am. & Eng. R. Cas. 259.

22. *Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198, 6 S. W. 209.

23. **Notice before unloading.**—*Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 2 McCrary 48.

24. A carrier may stipulate that no claim for damage on live stock will be allowed unless made in writing before or at the time the stock is unloaded. *Rice v. Kansas Pac. Railway*, 63 Mo. 314.

25. **Within one day after delivery at destination.**—*St. Louis, etc., R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125; *Shelton v. St. Louis, etc., R. Co.*, 131 Mo. App. 560, 110 S. W. 627.

26. **And before the stock is removed.**—A contract which makes it a condition precedent to the recovery of damages to live stock that before the stock is removed, and within one day after its delivery at its destination, the shipper shall serve a written notice on the carrier that he intends to claim damages, is a reasonable one. *Kansas, etc., R. Co. v. Ayers*, 38 S. W. 515, 63 Ark. 331, 6 Am. & Eng. R. Cas., N. S. 628.

A provision in a contract of shipment requiring, as a condition precedent to recovery of damages to live stock, that the shipper gave notice in writing of his claim to some general officer or station agent at the nearest station, before the stock is removed, such notice to be served within one day after delivery of stock at destination, is a valid provision. *St. Louis, etc., R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

By the laws in force in the territory of Oklahoma, provision in live stock contract for notice of injury to the shipment before removal, the notice to be served within one day after delivery as a condition precedent to recovery of damages, was valid. *St. Louis, etc., R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461.

27. **Notice within five days from unloading or removal.**—*Kime v. Southern R. Co.*, 156 N. C. 451, 72 S. E. 485.

28. **Five days from removal from cars.**—A provision in a contract for the transportation of cattle that, in consideration of paying at a reduced rate, any claim for damages should be made in writing, sworn to, and delivered to the general freight agent at a certain place within five days from the time the cattle were unloaded, is reasonable and binding. *Wabash, etc., R. Co. v. Black*, 11 Ill. App. 465; *Black v. Wabash, etc., R. Co.*, 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; *Cleveland, etc., R. Co. v. Newlin*, 74 Ill. App. 638; *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514.

29. *Kime v. Southern R. Co.*, 156 N. C. 451, 72 S. E. 485.

30. **Notice within ten days from unloading.**—*Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

31. A stipulation in a special contract for the transportation of live stock that unless claims for loss, damage, or detention are presented within ten days from the date of unloading and before the stock has been mingled with other stock, such claims shall be deemed waived and the carrier will be discharged, is reasonable, and the failure of the shipper to comply therewith precludes any recovery. *Smith Meat Co. v. Oregon R., etc., Co.*, 59 Ore. 206, 117 Pac. 303.

Amount of Damage, etc., on Reshipment.—A condition to recovery in a contract for transportation of live stock that the shipper give notice of amount of damages, etc., on reshipment is not reasonable.³²

Statement of Full Amount of Claim.—Stipulation in contract for shipment of live stock, requiring the shipper to give written notice not only of his claim for damages but to state therein the full amount of such loss or damage, is unreasonable.³³

§§ 2009-2011. Pleading and Proof of Reasonableness—§ 2009. Presumption and Burden.—Where a contract for shipping cattle requires the shipper to give notice of any claim for damages within a certain time, the burden of showing that such stipulation is reasonable is upon the carrier.³⁴ Hence, a railroad company can not escape liability for loss of cattle by the shipper's failure to notify it of the loss according to a stipulation in the bill of lading, where it does not prove facts showing that the stipulation was reasonable.³⁵ This is the rule under the Texas Act of March 4, 1891, art. 3379, Rev. Stat. 1895.³⁶ Stipulations in a contract for the carriage of cattle making recovery by the shipper for delay or for injury to the cattle dependent upon his giving notice of such claim within a certain time after the delivery of the stock³⁷ before the shipment is delivered to any connecting line or taken from the station,³⁸ or before removing the cattle from the place of delivery,³⁹ must be shown to be

32. Amount of damage, etc., on reshipment.—*Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480, affirming 29 S. W. 806.

At the time the cattle were reshipped, the plaintiff, according to his own testimony, knew that his cattle had been crowded in pens and had suffered for the want of food and water, but did not know the extent of his damages. Under the circumstances, he could at most have made only a vague complaint, which would have subserved no useful purpose to either party. It was by no means certain that any serious loss would ensue, and, if the contract is to be construed as requiring notice in such a case, it must be held unreasonable. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480, affirming 29 S. W. 806.

33. Statement of full amount of claim.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593.

34. Presumption and burden.—*St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

A contract with a railway company for the shipment of cattle contained a stipulation that as a condition precedent to the shipper's right to any damages occasioned in the transportation, he should give notice in writing of his claim therefor to the station agent, or a general officer of the road carrying the cattle to their destination, within one day after they arrived there; and that a failure to give such notice should bar any recovery for such damage. Held, that on its face the stipulation was unreasonable and invalid, and that it devolved on the railway company to show that it was reasonable

in fact. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

35. Galveston, etc., R. Co. v. Boothe, 3 Texas App. Civ. Cas., § 364.

36. Houston, etc., R. Co. v. Davis, 88 Tex. 593, 594, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

37. St. Louis, etc., R. Co. v. Bryce, 49 Tex. Civ. App. 608, 110 S. W. 529.

38. Where the validity of a carrier's contract depends upon the reasonableness of a provision that in case of injury to stock the shipper must give notice of his claim therefor, in writing, to the agent, before it is delivered to any connecting line, or taken from the station, the carrier must, in order to avail itself of this provision as defense in an action by the shipper for damage so suffered, allege in its answer a state of facts showing that the shipper had failed to give the notice before defendant delivered to its connecting line, and that he had the opportunity to do so. *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510.

39. Before removal of cattle from destination.—*Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834.

In an action by a shipper of cattle against a carrier for damages resulting from defendant's negligence in transporting them, a provision in the contract of shipment requiring the shipper, in case of loss or injury, to give the carrier notice of his claim therefor before removing the cattle from the place of delivery, so that the claim may be investigated, will not be enforced against plaintiff, in the absence of pleading and proof, on the part of defendant, of facts showing that

reasonable both by pleading and proof on the part of the carrier,⁴⁰ and in the absence of such allegation and proof the stipulation will be regarded as invalid and unreasonable.⁴¹

Proof That Shipper Had Information Sufficient to Comply with Stipulation.—Where a live stock shipping contract is unreasonable in requiring almost immediate notice of claim for loss to unnamed officers of the carrier, the burden is on the carrier to show that shipper has information sufficient to comply within the time stipulated.⁴² The burden rests on the carrier to prove such facts, either by the terms of the contract itself, or by evidence aliunde showing that plaintiff in fact possessed the necessary information.⁴³

§ 2010. Admissibility of Evidence.—The usual rules as to admissibility and relevancy of evidence in civil cases governs the admissibility of evidence as to the reasonableness of stipulations by a carrier for notice of loss or injuries to live stock.⁴⁴

the provision is reasonable. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, citing *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75, and *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574.

^{40.} *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 110 S. W. 529.

^{41.} *Galveston, etc., R. Co. v. Boothe*, 3 Texas App. Civ. Cas., § 364.

^{42.} **Proof that shipper had information sufficient to comply with stipulation.**—*Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 624, 21 S. W. 78.

^{43.} *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930.

A plea, by a railroad company sued for damages to transported live stock, alleging that plaintiff had failed to comply with a stipulation requiring him to notify some agent of the company of the damage, is insufficient, where it states that it had an agent in Chicago to whom such notice should have been given, but does not state his name, or that plaintiff knew about him. *Gulf, etc., R. Co. v. Wilhelm*, 3 Texas App. Civ. Cas., § 458.

The allegations of the answer do not show such a state of facts, where it does not appear at what time the stock arrived, at the places of transfer to a connecting line, whether day or night, whether or not the agent to whom notice was to be given was convenient to the place of transfer, nor that the stock was stopped over in such place, before transfer to the connecting line, for a sufficient length of time to enable the shipper to comply with the terms of his contract. *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 24, 32 S. W. 163.

A railway company in a suit to recover damages against it for negligence in failing to deliver cattle within a reasonable time, set up a special contract in its answer by which it was agreed that as a condition precedent to the

plaintiff's right to recover damages for loss or injury to the cattle, the shipper should give notice in writing of his claim to the officers of the company or its nearest station agent before the cattle were removed from their place of destination, and before they were mingled with other stock. The line of railway did not extend to the point of destination, and both contracting parties understood that the carrier would transport the cattle from its own road over a connecting road. Held, that failure of the answer to show that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable, was fatal on demurrer. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

In answer to an action for damages to horses shipped over defendant's railroad, defendant pleaded a written contract requiring, as a condition precedent to plaintiff's recovery, notice, in writing, of his claim, to some officer of defendant, or its nearest station agent, before the stock was removed from its destination. Held, that the answer was defective in failing to allege the name of the agent to whom the notice was to be given, or whether or not he was accessible, or conveniently located at the point of destination. *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930.

Station agent.—*Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019, reversing 25 S. W. 311.

"General officers."—*Missouri Pac. R. Co. v. Childers* (Tex. Civ. App.), 29 S. W. 559.

^{44.} **Admissibility of evidence.**—In an action by a shipper against a carrier for injury to stock, testimony was admissible to show that the terminus of defendant's line of railway was at Cario, Illinois, and from there to East St. Louis, the point of destination, the cattle were carried by a connecting line, such evidence being proper as bearing upon the reasonableness of the written contract, requiring plaintiff to give notice of dam-

§ 2011. Weight of Evidence.—The usual rules as to the weight and sufficiency of evidence in civil cases apply to the proof of the reasonableness of a stipulation for notice of a claim against a carrier of live stock.⁴⁵

§ 2012. Question for Court or Jury.—Live Stock Shipments.—The question whether a stipulation in a shipment contract, requiring notice of injuries to the stock shipped to be given within a certain time, to render the carrier liable, is reasonable, is for the jury.⁴⁶

Question for Court.—Where, from the nature of the injury inflicted upon cattle in shipment, serious damage must have been apparent on their arrival, the question of the reasonableness of the provision for notice of such injury is a question for the court.⁴⁷

Reasonableness Not an Issue.—Where a provision of a contract for the carriage of live stock requiring notice of injuries to be given to the carrier at a point not the final destination is unreasonable and invalid so that there is no

age at the place of destination, there being other evidence showing that defendant had no agent at the point of destination to whom the notice called for in the contract could be given. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Parol proof of terminus of carrier road.—Plaintiff delivered his cattle to the company, and executed a contract reciting that, "as a condition precedent to his right" to damages for loss or injury to his stock in transit, he must give notice in writing of his claim therefor to some general officer of the company, or its nearest station agent, within one day after the delivery of the stock at the destination. Held, that verbal testimony that the terminus of the railroad company was at one point, and the destination was at another, was admissible as bearing on the reasonableness of the contract in requiring written notice of damage at the destination, and in connection with other evidence that there was no agent at the point of destination. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Evidence of custom.—It not being shown that there was an officer or agent at the point of shipment or destination, evidence of a custom requiring the shipper to agree, as a condition precedent to his right to damages for any loss or injury, that he will give notice of claim therefor, before the stock are removed from the point of shipment or destination, is properly excluded; the custom without such officer or agent being unreasonable. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

45. Weight of evidence.—In an action for damages for negligence and default of defendant, a common carrier, in transportation of cattle shipped by plaintiff, held, that the evidence did not conclusively establish the reasonableness of the contract requiring notice by plaintiff of damages within a certain time after arrival of the stock. *Missouri Pac. R. Co.*

v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78.

The mere fact that cattle shipper obtained return pass from carrier's station agent at Chicago, the point of destination does not prove that he could have notified such agent of damages to his stock within the twenty-four hours stipulated in the shipping contract. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 624, 21 S. W. 78.

46. Live-stock shipments.—Texas, etc., *R. Co. v. Barber* (Tex. Civ. App.), 30 S. W. 500; *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 78.

The reasonableness of a contract of shipment of stock which requires the shipper, as a condition precedent to a recovery of damages for any injury to his stock, to give notice of his claim therefor to some general officer of the carrier, or its nearest station agent, before the stock is removed from the place of destination or mingled with other stock, and within one day after its arrival, is for the jury when the contract is for an interstate shipment, as well as when it is for a domestic one. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

Name of agent to be notified not given.

—A shipper of cattle made a contract with a railroad company, which recited that, as a condition precedent to his right to recover damages for injury to cattle in transit, he should give notice of his claim therefor to some agent or officer of the company, or to its nearest station agent, within one day after delivery of the cattle at destination. Held that, where the cattle are to be delivered at a place where defendant alleges it had a station agent whom plaintiff knew and saw, whether the contract was unreasonable when it did not give the name of the agent or officer on whom notice is to be served was for the jury. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 78.

47. Question for court.—*St. Louis, etc., R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461.

issue on the question, the court should so declare as a matter of law, where a state statute makes the reasonableness of regulations for the transportation of live stock a jury question only where the same becomes an issue.⁴⁸

§§ 2013-2015. Form and Requisites—§ 2013. Certainty and Definiteness.—In a contract of affreightment, a provision that "claims for loss and damages must be presented in thirty days from date of shipment, in order to receive attention," is not so definite that a failure to present within thirty days will cut off a claimant's cause of action.⁴⁹

Certainty as to Agent to Be Notified.—See ante, "Respecting Officer or Agent to Be Notified," § 2007.

§ 2014. Name of Agent to Be Notified.—See ante, "Respecting Officer or Agent to Be Notified," § 2007.

Bill of Lading Blank as to Name and Location of Agent.—A provision of a bill of lading requiring the shipper to give notice to the freight agent of the carrier of any claim for damage to the stock, within a given number of days after its arrival at its destination, is waived where the bill of lading is blank as to the name and location of such agent, and the location of his office, and they are unknown to the shipper.⁵⁰

§ 2015. Consideration.—A contract signed by a shipper of stock whereby the company was not to be liable for loss or injuries, unless notice was given within a stipulated number of days after delivery, is not binding upon the shipper where there is no consideration for the agreement, though the contract recited that the rate charged was less than that charged for shipments at the carrier's risk.⁵¹ But the court of North Dakota has held that a stipulation in a contract for the shipment of stock, requiring the shipper to give notice to the carrier of injuries to the stock before its removal to the place of destination before it is mingled with other stock, is binding upon the shipper, although not based on any consideration except that for the contract generally.⁵²

Cause of Action Accrued Prior to Execution of Written Contract.—A stipulation in a contract for transportation of cattle requiring the shipper to give notice within a certain time of "loss or injury to his said stock," is not binding upon the shipper where the cause of action to recover it had accrued and was complete before the written contract for the transportation of the cattle was executed, there being no consideration for any provision in the writing affecting that cause of action.⁵³

§§ 2016-2031. Construction, Operation and Effect—§ 2016. Rules of Construction.—A stipulation between a shipper and carrier of live stock for notice of the claim for damages within a specified time is not to be construed strictly as against the shipper, but liberally in his favor.⁵⁴

§§ 2017-2018. Construction of Phrase "Removal from Place of Destination"—§ 2017. "Place of Destination."—The words "place of destination" as used in a stipulation in a shipment contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, re-

48. Reasonableness not an issue.—St. Louis, etc., R. Co. v. Dunn, 94 Ark. 407, 127 S. W. 464.

49. Certainty and definiteness.—Dunn v. Hannibal, etc., R. Co., 68 Mo. 268.

50. Bill of lading blank as to name and location of agent.—Norfolk, etc., R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

51. Consideration.—George v. Chicago, etc., R. Co., 214 Mo. 551, 113 S. W. 1099.

52. Hatch v. Minneapolis, etc., R. Co., 15 N. Dak. 491, 107 N. W. 1087.

53. Cause of action accrued prior to execution of written contract.—Pecos, etc., R. Co. v. Evans-Snyder-Buel Co., 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

54. Rules of construction.—Chicago, etc., R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228.

fer to the town, village, or city to which the shipment is made.⁵⁵

§ 2018. What Constitutes a Removal.—Where no place for delivery was named in the contract, a shipper of stock has the right in course of unloading the same to take it to some place for its care, which is within a reasonable distance of the car, before it can be said that there is a completed removal, within the provision of the contract, reciting that a condition precedent to recovery for damage for delay, loss, or injury, the shipper should give notice in writing of the claim therefor to the agent at destination, before such stock is removed from the point of shipment or from the place of destination, etc.⁵⁶ Where a shipment of household goods and live stock was made in one car, the carriage of the same was indivisible and was not completed until there was a delivery at the destination, so that the delivery of no part was completed until delivery of the entire shipment was made, provided the same was removed within a reasonable time.⁵⁷ A shipper of household goods and live stock is entitled to a reasonable time in which to remove the same.⁵⁸ Where a shipper was compelled to take his goods and stock one and one-half miles from the car for care and protection, a day and a half was not an unreasonable time for removal of the same.⁵⁹ The removal of stock to the shipper's farm, one and one-half miles from the car, was not an unreasonable distance.⁶⁰

Allowing Injured Animal to Run at Large on Commons.—Under a special contract of shipment, providing for no recovery for injuries unless upon notice by the shipper "before said stock is removed from the place of destination, and before such stock is mingled with other stock," the taking an injured animal from the cars at the place of destination, and allowing it to run on the commons there, the shipper refusing to receive it, was not such removal or mingling.⁶¹

§§ 2019-2031. Losses of Which Notice Must Be Given—§ 2019.

In General.—A stipulation in a contract of carriage that in case of loss the shipper will give notice in writing of his claim before the property has been removed from the place of destination will not avail the carrier, where the property was injured while in its custody and before delivery to the shipper.⁶²

§ 2020. Resulting from Negligence Generally.—A stipulation with a carrier of live stock, fairly entered into and reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not ineffectual in all cases where the loss or damage results from negligence.⁶³ Where

55. "Place of destination."—Hatch v. Minneapolis, etc., R. Co., 15 N. Dak. 491, 107 N. W. 1087.

56. What constitutes a removal.—Missouri, etc., R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702.

A contract for the shipment of mules required as a condition to recovery for loss that the shipper give notice to the conductor, or the nearest station or freight agent before the mules were mingled with other live stock, or removed from the pens at their destination. During the same afternoon on which the mules arrived at destination they were removed from the pens to the shipper's barn adjoining the right of way and nearer the depot than the stock pens, and on the next morning, while still in the barn and before they had been mingled with other stock, the shipper served upon the station agent notice of claim for damages. The agent, after the mules had been placed in the barn and before mingling with other stock, and both on the

day of their arrival and the day the notice was served, inspected them and made a memoranda of their injuries. Held, that the notice of loss substantially complied with the contract. Missouri, etc., R. Co. v. Davis, 24 Okla. 677, 104 Pac. 34, 24 L. R. A., N. S., 866.

57. Missouri, etc., R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702.

58. Missouri, etc., R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702.

59. Missouri, etc., R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702.

60. Missouri, etc., R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702.

61. Allowing injured animal to run at large on commons.—Chicago, etc., R. Co. v. Abels, 60 Miss. 1017.

62. Losses of which notice must be given.—Jones-Lane Co. v. Atlantic, etc., R. Co., 148 N. C. 580, 62 S. E. 701.

63. Loss resulting from negligence generally.—Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

a contract for the shipment of sheep limits the carrier's liability to loss from willful or gross negligence, a paragraph requiring the presentation of a claim within a given number of days as a condition of liability must be construed as referring only to claims for willful or gross negligence.⁶⁴

§ 2021. Delay in Furnishing Cars.—The provision in a bill of lading that, as a condition to collection of damages for any loss or injury to live stock "covered by this contract," the shipper shall give notice before removal of the stock, does not apply to damages occasioned by failure to furnish a car in time,⁶⁵ and in an action by a shipper of live stock to recover damages for delay in furnishing a car, a clause in a contract between the parties requiring plaintiff to give notice of his damage before removal of stock is inadmissible in evidence; the damage from the delay having accrued when the contract was executed.⁶⁶

§ 2022. Loss by Delay.—The provision in a contract with a carrier requiring the shipper, as a condition precedent to his right to recover damages for loss or injury to live stock, to give written notice of his claim before said stock is removed from the place of delivery, applies only where the claim is for physical injury done to the stock while in transit, and not to damages for mere delay,⁶⁷ which has arisen after the transportation has ended.⁶⁸ Aliter, as to shrinkage in weight of cattle due to confinement in cars an unnecessary length of time,⁶⁹ or delaying the delivery of the cars at the destination chutes for unloading.⁷⁰

Loss of or Depreciation in Market.—A stipulation in a live stock shipping contract, that a written notice of the shipper's claim for damages should be a condition precedent to recovery for any injury to the stock during transportation, does not apply to damages such as loss of market or depreciation in the market price of live stock occasioned by the carrier's negligent delay,⁷¹ but

64. *Houtz v. Union Pac. R. Co.*, 33 Utah 175, 93 Pac. 439, 17 L. R. A., N. S., 628.

65. *Delay in furnishing cars.*—*St. Louis, etc., R. Co. v. McNeil*, 79 Ark. 470, 96 S. W. 163. See *St. Louis, etc., R. Co. v. Puckett*, 82 Ark. 603, 101 S. W. 762.

A bill of lading on a shipment of live stock provided that, as a condition precedent "to any damages, or any loss or injury to live stock covered by this contract," the shipper should give a certain notice to the company. The cattle of a shipper were detained several days in a receiving pen of the railroad company—due to a delay in furnishing cars. The shipper failed to give the required notice to the company of damages caused thereby. Held, that the notice given was confined to "any damages covered by the bill of lading," and that the damages sued for were not covered by the bill of lading. *St. Louis, etc., R. Co. v. Law*, 57 S. W. 258, 68 Ark. 218.

66. *Missouri, etc., R. Co. v. Sneed*, 85 Ark. 293, 107 S. W. 1182.

67. *Loss by delay.*—*Louisville, etc., R. Co. v. Bell*, 13 Ky. L. Rep. 393; *Louisville, etc., R. Co. v. Smith*, 14 Ky. L. Rep. 814.

68. *Negligent delay.*—*Cornelius v. Atchison, etc., R. Co.*, 74 Kan. 599, 87 Pac. 751.

69. *Shrinkage in the weight of cattle* due to confinement in cars for an un-

necessary length of time for which the shipper seeks damages because of the negligent delay is within the stipulation of a shipping contract making a notice of loss to the railway company before the intermingling of the cattle with other stock a condition precedent to recovery for loss or injury to cattle. *Atchison, etc., R. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132.

70. *Hayes v. Missouri, etc., R. Co.*, 84 Kan. 1, 113 Pac. 421.

71. *Loss of or depreciation in market.*—*Arkansas.*—*St. Louis, etc., R. Co. v. Law*, 68 Ark. 218, 57 S. W. 258.

Colorado.—*Estes v. Denver, etc., R. Co.*, 49 Colo. 378, 113 Pac. 1005.

Kansas.—*Atchison, etc., R. Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Cornelius v. Atchison, etc., R. Co.*, 74 Kan. 599, 87 Pac. 751; *Hayes v. Missouri, etc., R. Co.*, 84 Kan. 1, 113 Pac. 421.

A contract for a shipment of live stock stipulated that as a condition precedent to a right to recover for any injury to the cattle from the carrier's negligence, "including delays," the shipper should give notice, in writing, before the cattle were removed from the pens at destination. Held, that the words "including delays" did not refer to a loss from a decline in the market caused by the negligent delay in transportation. *Missouri, etc., R. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754.

Under a written contract for the shipment of live stock, requiring notice as a

it is held in Pennsylvania, although a railroad company deviates from a contract to transport live stock by shipping it by freight service instead of by passenger service, as agreed upon, and the stock is injured by the delay and rougher service, such deviation does not relieve the shipper from giving the carrier notice of his claim for damages within five days, in accordance with a stipulation of the contract.⁷²

§ 2023. Death of Animals in Transit or before Removal.—A provision in a contract for the carriage of live stock that the shipper shall give written notice of any loss or damages "before the animals are removed from destination and before they are mingled with other animals," etc., is not applicable to a suit for the value of animals which died in transit,⁷³ or before their removal from the place of destination.⁷⁴

§ 2024. Statutory Penalty for Failure to Feed and Water.—A statutory penal action against a carrier for failure to feed and water live stock in transit is not affected by a stipulation of the shipping contract that notice of any damages to the stock must be given within forty days after the damage occurred.⁷⁵

§ 2025. Nondelivery.—A provision in a contract of affreightment that it should be a condition precedent to the right of the shipper to recover damage for loss or injury to the live stock that he gave notice in writing of his claim to the agent of the carrier actually delivering the stock to him, whether at destination or at any intermediate point where the same may be actually delivered, before the stock is removed from the place of destination and before the stock

condition precedent to the recovery of damages for any loss or injury from the carrier's negligence, including delay, loss of market and depreciation in price resulting from negligent delay in the delivery of the cattle may be recovered without such notice. *Hayes v. Missouri, etc., R. Co.*, 113 Pac. 421, 84 Kan. 1.

Missouri.—*Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293, 294.

Texas.—*Judgment, Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190, 97 S. W. 466; *Southern, etc., R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 99 S. W. 566.

72. *Pavitt v. Lehigh Valley Railroad*, 153 Pa. 302, 25 Atl. 1107.

73. *Arkansas.*—Cattle that are dead in the car when it reaches its destination are not within a contract making it a condition precedent for the recovery of damages for injuries to the shipment that the carrier should be served with written notice of the shippers' intention to claim damages, before the cattle were removed and mingled with others. *Kansas, etc., R. Co. v. Ayers*, 38 S. W. 515, 63 Ark. 331, 6 Am. & Eng. R. Cas., N. S., 628.

Georgia.—*Louisville, etc., R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308; *Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

Oklahoma.—Cattle which died in transit were not within the terms of a stipulation between the shipper and carrier for notice of claim for damages before the stock should be removed or mingled with oth-

ers. *Chicago, etc., R. Co. v. Spears*, 122 Pac. 228, 31 Okla. 469.

Hogs that died in the car, and were removed therefrom in transit by the carrier's employees are not within the requirement of the transportation contract making it a condition precedent to a recovery by the shipper for loss or injury that he give notice to the conductor or nearest station or freight agent before the car left the carrier's line, or the hogs had been mingled with others, or removed from pens at destination. *Patterson v. Missouri, etc., R. Co.*, 24 Okla. 747, 104 Pac. 31.

Kansas.—*Wichita, etc., R. Co. v. Koch*, 8 Kan. App. 642, 56 Pac. 538.

A contract for the transportation of live stock, making it a condition precedent to a recovery of damages for injury from the carrier's negligence that the shipper should give written notice of his claim before the live stock are mingled with other live stock or removed from the pens at destination, does not apply to animals that are dead when they arrive at their destination, killed through the carrier's negligence. *Missouri, etc., R. Co. v. Frogley*, 89 Pac. 903, 75 Kan. 440.

Hogs placed in stockyards at intermediate station—Deaths from exposure before reshipment.—*Wichita, etc., R. Co. v. Koch*, 8 Kan. App. 642, 56 Pac. 538.

74. *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509.

75. Statutory penalty for failure to feed and water.—*Gulf, etc., R. Co. v. Gray* (Tex. Civ. App.), 24 S. W. 837.

is intermingled with other stock, has no application to a claim for damages for misdelivery.⁷⁶

§ 2026. Stock Removed before Arrival at Destination.—Though the shipper of live stock has failed to comply with stipulations requiring notice of his claim for injuries to the stock before it is removed or mingled with other stock, he is not thereby prevented from recovery where the stock never reached the destination contemplated in the contract, but was removed at another point with the carrier's consent and where the carrier had actual knowledge of the injury from the beginning of the journey.⁷⁷

§ 2027. Shrinkage from Shunting or Bumping Cars.—A claim for shrinkage in the weight of cattle due to unnecessary causes by unnecessary shunting and bumping cars is within a stipulation requiring notice of loss to be given within a stipulated time.⁷⁸

§ 2028. Injuries Accruing after Unloading.—A shipper's contract, providing that no claim for damages which may accrue to the shipper "under the contract" shall be allowed, unless a claim for such loss or damage be made in writing, verified by affidavit, and delivered to the general freight agent within a specified number of days from the time the stock is removed from the cars, requires the shipper to give the notice, though the injury complained of was suffered by a horse after it had left the car, since the injury was one "under the contract."⁷⁹

§§ 2029-2030. Injuries Not Discoverable within Stipulated Time—
§ 2029. In General.—The requirement of a live stock transportation contract that notice of loss or injury be given within a day after delivery does not apply where the injury is not discoverable by reasonable care until after that time,⁸⁰ or where the nature and extent of the injury could not be ascertained with any degree of certainty within the limited time.⁸¹ Where a shipper of

76. Nondelivery.—Southern R. Co. *v.* Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. Rep. 45.

77. Stock removed before arrival at destination.—Central R., etc., Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750.

78. Where a written contract for the shipment of live stock contains a stipulation that, as a condition precedent to the shipper's right to recover for any loss or injury from the carrier's negligence, including delays, he must give notice in writing to the conductor in charge of the train or the nearest station or freight agent before the car leaves that carrier's line and before the cattle are mingled with other cattle or removed from pens at destination, where the cattle are removed from pens at destination without such notice, the shipper can not maintain an action for shrinkage occasioned by the carrier's negligence in unnecessarily shunting and bumping the cars, and in delaying the delivery of the cars at the destination chute for unloading. *Hayes v. Missouri, etc., R. Co.*, 113 Pac. 421, 84 Kan. 1.

79. Injuries accruing after unloading.—Letts *v.* Wabash R. Co., 131 Mo. App. 270, 111 S. W. 138.

80. Injuries not discoverable within stipulated time.—St. Louis, etc., R. Co. *v.* Copeland, 23 Okla. 837, 102 Pac. 104.

Where a carrier was negligent in failing to feed and water horses during transportation, whereby several of them were injured, and some of them subsequently died, the nature of the injury was such that the actual damage could not by any reasonable degree of diligence have been discovered and sworn to within ten days after they were unloaded; and hence a provision in the contract of shipment, requiring a claim for damages to be made within ten days, could not be said, as a matter of law, to be reasonable. Judgment, 122 Ill. App. 569, affirmed. *Wabash R. Co. v. Thomas*, 78 N. E. 777, 222 Ill. 337, 7 L. R. A., N. S., 1041; *St. Louis, etc., R. Co. v. Copeland*, 23 Okla. 837, 102 Pac. 104; *Chicago, etc., R. Co. v. Spears*, 31 Okla. 469, 122 Pac. 228.

81. Missouri.—*Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

Oklahoma.—*Chicago, etc., R. Co. v. Spears*, 31 Okla. 469, 122 Pac. 228.

Texas.—*Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

A stipulation in a contract for the carriage of live stock, that as a condition to a recovery for injury to the stock at any place where the same might be loaded or unloaded for any purpose notice in writing should be given to the station-master specifying the nature of the claim, etc., before the removal of the stock from the station, is unreasonable, when it ap-

live stock could not, by ordinary diligence, have discovered the injury thereto, and its extent, before the animals were removed, notice within a reasonable time is a substantial compliance with a stipulation requiring notice before the stock should be removed with others.⁸² Whether such subsequent notice is given in a reasonable time it is a question for the jury.⁸³

§ 2030. Right to Give Additional Notice.—That an owner to whom a bill of lading has been issued gives written notice of injury to certain animals before their removal does not preclude him from the right of giving additional notice of other injuries within a reasonable time after their discovery.⁸⁴ Where

appears that although before reloading the shipper knew that his cattle had been crowded in pens and had suffered for the want of food and water, yet he did not know the extent of his damages, and, at most, could have made only a vague complaint. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480.

Washington.—An agreement by a shipper of live stock that, as a condition precedent to a recovery for loss or injury to any of the stock, he will give notice in writing of his claim therefor to some agent of the company before the stock has been removed from the place of destination or mingled with other stock, is unreasonable and inapplicable to animals surviving, where the nature and extent of the injury could not be ascertained with any degree of certainty within the limited time. *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509.

Horses injured by burning of their car.—A provision in a shipping contract requiring notice of any claim for damages to be given before the removal of the freight from the station, is, when applied to injuries to horses caused by the burning of the car in which they were shipped, prima facie unreasonable, as it is not probable that the full amount of the damage to the horses would be immediately disclosed. *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

Extent of illness of horses not discoverable before removal.—A stipulation that for injuries to the animals shipped over the railroad the owner shall make a demand in writing of the agent of the carrier before removing them from the place of destination or from the place of delivery does not apply where the injury is the illness of the animals, and the extent of the illness can not be known until their removal from the cars, and probably not for some time after their removal. *Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 2 McCrary 48.

Survival of horse in doubt.—*Baltimore, etc., R. Co. v. Hubbard*, 72 O. St. 302, 16 R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71, 74 N. E. 214.

^{82.} *Chicago, etc., R. Co. v. Spears*, 31 Okla. 469, 122 Pac. 228.

Where a bill of lading for a shipment of cattle provides that the shipper, as a prerequisite to any right to recover for

injury to the cattle, shall, before removal of the cattle from the place of delivery, and before their mingling with other cattle, give written notice of any damages, the requirement is complied with where the shipper does not discover injuries, and could not have done so, before removal, but he gives notice thereof within a reasonably short time after discovery of the injury. *Louisville, etc., R. Co. v. Landers*, 33 So. 482, 135 Ala. 504, 6 R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

Injury to poultry from delay.—In an action to recover for breach of a contract for the delivery of a car load of poultry at, "team track," Chicago, it appeared that the car, when it arrived at 51st street, Chicago, was delayed at that point about nine hours, such delay causing the poultry to greatly shrink in weight before it could be got to market. The contract stipulated that notice should be given in writing of any claim for damages to some officer of the company or its nearest station agent, before the stock was removed from the place of delivery, and before it was mingled with other stock. The only testimony as to notice of loss was by the shipper, which was to the effect that he notified the carrier by letter, about two weeks after the loss, as soon as he had ascertained the amount thereof. It was held that the evidence as to notice was sufficient to withstand a demurrer, and that the notice, under the circumstances, was a sufficient compliance with the requirement of the contract. *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183, 33 N. E. 236.

^{83.} Where the contract stipulates that the shipper must notify the company's agent in writing of a claim for injury before removing the animals from the place of delivery, the shipper has a reasonable time after the removal, in case the injury is not then discovered by ordinary diligence, in which to give the notice; and where he removes the animals December 29th, and notifies the agent January 4th, it is a question for the jury whether the notice was given in a reasonable time. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. 781, affirming 91 Ala. 340, 8 So. 649.

^{84.} **Right to give additional notice.**—*Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482, 6 R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

after the expiration of the time within which notice of loss or injury to the animals must be given to the carrier, some of them died of injuries, a second notice of a claim for damages within a reasonable time is a substantial compliance with the contract.⁸⁵

§ 2031. Claims Accruing Prior to Contract.—No Defense to Breach of Verbal Contract to Furnish Car.—It is no defense to an action for breach of a verbal contract to furnish cars that the shipper failed to give written notice of his claims for damages within a named number of days, as provided by the bill of lading under which the stock was shipped subsequently to the breach of the oral agreement, and such defense is properly stricken from the answer.⁸⁶

§§ 2032-2035. Sufficiency of Notice—§ 2032. In General.—A substantial compliance with the provision of the contract is all that is required of the shipper,⁸⁷ especially where the carrier is given notice and opportunity to inspect on arrival at destination.⁸⁸

85. Condition of stock made known to station agent—Opportunity to inspect.—Consent to Removal.—Subsequent notice of claim.—*Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362.

A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover for any loss or injury, the shipper should give notice in writing to some officer of the company or its nearest station agent before the removal of such stock from the place of delivery. In an action to recover damages for injuries to the stock while en route, it appeared that the condition of the stock was made known to the station agent at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal, and before they had mingled with other stock, or been removed from the place of destination, and that a written notice for damages was transmitted to the claim agent of the company within four days after the removal of the stock from the car, and, ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company. Held, that there had been a substantial compliance with the contract upon the part of the shipper. *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362; *Atchison, etc., R. Co. v. Collins*, 47 Kan. 11, 27 Pac. 99.

86. No defense to breach of verbal contract to furnish car.—*Meriwether v. Quincy, etc., R. Co.*, 128 Mo. App. 647, 107 S. W. 434.

87. A contract of shipment of horses required written notice of injury within five days after the horses had been unloaded, but failed to designate the agent to whom notice should be given, and provided that, if consigned to any stockyards or other live stock market, then notice should be given before the stock

was removed from the yards to the live stock agent or the general freight agent, or to the freight agent nearest the yards or market place. Within five days after unloading the horses not shipped to any stockyards or other live stock market, the shipper wrote to an agent of the carrier, as general freight agent, informing him of injury to a horse, and directed the letter to the carrier's ticket and freight office. Shortly thereafter the shipper applied to the carrier's division freight agent at the station where shipper lived, and received from him directions as to his claim, and at his request handed to that agent the papers relative thereto. Thereafter the division freight agent was transferred, and, in reply to a letter from the shipper's attorney, stated that he would refer his letter to the then district freight agent, who shortly thereafter called on the shipper relative to the claim. Held, that there was a sufficient compliance with the contract as to the giving of notice. *Hancock v. Chicago, etc., R. Co.*, 111 S. W. 519, 131 Mo. App. 401; *St. Louis, etc., R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

88. Contracts for carriage of live stock provided that claims for loss or damage should be made in writing within ten days after unloading, and that failure to make such claim should operate as a waiver and release. A shipper filed a separate claim for damages for each shipment, the purport of which was a claim for loss and damage, and due to rough handling and improper facilities for loading and unloading at an intermediate point, and that the stock were badly bruised and depreciated in value. The carrier was also given notice and opportunity to inspect on arrival at destination. Held, that this substantially complied with provisions of the contract, especially in view of the notice and opportunity to inspect, and that the shipper was entitled to prove any damage which was the natural and probable result of such cause, without furnishing a bill of particulars

§ 2033. Time of Presentation.—The agent of a carrier of live stock can not put off a shipper, asking to make a claim, from one time to another and finally be heard to say that no claim was made in time.⁸⁹

Second Notice on Death of Animal.—See ante, "Injuries Not Discoverable within Stipulated Time," §§ 2029-2030.

Time of Giving Notice Where Stipulation Unreasonable.—Though it is a rule that, where a shipper's contract provides for notice of injury to stock in a stated time, no notice need be given where the shipper could not know the extent of his damages within that time, still the rule requires the giving of notice in a reasonable time.⁹⁰

§ 2034. Agent Notified.—**Notice to Claim Agent Instead of Freight Agent.**—Where a shipper's contract provided that notice of injury to stock shipped should be given the general freight agent at L., a notice directed to the general claim agent at L. was insufficient.⁹¹

Cashier in Charge of Business.—Filing claim for injuries to freight with the cashier at the office of defendant at the destination of the shipment, who was in charge of the business in the absence of the agent having general charge, was a sufficient compliance with the statute requiring the claim to be filed with the agent of the carrier at the point of destination.⁹²

Employee Having Charge of Unloading and Delivery.—Notice of injury to cattle in transit given to an employee of defendant's stockyards, who had charge of the unloading and delivery of cattle for railroads, is notice to the carrier.⁹³

Officers and Agents of Connecting Carrier Regarded as Those of Initial Carrier.—Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of such company, or its nearest station agent, before the stock is removed from the place of destination or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract be treated as the officers and agents of the latter company, and notice given to the agent of the connecting company at the place of destination will be sufficient.⁹⁴

§ 2035. Claims Covered by Notice.—**Death of Cattle Occurring after Removal.**—Where, under a bill of lading requiring written notice of injury before removal, the only notice given the carrier as to the death of cattle was

showing the items. *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A., N. S., 975.

89. Time of presentation.—A contract of shipment of live stock stipulated that a claim for damages, unless presented within ten days from the date of unloading at destination, should be waived. The shipper, on the day after unloading, informed the carrier's agent at that point that he wanted to put in a claim for damages. The agent told the shipper to see another agent on paying the freight. The shipper did so, and that agent told him to see another agent. The shipper within ten days made an oral claim to the latter agent, who requested a written statement, which was furnished after the expiration of the ten days. Held, that the claim for damages was made within the time specified. *Reynolds v. Great North-*

ern R. Co., 82 Pac. 161, 40 Wash. 163, 111 Am. St. Rep. 883, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

90. Time of giving notice where stipulation unreasonable.—*Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

91. Notice to claim agent instead of freight agent.—*Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

92. Cashier in charge of business.—*Walker v. Southern R. Co.*, 76 S. C. 308, 56 S. E. 952.

93. Employee having charge of unloading and delivery.—*Southerland v. Atlantic, etc., R. Co.*, 158 N. C. 327, 74 S. E. 102.

94. Officers and agents of connecting carrier regarded as those of initial carrier.—*Wichita, etc., R. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013.

for certain cattle that had died before removal, the shipper could not recover for cattle that died after removal.⁹⁵

Claims for Cost of Recovering Lost Cattle.—A shipper's claim for damages which recites that he had sustained a loss of a specified number of cattle shipped, that the cattle scattered at the place of unloading, and that some of the cattle were lost, for which he offered a reward, is sufficient to support a claim for the cost of recovering the lost cattle and the depreciation in their value.⁹⁶

§ 2036. Effect of Failure to Give Notice.—Failure of a shipper of live stock to comply with a provision in the contract that notice of claim for injury should be given before the live stock is removed deprives the shipper of any right to damages,⁹⁷ the giving of such notice is a condition precedent to recovery,⁹⁸ unless there was some good reason for failure to make the claim, and it is error to strike such defense from the answer.⁹⁹ Thus a shipper of stock under a contract which stipulates, as a condition precedent to his right to recover for loss or injury of the stock, that he shall give written notice of his claim to an officer or agent of the carrier at or before time of unloading,¹ or before the stock is removed from the place of destination or delivery, or is mingled with other stock,² can not recover for stock killed or injured in transitu, where he fails to give such notice of his claim.³

Where Neither Owner nor Agent Accompanies Stock.—An owner of live stock shipped under a stipulation requiring the owner to give notice of his claim for damages to the company before the stock is removed from its destination, can not recover on failure to give such notice, though he did not go in person or send an agent with the stock in order that the consignee might comply with the stipulation.⁴

Delay in Furnishing Cars and Transportation.—The failure of a shipper to give notice within the time stipulated in his contract of shipment of a claim against the railroad for damages for delay in furnishing cars, and in transporting the stock to destination after shipment, precludes recovery.⁵

§§ 2037-2042. Facts Relieving from Necessity for Notice—§ 2037. Carrier Having Notice and Opportunity to Investigate.—Where the agent

95. Death of cattle occurring after removal.—*Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S. 96, 33 So. 482.

96. Claims for cost of recovering lost cattle.—*Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S. 70.

97. Effect of failure to give notice.—*Southern R. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799.

98. Failure to comply with contractual stipulation.—*Southern R. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799.

Where a live stock bill of lading required that notice of loss from injury or detention be given before the stock is removed from destination and mingled with other stock, the giving of such notice is a condition precedent to recovery. *Chicago, etc., R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110.

99. Meriwether v. Quincy, etc., R. Co., 128 Mo. App. 647, 107 S. W. 434.

1. Notice at or before the time of unloading.—Where a railway company, being a common carrier of live stock, trans-

ports a car load of cattle for the plaintiff at special rates, under a special contract signed by both parties, by the terms of which the plaintiff is to accompany the stock and superintend it on the way, and where, by another clause in the contract, it is stipulated that damages to such stock in transit shall not be allowed unless notice in writing of a claim therefor be given to the company at or before the time of unloading the cattle, and it appears that plaintiff did accompany the stock, and knew at the time that it had been injured, but did not give notice of such injury for more than a year, he can not recover. *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.

2. Wichita, etc., R. Co. v. Koch, 47 Kan. 753, 28 Pac. 1013.

3. Wichita, etc., R. Co. v. Koch, 47 Kan. 753, 28 Pac. 1013.

4. Where neither owner nor agent accompanies stock.—*St. Louis, etc., R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201.

5. Delay in furnishing cars and transportation.—*St. Louis, etc., R. Co. v. Puckett*, 82 Ark. 603, 101 S. W. 762.

of a carrier of live stock had, at the time they were unloaded, notice of injuries received by them in transit, the shipper's failure to give the notice required by the bill of lading will not prevent recovery.⁶

Opportunity to Examine and Investigate Injury.—The object of a stipulation in a bill of lading requiring written notice by the shipper of injury to stock is not to relieve the carrier of liability, but to enable it by proper investigation to protect itself against unjust claims;⁷ and a railroad company can not claim to have been injured by lack of notice of injury to live stock where it had ample opportunity to make full investigation of their condition, and did so before they were commingled with the other stock.⁸

Agent Present When Injured Stock Unloaded.—Where the railroad company's agent was standing by when stock was unloaded in a damaged condition, failure of the shipper to comply with a provision in the bill of lading requiring a given number of days' notice of injuries was no defense.⁹

Animals Hauled to Point Distant from Destination.—A shipping contract requiring the owner to notify the carrier of damage within five days after it occurs will not be enforced, where the carrier hauled an injured animal to a point distant from destination, and the owner had no means of learning of the injury within five days.¹⁰

Injured Animal in Charge of Carrier's Employees.—Where after the injury complained of the injured animal was in charge of the carrier's employees, and the delay in giving notice was caused by their conduct, the shipper when he learned of the loss having promptly notified the carrier, it would be unreasonable to require such owner to have given the notice sooner than it did or to have denied him the right to recover because no notice was actually given within the time required by a stipulation in the shipping contract that the owner of the stock in case of injury or loss in shipment should notify the company within a given number of days within which said loss or damage had occurred.¹¹

Animals Removed and Killed by Carrier's Agents.—A provision of a

6. **Carrier having notice and opportunity to investigate.**—*Kime v. Southern R. Co.*, 156 N. C. 451, 72 S. E. 485.

7. The purpose of giving a written notice of a claim for damages to a shipment of live stock is that the railroad company may have a fair and reasonable opportunity of examination and inspection of the condition of the live stock transported under its management before it shall be placed beyond its reach or beyond the possibility of certain identification. *Wichita, etc., R. Co. v. Koch*, 8 Kan. App. 642, 56 Pac. 538, 539; *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362; *Kime v. Southern R. Co.*, 153 N. C. 398, 69 S. E. 264.

8. *North Carolina.*—*Kime v. Southern R. Co.*, 153 N. C. 398, 69 S. E. 264.

Kansas.—Where a car load of cattle which were being transported to market was in a railroad wreck, and suffered injury, and the representatives of the railway company in charge of the live stock business at the place of delivery were present and inspected the injured cattle when they arrived, and directed what disposition should be made of them, the purpose of the stipulated notice to be given by the shipper of any injury was fully accomplished, and no further notice was essential to a recovery. *Atchison,*

etc., R. Co. v. Wright, 78 Kan. 94, 95 Pac. 1132.

North Carolina.—Where notice of injury to stock could not be given to the company's agent at destination before unloading because of his absence, and the conductor had oral notice of their injured condition before unloading, and the stock were removed only two hundred yards from where they were examined by the agent and the company's stock inspector before being commingled with other stock, the company was not relieved of liability for such injuries because written notice thereof, verified by the shipper, was not given as required by the bill of lading. *Kime v. Southern R. Co.*, 69 S. E. 264, 153 N. C. 398.

Washington.—*Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A., N. S., 975.

9. **Agent present when injured stock unloaded.**—*Kime v. Southern R. Co.*, 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

10. **Animals hauled to point distant from destination.**—*Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

11. **Injured animal in charge of carrier's employees.**—*Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas., N. S., 170.

shipping contract requiring the shipper to give notice in writing of his claim, within five days after loss or damage is sustained, does not apply where the carrier's employees removed the injured animals to a distant point and killed them.¹²

Refusal of Owner to Receive Injured Animals.—A stipulation in a shipping contract requiring notice of an injury to live stock to be given before said stock is removed from the place of destination and before such stock is mingled with other stock is not applicable where the owner refused to receive the injured animals.¹³

Receipt for Cattle Signed under Protest Because of Damaged Condition.—Where a contract for shipment of cattle stipulates that, as a condition precedent to shipper's right to recover damages for their injury, he will give written notice of his claim to the carrier before removal from destination, the shipper's failure to give a formal written notice of his intention to demand compensation will not preclude recovery, where he signed a receipt for the cattle at destination under protest, because of their damaged condition.¹⁴

§§ 2038-2042. Waiver—§ 2038. Power to Waive.—The requirement of a contract of shipment of live stock that notice in writing of loss or damage be given by the shipper within a stipulated time after the arrival of the stock at its destination may be waived,¹⁵ by the carrier expressly,¹⁶ or impliedly by conduct,¹⁷ or rendered unreasonable or unenforceable in the particular case by the conduct of the carrier.¹⁸

§ 2039. Authority of Agent.—Where, after injury to a horse while being unloaded from a car, no notice of its injury is given as required by the shipper's contract, the fact that three months thereafter an employee of the carrier, who was not shown to have any authority to adjust the matter, wrote a letter to the shipper relative to an adjustment, was not a waiver of the required notice.¹⁹

Provision against Authority of Agent to Waive.—Where, in a special live-stock contract for the shipment of cattle, the shipper expressly agrees, as a condition precedent to his right of recovery for damages growing out of such shipment, that "he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur, before said cars leave carrier's line, or before the cattle are mingled with other cattle, or removed from pens at destination," and where it is further provided in such contract that "no agent of this company has any

12. Animals removed and killed by carrier's agents.—*Richardson v. Chicago, etc., R. Co.*, 62 Mo. App. 1.

13. Refusal of owner to receive injured horse.—Stock was shipped to D. by defendant railroad, upon a special contract, and one of the animals was injured in transit. It was taken from the cars at D. in the presence of the carrier's station agent who saw its injured condition. The owner refused to receive it and it was allowed to run on the commons at D. The shipping contract provided that as a condition precedent to a right to recover for such an injury the shipper should give notice in writing to the agent of the carrier of his claim for damages "before said stock is removed from the place of destination and before such stock is mingled with other stock." It was held that the condition as to notice was not applicable as there was no removal of the injured animal, and no mingling of it with other stock, within such stipulation. *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017.

14. Receipt for cattle signed under protest because of damaged condition.—*Hinkle v. Southern R. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685.

15. Power to waive.—*Arkansas.*—*St. Louis, etc., R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

Georgia.—*Arnold v. Louisville, etc., R. Co.*, 4 Ga. App. 519, 61 S. E. 1050.

Kentucky.—*Louisville, etc., R. Co. v. Lazarus*, 13 Ky. L. Rep. 461.

South Carolina.—*Gilliland v. Southern Railway*, 85 S. C. 26, 67 S. E. 20.

16. St. Louis, etc., R. Co. v. Ladd, 33 Okla. 160, 124 Pac. 461.

17. St. Louis, etc., R. Co. v. James (Okla.), 128 Pac. 279; *St. Louis, etc., R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461.

18. Arnold v. Louisville, etc., R. Co., 4 Ga. App. 519, 61 S. E. 1050.

19. Authority of agent.—*Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138.

authority to waive, modify, or amend any of the provisions of this contract" it is error to instruct the jury that notice different from that provided in the contract is sufficient, based on the waiver of such written notice by the acts or knowledge of the agent of the company.²⁰

§§ 2040-2042. What Constitutes—§ 2040. Waiving Written by Acting on Verbal Notice.—A stipulation or provision in a contract of shipment of live stock that the shipper give written notice of injury within a specified time is waived by the proper agents of the carrier acting on verbal notice, and making all investigation desired, without demanding written notice.²¹ Where a bill of lading of live stock provides that, as a condition precedent to the shipper's right to recover any damage for loss or injury to the animals, he will give notice in writing of his claim to the agent of the carrier before said animals are removed from the place of destination, the notice provided for is waived; where the carrier, without objection to the want of written notice, makes a thorough examination of plaintiff's claim for damages, and, acting on the information obtained thereby, refuses to pay the claim.²²

Statement Shipper Need Not Sue.—The statement of a carrier's agent to a shipper at the place of destination, when told by the latter that he would have to sue the company for damage to cattle, that the shipper need not do that, but could get his money without suit, is a waiver of a stipulation requiring written notice to the agent at the place of destination as a condition precedent to a claim for damages.²³

Promise of Stockyard Superintendent and Train Conductor.—When a shipping contract stipulated that the shipper should give notice in writing of his claim for loss of or damage to freight to some officer of the carrier, or its nearest station agent, before removing the stock from its place of delivery, and before it should be mingled with other stock, and he did not give any written notice of his claim for damages, but verbally notified the superintendent of a stockyard, and the conductor of the train on which his cattle were transported, of his claim for damages, the verbal notice of his claim to the parties named was not a compliance with such stipulation; and the fact that upon giving such verbal notice such persons told him to wait a reasonable time, and informed him that a member of the company would come and settle with him did not amount to a waiver on the part of the carrier of such written notice.²⁴

20. Provision against authority of agent to waive.—Missouri, etc., *R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261.

21. Acting on verbal notice.—St. Louis, etc., *R. Co. v. Jacobs*, 79 Ark. 401, 68 S. W. 248.

Plaintiff shipped cattle over defendant's road under a stipulation that no claim for damage should be allowed unless "made in writing, before or at the time the stock was unloaded." The cattle were injured in a wreck, and, after some delay, the train reached defendant's stock yards, about midnight, in the rain, where the stock was unloaded, previous to which plaintiff verbally notified the yard master that he would not receive it, except under protest, and asserted his claim for damages, without objection being made to its form, and was told that it was not necessary to go to the company's office that night. On the next day, with the yard master's consent, the cattle were removed to plaintiff's farm, sixteen miles away, because of the bad condition of the stock yards, and three days later plaintiff

made written claim for damages, which defendant declined to pay, on the ground that the stock was not injured. Held, that defendant had waived the delay in making written demand. *Rice v. Kansas Pac. Railway*, 63 Mo. 314.

22. Louisville, etc., R. Co. v. Lazarus, 13 Ky. L. Rep. 461.

A horse having been injured in the presence of defendant's agents in charge of the train, and examined by a surgeon at the instance of defendant, and returned over defendant's road to the place from which he was originally shipped, notice of intention to claim damages, required by the contract of carriage to be given in case of injury, is waived. *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 9 S. W. 698, 10 Ky. L. Rep. 554.

23. Statement shipper need not sue.—*Wood v. Southern R. Co.*, 118 N. C. 1056, 24 S. E. 704.

24. Promise of stockyard superintendent and train conductor.—Missouri Pac. *R. Co. v. Scott*, 2 Texas App. Civ. Cas., § 324.

§ 2041. Want of Verification.—Provisions in a contract of shipment of live stock that no claim for damages shall be valid unless made in writing and verified by the oath of the claimant, is waived by the proper agents of the carrier acting on an unverified notice,²⁵ or by their demanding payment of the freight charges as a condition precedent to the consideration of the claim.²⁶

§ 2042. Delay in Filing Notice.—A provision in the contract of shipment of live stock that no claim shall be valid unless the shipper give notice within a specified time, is waived by the proper agents of the carrier acting on a notice which was filed too late, or by refusing to pay the claim or by declining to settle, but not on the ground that the claim was filed too late,²⁷ by referring the claim

25. Treating unverified notice as sufficient.—Even if a stipulation in a bill of lading of live stock that claim should be made within ten days was reasonable, where plaintiff's attorney testified that he mailed an unsworn notice of claim within ten days, and defendant company neither objected to the testimony nor moved to exclude it, and no plea was interposed that the claim was not sworn to, and the point was not otherwise raised until the court directed a verdict for defendant on that ground, it was a waiver of the objection. *Williams v. Yazoo, etc., R. Co.* (Miss.), 46 So. 399.

A railroad company will be deemed to have waived a provision in a contract of shipment of cattle providing that no claim for damages shall be valid unless made in writing and verified by the oath of the claimant, and presented to the general freight agent within ten days after their arrival at their destination, where the shipper received several letters from the superintendent and freight claim agent in regard to the claim, and in no instance did they object to the claim on the ground that it was not verified. *Illinois Cent. R. Co. v. Pogard*, 27 So. 879, 78 Miss. 11.

26. Demand for payment of freight charges.—Where a shipper of horses, under a contract stipulating for the filing of a verified claim for damages within five days from the removal of the horses, filed his claim for damages with the carrier's agent at the point of destination on the day of removal, and the claim was within twenty-four hours transmitted to the carrier's claim agent, who notified the shipper that the claim would not be considered unless the freight charges were paid, and he made no other objections, the carrier waived the right to insist on the filing of a verified claim. *Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, 89 N. E. 951.

27. Claim filed too late.—A shipper sought to recover damages arising from defendant's alleged neglect in the transportation of a car load of hogs. The way-bill provided that no claim for damages should be made, unless filed within five days and verified by the affidavit of the shipper or his agent. Plaintiff's claim was filed one day late, but was returned

to him to have the bill attached, which was done, whereon defendant declined to settle, but not on the ground that the claim was filed too late. Held sufficient to show a waiver of the provision as to time of filing the claim. *Wallace v. Lake Shore, etc., R. Co.*, 95 N. W. 750, 133 Mich. 633.

Verbal claim received by agent without objection to its form—Consent to removal to consignee's farm—Opportunity to inspect in time.—In *Rice v. Kansas Pac. Railway*, 63 Mo. 314, it appeared that the shipping contract in question provided that no claim for damages to the cattle shipped should be allowed unless "made in writing before or at the time the stock was unloaded;" that, while in transit, the cars were thrown from the track and some of the cattle injured; that after a considerable delay the train proceeded to its destination, where it arrived in the rain about midnight; that the consignee, before unloading, verbally notified the carrier's yardmaster and agent that they would not receive the cattle except under protest, and asserted his claim for damages without objection as to its form, and with the assurance from the agent that it was unnecessary to proceed to the company's office that night; that from the time of the accident till then, he had been compelled to give his entire attention to the care of his stock; that in consequence of the unfitness of the stockyard, and by consent of the company, the cattle were, on the night of their arrival, removed to plaintiff's farm sixteen miles distant, where their examination by the carrier was not difficult. Three days after their removal, he gave a written notice of his claim to an officer of the company, who refused to pay the same, insisting that the stock was not damaged; but he made no objection on the ground of delay in giving the notice. It was held that this showed a sufficient compliance with such provision of the contract, as it afforded the carrier an opportunity to inspect the cattle before they were mingled with other cattle, or its ascertainment of damages otherwise rendered impracticable; and that the conduct of the carrier amounted to a waiver of the delay in giving notice.

to its claim department and negotiating for an adjustment thereof,²⁸ or by putting off a claimant seeking to file his claim from time to time until after the lapse of the stipulated number of days.²⁹

§§ 2043-2051. Enforcement—§ 2043. Form of Action.—Wherever there is a special contract varying the liability of a carrier of live stock, the action is properly brought on the special contract and not on the general liability.³⁰

Right to Maintain Action in Tort.—Inasmuch as the common carrier did not stipulate by special contract against liability for his own negligence, even if he could do so effectively, the existence of a special contract for the shipment of live stock, with certain stipulations therein exempting the carrier from liability, is no obstacle to the maintenance of an action of tort based on his legal duty and a breach thereof by negligence. The special contract will be a defense only in connection with evidence showing that the loss or injury complained of was not caused by the negligence alleged.³¹

§§ 2044-2046. Pleading—§ 2044. Petition or Declaration.—In an action on a contract for loss and injury to live stock during transportation a petition which fails to allege compliance with the conditions of the contract requiring notice of the claim for damages within a certain time, or a waiver thereof is insufficient to state a cause of action.³² *Aliter* in North Dakota. Since a stipulation in a contract for the carriage of live stock, requiring notice of claim of loss to be given the carrier before the stock are removed or mingled, is valid if reasonable in the particular case, in an action against the carrier for loss en route, the complaint should allege the giving of such notice if the stipulation is not invalid as a matter of law, or allege facts showing that it would work hardship in the particular case so as to excuse nonperformance.³³

Sufficiency of Declaration.—Where the first paragraph of a complaint against a railroad for damages to plaintiff's live stock in shipment, resulting from defendant's negligence in furnishing an unfit car, counted on its common-law liability; the second paragraph alleging that plaintiff was compelled to assent to a special contract of carriage; requiring him to select and inspect his own car, and releasing defendant from all liability, as a condition precedent to the shipment of the stock; there being no choice of rates, or reduction in the usual freight charges, or other consideration for such release, by reason of which the contract was void; and the third paragraph alleging that the car selected by plaintiff appeared to be safe, but in fact was unsound, which defendant knew—the facts alleged constituted a good cause of action.³⁴

28. Referring claim to claim department.—A waiver by the carrier of the requirement of the contract of shipment of live stock that notice of loss or damage be presented within one day after arrival of the stock at its destination may be inferred from its referring the claim to its claim department and negotiating for an adjustment thereof. *St. Louis, etc., R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

29. Delay caused by shipper being directed to see other agents.—*Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 111 Am. St. Rep. 838, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70, 82 Pac. 161. See ante, "Time of Presentation," § 2033.

30. Form of action.—*Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711.

31. Right to maintain action in tort.—The case of *Boaz v. Central R., etc., Co.*, 87 Ga. 463, 13 S. E. 711, construed in the

light of the authorities therein cited, rules nothing to the contrary of this holding. *Nicoll v. East Tennessee, etc., R. Co.*, 89 Ga. 260, 15 S. E. 309.

32. Petition or declaration.—In an action by a shipper for damages, a compliance with the condition, in a contract for the carriage of live stock, that a verified claim for damages shall be filed with the carrier's agent within five days from the date of the removal of the stock from the cars, or its waiver, must be shown in the pleading. Judgment (App.), 87 N. E. 555, reversed. *Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, 89 N. E. 951; *Midland Valley R. Co. v. Ezell*, 29 Okla. 40, 116 Pac. 163.

33. Atchison, etc., R. Co. v. Coffin, 13 Ariz. 144, 108 Pac. 480.

34. Declaration.—*Lake Erie, etc., R. Co. v. Holland*, 167 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

Amendment.—Where a suit was brought against a railroad on a written contract for the shipment of live stock, the declaration could not be amended by alleging that the agents of the railroad company procured the contract by fraud and deceit as to the capacity and construction of the car to be used in the transportation of the stock—such representations not being in the written contract sued on—and that by reason of such deception the animals were badly crowded in loading, and were seriously damaged. The first was on a contract; the amendment was based on a tort. Especially was this the case where the contract was to be executed in the county in which the suit was brought, and the fraudulent statements and loading occurred in another county.³⁵

§ 2045. Plea or Answer.—Facts Showing Reasonableness.—Where in a suit against a carrier for damages to stock in shipment, it pleads the shipper's failure to observe stipulation in the contract of shipment making certain notice of claim condition precedent to suit, such plea is demurrable unless it alleges circumstances showing reasonableness of such stipulation.³⁶

Allegation That Shipper Knew Name of Station Agent at Destination.—A special plea setting up a contract for the transportation of stock which required the shipper to give written notice of any claim for damage, before the stock was mingled with other stock, to "——, station agent of said" carrier at A. station, or, if he were not at such office, to such servant of the carrier at such station as represented it at the actual delivery and alleging that plaintiff never made any such demand within ninety days after receipt of the stock, and that the carrier had and has at A. an agent named, does not allege a reasonable condition because it fails to show that the shipper knew the name of the station agent, or that the carrier had a station agent, or any servant representing it, at the time of delivery of the stock at its destination.³⁷

Notice of Claim.—A stipulation in a shipping contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, while not strictly a condition precedent to the bringing of an action for damages for injuries, is a limitation upon the right of recovery, and compliance with such stipulation need not be affirmatively shown by the complaint, but noncompliance is a matter of defense to be raised by the answer.³⁸ Instances of sufficient allegations of failure to give notice are given in the footnotes.³⁹

§ 2046. Replication or Reply.—The waiver of a provision in a contract for the carriage of live stock, requiring written notice of a claim for damages, when pleaded as a defense, is a matter of confession and avoidance and must be especially pleaded.⁴⁰

35. Amendment.—*Mitchell v. Georgia R. Co.*, 68 Ga. 614.

36. Facts showing reasonableness.—*Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

37. Allegation that shipper knew name of station agent at destination.—*Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019.

38. Notice of claim.—*Hatch v. Minneapolis, etc., R. Co.*, 15 N. Dak. 491, 107 N. W. 1087.

39. Where a contract for the transportation of twenty-eight mules provided that, as a condition precedent to the owner's right to recover any damages for loss or injury thereto, the owner or person in charge should give notice in writ-

ing of his claim to some officer of the delivering road or its nearest station agent, before the stock was removed from destination or place of delivery and before it was mingled with other stock, pleas in an action for the carrier's failure to deliver one of the mules, alleging that neither the owner nor the person in charge of the stock on his behalf gave any notice in writing of the loss of the mule before removal of the remainder from the place of destination, and that neither defendant nor its agent at destination counted the mules, and did not know the number that were in the car, nor that one was alleged to have been missing, stated a valid defense to the action. *Central, etc., R. Co. v. Henderson*, 152 Ala. 203, 44 So. 542.

40. Replication or reply.—*Atchison, etc., R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449.

Effect of General Denial.—In an action for injury to stock shipped where the defendant pleads a condition requiring the shipper to file claim for damages within a certain time and his failure to do so, an allegation in the shipper's reply that the condition was void not being an express admission of the existence of the condition, such existence must be taken as denied by the general denial implied by law to allegations in answer.⁴¹

Facts Showing Fraud, Duress or Mistake.—Where there is reliance upon a carrier's fraud, duress, or bad faith in obtaining contracts for the shipment of live stock, requiring notice of injury, or it is claimed they were executed by mistake, the facts must be pleaded; and a mere denial of the execution of the contracts is not sufficient.⁴²

§ 2047. Burden of Proof.—Fact of Giving Notice.—Where a contract for carriage of live stock provided for notice in writing of a claim for delay, loss or injury to the stock the burden of proof was on the shippers in an action to recover damages to a shipment of stock to show that they had given the notice.⁴³

That Notice Given within Stipulated Time.—Where a contract of shipment provides that the shipper shall make any claim for injuries to stock shipped within a certain time, the burden of showing performance of such condition rests on the shipper.⁴⁴ In Delaware⁴⁵ and Texas⁴⁶ the burden is on a carrier of live stock to show failure to give notice of a claim for loss or damage as required by the shipment contract.⁴⁷

As to Having Officer at Destination.—Where a common carrier's contract with a shipper of cattle for carriage to a point outside of state requires notice to be given to an officer or agent of company, at place of destination, of his claim for damages, the carrier must show that it had an officer or agent at such place to receive such notice, as such fact can not be presumed.⁴⁸

§ 2048. Admissibility and Competency.—Best Evidence.—Where a live stock transportation contract required notice in writing of injury or loss, letters by the shipper to the claim agent itemizing the loss were the best evidence that notice was given and properly admitted.⁴⁹

Hearsay.—In an action against a carrier for injuries to live stock, plaintiff's evidence that he prepared a written notice of such injury, as required by the bill of lading, and left it with his commission firm at destination of the stock, and that they afterwards wrote him that they had filed it with defendant, was incompetent.⁵⁰

As to Request for Cars, etc.—Where, in an action for the failure of a carrier to furnish cars for the shipment of live stock, the answer denied the allegations of the complaint, and alleged that it entered into a contract for the

41. **Effect of general denial.**—Nichols v. Chicago, etc., R. Co., 94 Iowa 202, 62 N. W. 769.

42. **Facts showing fraud, duress or mistake.**—Atchison, etc., R. Co. v. Baldwin, 53 Colo. 416, 128 Pac. 449.

43. **Fact of giving notice.**—St. Louis, etc., R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125.

44. **That notice given within stipulated time.**—Kalina v. Union Pac. R. Co., 69 Kan. 172, 76 Pac. 438; Chicago, etc., R. Co. v. Conway, 34 Okla. 356, 125 Pac. 1110.

45. *Klair v. Philadelphia, etc., R. Co., 2 Boyce (25 Del.) 274, 78 Atl. 1085.*

46. In an action to recover for loss by negligent delay in transporting cattle to market, if a written agreement for notice

of any claim for damages to be given before the cattle are unloaded is founded on a valid consideration, the burden is on defendant to show that such notice was not in fact given by plaintiff, as required. *St. Louis, etc., R. Co. v. Boshear (Tex. Civ. App.), 108 S. W. 1032, judgment affirmed 113 S. W. 6.*

47. *Klair v. Philadelphia, etc., R. Co., 2 Boyce (25 Del.) 274, 78 Atl. 1085.*

48. **As to having officer at destination.**—Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 172, 2 S. W. 574.

49. **Best evidence.**—Berry v. Chicago, etc., R. Co., 24 S. Dak. 611, 124 N. W. 859.

50. **Hearsay.**—Chicago, etc., R. Co. v. Conway, 34 Okla. 356, 125 Pac. 1110.

shipment, which required notice of any claim for damages within one day after reaching destination, which notice was not given, the testimony of a witness that he, on behalf of plaintiff, requested cars and informed the agent of the number required, etc., was competent under the issues.⁵¹

Proof of Waiver.—In determining whether a live stock carrier waived notice of claim for damage as required by the shipment contract, the jury can consider complaints by the consignee's agent to the carrier's local freight agents, and what was said and done between such persons when the cattle were delivered, as well as subsequent letters written by the consignee to the carrier's officers, and any reply thereto.⁵²

§ 2049. Weight and Sufficiency.—Proof of Waiver.—In an action against a carrier to recover for injuries to a shipment of live stock based upon the admission by the complainant of his failure to comply with the contract requirement as to notice and express waiver thereof by the carrier, the fact of waiver is not sufficient to support it by evidence where there is direct conflict in the testimony of the two principal witnesses, the attorney for the plaintiff claiming that he specifically mentioned the claim in question, which was denied by the claim agent, where certain correspondents in the case entitled to correct witness is not accounted for in a satisfactory manner, and where there is no reasonable explanation of the fact that the claimant in person presented his claim to the claim agent after the time of the alleged waiver, making no mention of the fact that the matter was in the hands of his attorney. In addition to this the claim agent had settled another claim with the understanding that it was the one referred to in the express waiver.⁵³

§ 2050. Question for Jury.—The question whether a carrier of live stock has waived its right to formal notice of a loss is for the jury.⁵⁴

§ 2051. Appeal and Error.—In an action to recover for injuries to live stock, error in placing the burden of proof upon the plaintiff is of such a character as to require a new trial.⁵⁵

Error in Instructions.—If in an action upon a special contract for the transportation of live stock which requires that the shipper shall feed and water the stock at his own risk, the charge of the court is susceptible of the construction that this duty was imposed upon the carrier, the charge is erroneous and a new trial should be granted.⁵⁶

Verdict Contrary to Law and Evidence.—The evidence showing that the shipment of the mules was made on a valid special contract at a reduced rate of freight and the finding of the jury being upon the basis of general liability

51. As to request for car, etc.—*St. Louis, etc., R. Co. v. Taylor*, 87 Ark. 331, 112 S. W. 745.

52. Proof of waiver.—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085.

53. *Shumaker v. Northern Pac. R. Co.*, 108 Minn. 35, 121 N. W. 122.

In an action against a carrier to recover for injuries to a shipment of live stock, evidence held insufficient to show that defendant had waived provisions in a contract requiring notice of claim for injuries to be given in writing to some officer or station agent of the company before the stock was removed. *Shumaker v. Northern Pac. R. Co.*, 121 N. W. 122, 108 Minn. 35.

54. Question for jury.—*Eckert v.*

Pennsylvania R. Co., 211 Pa. 267, 60 Atl. 781, 41 Am. & Eng. R. Cas., N. S., 475, 18 R. R. R. 475, 107 Am. St. Rep. 571.

Where a carrier of live stock has actual knowledge of injuries to them within the time limited, or notice thereof, and has not raised any question as to the want of notice until the trial, a year and a half thereafter, the question of formal notice is for the jury. *Eckert v. Pennsylvania R. Co.*, 60 Atl. 781, 211 Pa. 267, 107 Am. St. Rep. 571, 41 Am. & Eng. R. Cas., N. S., 475, 18 R. R. R. 475.

55. Appeal and error.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240.

56. Error in instructions.—*Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422, 41 S. E. 653.

irrespective of the special contract, the verdict was contrary to law and the evidence, and the court erred in not granting a new trial.⁵⁷

Weight and Sufficiency.—Where the evidence apparently preponderates against the fact of negligence, yet one witness testified to facts from which negligence might be found by the jury to have existed; and where the verdict has been approved by the trial judge it can not be said that it was without evidence to support it.⁵⁸

§ 2052. Time When Suit Must Be Brought.—See ante, "Stipulation Limiting Time within Which Suit Must Be Brought," §§ 1473-1497.

§ 2053. Limiting Loss to Carrier's Own Line.—See post, "Limitation of Loss by Connecting Carrier," chapter 32.

§ 2054. Limiting Liability to That of Forwarder.—A railroad company receiving cattle for transportation as a common carrier can not limit its liability to that of a mere agent of the consignor in the matter of delivering the cattle to the next connecting road, such stipulations being contrary to public policy.⁵⁹

^{57.} Verdict contrary to law and evidence.—Georgia R., etc., Co. v. Reid, 91 Ga. 377, 17 S. E. 934.

etc., R. Co. v. Hurst, 113 Ga. 1006, 39 S. E. 476.

^{58.} Weight and sufficiency.—Central,

^{59.} Alabama, etc., R. Co. v. Thomas, 83 Ala. 343, 3 So. 802.

CHAPTER XX.

ACTIONS.

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§§ 2055-2058. Nature and Form of Action—§ 2055. Right of Plaintiff to Sue Either Ex Contractu or Ex Delicto.—A shipper, whose live stock has been injured or lost by the negligence of the common carrier, may sue either for the breach of contract or for the tort.¹ While assumpsit is the usual remedy against carriers, for the neglect or breach of their duties, yet where their liability is founded on the common law as well as on contract, they are also liable in an action on the case for injuries to or loss of live stock resulting from the neglect or breach of a duty in the course of their employment.²

Language of Petition or Complaint Determining Form of Action.—In determining whether the action is ex delicto or ex contractu, the petition or complaint must be examined. The form of action is to be determined by the wording of the pleadings filed by the plaintiff.³ Where the language of the pe-

1. Action ex contractu or ex delicto.—As to requisites and nature of complaint, etc., see post, "Declaration, Petition, or Complaint," §§ 2067-2074.

As to party in whom is the right of action, see post, "Right of Action," §§ 2059-2062.

Alabama.—St. Louis, etc., R. Co. v. Cavender, 170 Ala. 601, 54 So. 54.

Arkansas.—St. Louis, etc., R. Co. v. Wilson, 85 Ark. 257, 107 S. W. 978.

Delaware.—Klair v. Philadelphia, etc., R. Co., 2 Boyce (25 Del.) 274, 78 Atl. 1085.

Georgia.—Mitchell v. Georgia R. Co., 68 Ga. 644; Nicoll v. East Tennessee, etc., R. Co., 89 Ga. 260, 15 S. E. 309.

Indian Territory.—Missouri, etc., R. Co. v. Byrne, 3 Ind. T. 740, 49 S. W. 41.

Illinois.—United States Exp. Co. v. Council, 84 Ill. App. 491.

Iowa.—Owens Bros. v. Chicago, etc., R. Co., 139 Iowa 538, 117 N. W. 762.

Kentucky.—Louisville, etc., R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185; Chicago, etc., R. Co. v. Chestnut Bros., 28 Ky. L. Rep. 404, 89 S. W. 298.

Montana.—Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311; Russell v. Chicago, etc., R. Co., 37 Mont. 1, 94 Pac. 488.

2. United States Exp. Co. v. Council, 84 Ill. App. 491; St. Louis, etc., R. Co. v. Wilson, 85 Ark. 257, 107 S. W. 978.

3. Language of petition or complaint determining form of action.—See post, "Actions Ex Delicto," § 2057.

Alabama.—St. Louis, etc., R. Co. v. Cavender, 170 Ala. 601, 54 So. 54.

Indian Territory.—Missouri, etc., R. Co. v. Byrne, 3 Ind. T. 740, 49 S. W. 41.

Iowa.—Owens Bros. v. Chicago, etc., R. Co., 139 Iowa 538, 117 N. W. 762.

Kentucky.—Louisville, etc., R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185;

tition leaves a doubt as to whether the pleader intended to claim in tort or for breach of contract, the action will be construed to be in tort, though the rule will not be extended to prevent the carrier as defendant in an action in tort from pleading as a defense any contract with the shipper, which, if valid, waives the performance of the duty for a breach of which damages are claimed.⁴ The fact that a shipper alleges a contract of shipment does not necessarily characterize the action as one on contract rather than in tort; for, while the tort complained of is a breach of duty imposed by law, the relation between the parties which gives rise to such duty is a creature of contract, and ordinarily proof of the contract relation must be given as a preliminary to showing the tort.⁵

§ 2056. Action for Conversion.—The failure of the common carrier to discharge its common-law duties respecting the transportation of live stock does not give the shipper a cause of action for conversion of the stock injured by the carrier's negligence.⁶ The fact that a shipment is delayed, and the animals injured and depreciated in value, will not give the shipper the right to terminate the relation of bailment by abandoning them and charging the carrier as for a conversion.⁷

Quarantine Regulations.—It is not a conversion for a common carrier to refuse to ship live stock in violation of quarantine regulations.⁸ Where, upon the carrier's inability to ship the stock to their destination because of quarantine, they are shipped back to the original shipping point and tendered to the shipper, when he declines to receive them and directs the carrier to do whatever it sees fit, and the stock are sold and the money held for the shipper, he can not recover as for a conversion of the stock at the original shipping point.⁹

§ 2057. Actions Ex Delicto.—A petition, in an action against a carrier for delay in the shipment of live stock, which alleges not only the undertaking of the carrier to carry the animals, but which also charges the carrier with negligence in respect thereto, states a claim in tort.¹⁰ In such case, however, the

Chicago, etc., R. Co. v. Chestnut Bros., 28 Ky. L. Rep. 404, 89 S. W. 298.

Montana.—Nelson v. Great Northern R. Co., 28 Mont. 297, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, 72 Pac. 642; Russell v. Chicago, etc., R. Co., 37 Mont. 1, 94 Pac. 488.

4. Owens Bros. v. Chicago, etc., R. Co., 139 Iowa 538, 117 N. W. 762.

A complaint in an action against a carrier alleging that plaintiff's stock was received by defendant for carriage and delivery, and that by defendant's negligence the delivery was unreasonably delayed and the stock delivered in bad condition, will support an action in form either *ex contractu* or *ex delicto*. St. Louis, etc., R. Co. v. Wilson, 85 Ark. 257, 107 S. W. 978.

As to validity of contracts limiting a carrier's liability, see ante, "Limitation of Liability," chapter 14.

5. Klair v. Philadelphia, etc., R. Co., 2 Boyce (25 Del.) 274, 78 Atl. 1085; Owens Bros. v. Chicago, etc., R. Co., 139 Iowa 538, 117 N. W. 762.

Where the common carrier did not stipulate by special contract against liability for his own negligence, even if he could have done so effectively, the existence of a special contract for the shipment of live stock, with certain stipulations therein exempting the carrier from

liability, is no obstacle to the maintenance of an action of tort based on his legal duty and a breach thereof by negligence. The special contract will be a defense only in connection with evidence showing that the loss or injury complained of was not caused by the negligence alleged. Nicoll v. East Tennessee, etc., R. Co., 89 Ga. 260, 15 S. E. 309.

6. **Action for conversion.**—Olds v. New York, etc., R. Co., 94 N. Y. S. 924, 107 App. Div. 26.

7. Spalding v. Chicago, etc., R. Co., 101 Mo. App. 225, 73 S. W. 274.

8. **Quarantine regulations.**—Southern R. Co. v. Wallace, 175 Ala. 72, 56 So. 714.

9. Southern R. Co. v. Wallace, 175 Ala. 72, 56 So. 714.

10. **Actions ex delicto.**—Owens Bros. v. Chicago, etc., R. Co., 139 Iowa 538, 117 N. W. 762.

A complaint in an action against a carrier for delay in transporting cattle, which alleges that it accepted cattle for transportation and agreed to transport the same to the point of destination, that, by reason of its negligence in not furnishing sufficient motive power and cars and in not properly managing the running of its trains, the train carrying the cattle was delayed, whereby the cattle

avertment of negligence which does not amount to a violation of the carrier's duty as a carrier, but merely to a breach of contract, will not convert an action *ex contractu* into one *ex delicto*.¹¹

Actions for Injury Due to Negligent Condition or Maintenance of Stock Pens.—In an action against a carrier for injuries to live stock, allegations that the carrier received the stock into the stockyards preparatory to shipment and that the stockyards were insecure and unsafe and that such condition of the stockyard resulted in injury to the shipper states a cause of action *ex delicto*.¹²

§ 2058. **Actions Ex Contractu.**—A shipper, whose stock is injured by the negligence of the common carrier while in its possession for transportation, may bring an action *ex contractu*.¹³ In the notes below will be found examples of averments stating a cause of action *ex contractu*.¹⁴

§§ 2059-2062. **Rights of Action.**¹⁵—§ 2059. **In General.**—The right of action for loss or injury to live stock by a carrier is in the party who is injured by the act or omission of the carrier.¹⁶ Thus where a federal statute provides a

shrank in weight and depreciated in price, states a cause of action *ex delicto*, based on a violation of the carrier's duty as carrier. *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

A complaint which alleges that defendant, a common carrier, promised to provide cars for the transportation of plaintiff's sheep, and to transport them with due and reasonable speed; that it, in disregard of its duties as a common carrier, negligently delayed the commencement of the transportation until a certain date, when it willfully, negligently, and wrongfully loaded the sheep, and commenced their transportation, though it had knowledge that a violent storm was then prevailing along its line of railroad; and that it, in disregard of its duties as a common carrier, willfully, wrongfully, negligently, and carelessly delayed the sheep along the route, and exposed them to the severe weather and negligently refused to protect them—states a cause of action in tort. *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642, 9 R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

11. *Louisville, etc., R. Co. v. Wathen*, 22 Ky. L. Rep. 82, 49 S. W. 185; *Chicago, etc., R. Co. v. Chestnut Bros.*, 28 Ky. L. Rep. 404, 89 S. W. 298.

12. **Actions for injury due to negligent condition or maintenance of stock pens.**—*St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54; *Missouri, etc., R. Co. v. Byrne*, 3 Ind. T. 740, 49 S. W. 41.

13. **Actions ex contractu.**—*Alabama.*—*Nashville, etc., R. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

Georgia.—*Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

Indiana.—*Pittsburgh, etc., R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

Nebraska.—*Denman v. Chicago, etc., R. Co.*, 52 Neb. 140, 71 N. W. 967.

14. **Ex contractu—Examples.**—A petition alleging that plaintiff delivered to a carrier cattle for transportation under a bill of lading, a copy of which was attached to the petition as a part thereof, and that a part of the cattle were killed and the remainder delivered in an injured condition, and that such cattle were killed and injured without any fault of plaintiff, but solely because of the carrier's negligence, set forth an action *ex contractu*, and not *ex delicto*. *Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

A petition alleging that plaintiff made a written contract with defendant for the transportation of cattle, a copy of which contract is attached, that after delivery of the cattle there was an unreasonable delay in their shipment, and pleading special damages, states a cause of action on the contract, and not in tort. *Denman v. Chicago, etc., R. Co.*, 52 Neb. 140, 71 N. W. 967.

A complaint which alleges that plaintiff entered into a written contract with defendant to ship his household goods, cattle, etc., over his line, that defendant furnished plaintiff a car on a side track and directed him to load his goods therein, and that, after they were loaded, defendant, without notice to plaintiff, pulled the car on its main track, where it was negligently struck by a freight train and the property therein damaged, and setting out a contract in the usual form of a bill of lading, does not state a cause of action in tort, but one for breach of contract. *Pittsburgh, etc., R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

15. **Rights of action.**—As to proper parties to maintain an action against a carrier for injuries to live stock, see post, "Parties Plaintiff," §§ 2064-2066.

16. **Rights of action in general.**—*Kentucky.*—*Louisville, etc., R. Co. v. Wathen*, 22 Ky. L. Rep. 82, 49 S. W. 185; *Cincin-*

penalty for the failure of a carrier to water or otherwise properly care for stock, the owner of the stock injured by the failure of the carrier to comply with the terms of the statute may recover therefor.¹⁷

Notice of Loss or Injury.—A shipper may maintain an action against a common carrier for injury to live stock delivered to it for transportation, without giving notice of the injury or offering the stock to it to be cared for, in the absence of a valid stipulation for notice of loss or injury.¹⁸

§ 2060. Right of Action of Owner.—The owner of live stock who is also both the consignor and consignee, being the real party in interest, is the proper party to prosecute an action for their injury while in the hands of the carrier.¹⁹

Stock Sold.—The fact that the stock shipped has, subsequent to the injury, been sold and delivered, if the sale did not carry with it the seller's right of action, will not prevent the original owner from recovering for an injury en route.²⁰

Stock Shipped in the Name of Another.—The fact that the owner of the stock is not named in the bill of lading will not prevent him, upon proof that he is the real party in interest, from bringing an action against the carrier for an injury to the stock while in the care of the carrier.²¹

§ 2061. Right of Action of Party in Whose Name Stock Shipped.—The person delivering to a common carrier live stock for shipment, even though he be not the owner; has a special interest in them which will support a right of action against the carrier for their injury.²² Where the bailee of live stock delivers them to a common carrier under a contract by which they are to be redelivered to him at the destination, he has a right of action for the breach of contract by failure to deliver in the condition received.²³

nati, etc., R. Co. v. Gregg, 25 Ky. L. Rep. 2329, 80 S. W. 512.

Mississippi.—Fast v. Canton, etc., R. Co., 77 Miss. 498, 27 So. 525; Jordan v. Gulf, etc., R. Co., 102 Miss. 21, 58 So. 595.

Oklahoma.—Midland Valley R. Co. v. Pugh, 33 Okla. 648, 126 Pac. 759.

17. Recovery of penalty.—Under Ky. St. 1903, § 466, providing that any person injured by a violation of any statute may recover from the offender the damages sustained, though a penalty is also imposed by the statute, a person whose live stock is injured by the failure of a railroad company to comply with U. S. Comp. St. 1901, p. 2995, requiring railroad companies to feed and water stock every twenty-eight hours, may recover his damages. Cincinnati, etc., R. Co. v. Gregg, 80 S. W. 512, 25 Ky. L. Rep. 2329.

18. Notice of loss or injury.—Evans v. Dunbar, 117 Mass. 546.

19. Right of action of owner.—Louisville, etc., R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185.

Evidence that plaintiff is the consignor and consignee, and also the owner of a shipment of cattle shows that he is the real party in interest, and the proper party to prosecute an action for their injury. Midland Valley R. Co. v. Pugh, 126 Pac. 759, 33 Okla. 648.

20. Stock sold.—Jordan v. Gulf, etc., R. Co., 102 Miss. 21, 58 So. 595.

21. Stock shipped in name of another.—In an action for damages to live stock while being transported by defendant, the fact that plaintiff was not named in the bill of lading either as consignor or consignee did not justify a peremptory instruction for defendant, where plaintiff testified that he owned the stock, but that the bill of lading was in the name of a third person, to protect him for a balance due on some of the stock bought from him. Fast v. Canton, etc., R. Co., 27 So. 525, 77 Miss. 498.

22. Right of action of party in whose name stock shipped.—United States Exp. Co. v. Council, 84 Ill. App. 491.

Plaintiffs being both the consignors and the consignees of stock, the right of action for injury in shipment is in them, though some of the stock belonged to other persons. Louisville, etc., R. Co. v. Wathen, 49 S. W. 185, 22 Ky. L. Rep. 82.

23. A party in possession of a hog as bailee, which he ships by a common carrier, has such a special interest as enables him to maintain an action in tort against the carrier for an injury thereto. United States Exp. Co. v. Council, 84 Ill. App. 491.

If an express company agreed to receive horses from plaintiff and redeliver to him, he can recover for breach of contract by failing to redeliver in the condition received though he shipped the horses as bailee. McMurray v. Fargo, 131 N. Y. S. 884, 147 App. Div. 422.

§ 2062. Right of Action in Consignee.—Where the title to live stock is in the consignee at the time of injury, the right of action for the injury is in him.²⁴ In such a case it is immaterial whether the consignee has paid the consignor for the stock injured.²⁵ Where, under the contract between the consignor and consignee, the former is to deliver the live stock at a certain place, and the latter is to be liable to pay for only that part delivered, the right of action for injury to the stock actually delivered is in the consignee.²⁶ In such a case, an agreement between the shipper and carrier compromising the claim and stating that it is in full satisfaction of all damages to the shipper does not affect the right of the consignee to recover damages for the injuries to the cattle delivered.²⁷

§ 2063. Time to Sue and Limitations.—The time in which an action may be brought for the injury by a carrier to live stock in its custody for transportation, necessarily depends upon the wording of the statute of limitations of the various states. Those statutes are strictly construed.²⁸

§§ 2064-2066. Parties Plaintiff²⁹—**§ 2064. Owner.**—The owner of live stock delivered to a common carrier for transportation may sue for injury thereto, and it is immaterial in whose name they were billed.³⁰ Thus, where an agent ships live stock for his principal, the owner, the bill of lading being issued in the name of the agent, the principal, as owner, may maintain an action in his own name against the carrier.³¹ It is immaterial whether the agent of the carrier knew for whom the live stock were shipped. The owner, whether or not he be disclosed as the principal, has the right to sue in his own name.³²

24. *Jordan v. Gulf, etc., R. Co.*, 102 Miss. 21, 58 So. 595.

25. It was immaterial, upon the question of whether the consignee of live stock was entitled to recover against a railroad company for damages en route, whether he had paid the consignor therefor, if title was in the consignee when they were injured. *Jordan v. Gulf, etc., R. Co.*, 102 Miss. 21, 58 So. 595.

26. *International, etc., R. Co. v. Jones*, 41 Tex. Civ. App. 327, 91 S. W. 611.

27. Compromise of consignor's claims as affecting consignee's claims.—Where certain cattle were sold and the buyer was to pay for those delivered only, and the cattle that died en route were to be at the loss of the shipper, and the shipper sued the railroad for damages to the cattle while en route and not delivered to the shipper, and the buyer sued the carrier for damages and injuries to those cattle received, an agreement between the shipper and the carrier compromising his acts and stating that it is in payment and satisfaction of all claims and damages sustained by him in the transportation of the cattle, does not affect the right of the buyer to recover for damages and injuries to cattle delivered. *International, etc., R. Co. v. Jones*, 41 Tex. Civ. App. 327, 91 S. W. 611.

28. Time to sue and limitations.—*Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

Ky. St., § 2516, prescribing a limitation of one year as to actions for injuries to live stock by railroads, does not apply to

an action to recover damages for injuries resulting from negligence in the transportation of stock. *Illinois Cent. R. Co. v. Brown*, 54 S. W. 169, 21 Ky. L. Rep. 1089.

Ky. St., § 2516, providing that "an action * * * for injuries to cattle or stock by a railroad * * * shall be commenced within one year next after the cause occurred and not thereafter," has no application to a suit against a railroad for injuries to stock due to the defective condition of the car which it has expressly guaranteed to be sufficient. *Burnside, etc., R. Co. v. Tupman*, 72 S. W. 786, 24 Ky. L. Rep. 2052.

29. Parties plaintiff.—As to the person in whom is the right of action, see ante, "Rights of Action," §§ 2059-2062. As to parties defendant in cases involving questions of connecting carriers, see post, "Actions," chapter 32.

30. Owner of live stock as plaintiff.—*Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556; *Galveston, etc., R. Co. v. Freeman*, 57 Tex. 156; *Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.), 37 S. W. 234.

31. Where horses were billed in the name of an agent, and the carrier knew that fact, the shipper could sue in his own name for damages to the horses during transportation. *Norfolk, etc., R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521.

32. Knowledge of carrier's agent as to undisclosed principal unimportant.—*Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806.

Joint Owners.—Joint owners of a shipment of live stock may jointly sue for damages sustained by each, arising from injuries to the live stock during transportation.³³

§ 2065. Consignor.—The consignor may sue the carrier for breach of contract (e. g., for injury to stock shipped) without reference to his property in the goods shipped.³⁴ Thus, where one contracted in his own name for cars to ship cattle for a third person, it was held that he could recover for the delay in furnishing the cars.³⁵ Under a contract for the sale of cattle providing that they be shipped and delivered at a specified place, if they be injured in transit to such place, the consignor is the proper party to sue, since, until delivered, they were at his risk.³⁶

Necessity for Joining Other Parties in Interest.—One, in whose name a contract for the shipment of live stock is made may sue the carrier for injury sustained in transportation, and it is not necessary that the others interested with him in the stock be joined as parties plaintiff.³⁷ Thus, where a person had paid for live stock and shipped them in his own name, he may sue in his own name to recover for injuries thereto, although he had agreed to pay a third person a share of the profits.³⁸ So, also, in an action for the breach of a contract to furnish cars for the shipment of live stock to market, the party in whose name the contract was made may recover the full amount of damages sustained, although a part of the cattle to be shipped were owned by third persons.³⁹

Consignor's Assignee.—An agent contracting for shipment of cattle of another by rail, and receiving, after suit brought, a transfer of the interest of the owner in the damages occasioned, will be permitted to recover in his own name from the carrier for injuries in transit.⁴⁰

§ 2066. Consignee.—When the title to live stock, injured in transit by a carrier, is in the consignee he is the proper plaintiff to maintain an action for the injury.⁴¹

§§ 2067-2075. Pleading—§§ 2067-2074. Declaration, Petition, or Complaint—§ 2067. Stating Cause of Action.—The complaint, petition, or declaration of plaintiff, in an action against a carrier for loss of or injury to live stock, must state a cause of action. It must allege facts which will show not only the rights of the shipper but the duties and liabilities of the carrier as well.⁴² An allegation that the shipper signed the contract of shipment without reading it, or even involuntarily, does not state a cause of action.⁴³ A com-

33. **Joint owners.**—Texas, etc., *R. Co. v. Andrews* (Tex. Civ. App.), 80 S. W. 390.

34. **Consignor.**—Missouri Pac. R. Co. v. Smith, 84 Tex. 348, 19 S. W. 509; *Vanbuskirk v. Quincy*, etc., R. Co., 131 Mo. App. 357, 111 S. W. 832.

35. *Pecos*, etc., R. Co. v. Cox (Tex. Civ. App.), 150 S. W. 265.

36. *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239.

37. **Necessity for joining other parties in interest.**—*Betts v. Chicago*, etc., R. Co., 150 Iowa 252, 129 N. W. 962; Texas, etc., R. Co. v. Klepper (Tex. Civ. App.), 24 S. W. 567; *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 102 S. W. 396.

38. *Betts v. Chicago*, etc., R. Co., 150 Iowa 252, 129 N. W. 962.

39. *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 102 S. W. 396.

40. **Consignor's assignee.**—Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 262.

41. **Consignee.**—International, etc., R. Co. v. Jones, 91 S. W. 611, 41 Tex. Civ. App. 327.

In an action for injuries to cattle while being held in defendant's pens, caused by defendant's delay in furnishing cars for transportation, evidence examined, and held to show that the title to the cattle was in plaintiff when his vendor placed them in the pens, although the latter had agreed with plaintiff to put them on the cars for him free of charge, making plaintiff the proper party to maintain the action. *Ft. Worth*, etc., R. Co. v. Harrold, 101 S. W. 267, 45 Tex. Civ. App. 362.

42. **Stating cause of action in declaration, petition or complaint.**—*Nelson v. Great Northern R. Co.*, 72 Pac. 642, 28 Mont. 297, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

43. *Walter v. Missouri Pac. R. Co.*, 71 Kan. 164, 79 Pac. 1089.

plaint alleging the relation of shipper and carrier, delivery by the shipper to the carrier of live stock in good condition for transportation; the duty to safely carry and deliver, and the loss or injury of the animals in transit by the negligence of the carrier, states a good cause of action.⁴⁴

Allegations Must Be Definite.—The statement of plaintiff's cause of action must be intelligible and definite so as to give defendant notice of what he is expected to meet at the trial.⁴⁵ Where the statement of plaintiff's cause of action in the petition is definite and intelligible, it is immaterial whether it is based on the carrier's common-law liability or on a special contract; the court has no right to demand an explanation of the petition from the counsel.⁴⁶

Use of Word "Ship" in Complaint.—The word "ship" as used in a complaint stating a cause of action for failure to carry certain live stock, has been held sufficient averment of failure to "receive and carry."⁴⁷

Stating Cause of Action for Delay in Shipment.—Though the contract fails to fix a definite time within which the cattle were to be shipped, yet if the complaint, in an action for damages, alleges that they might have been shipped as soon as delivered; that they were not shipped for several hours after delivery; and that, in consequence of the delay, they arrived at the market after the close of business hours, it sufficiently appears that they were not shipped within a reasonable time.⁴⁸ A petition in an action against a carrier for failure to carry cattle which alleges that plaintiff brought the cattle to the station the day after he had given notice of the proposed shipment, that the carrier furnished him no car until noon of the following day, and then directed him not to load the car until evening, when it ordered him not to load, and that the carrier failed to furnish a car in a reasonable time, is a sufficient statement of a cause of action.⁴⁹

Alleging That Defendant Is a Common Carrier.—While, in actions against a common carrier for injuries to live stock, it should in general be alleged that the defendant is a common carrier, it is not necessary to do so under statutory or constitutional provisions declaring all railroad companies to be common carriers, if it appears by the face of the pleading that the defendant is a railroad company. In such case, an allegation that the defendant is a railroad company is equivalent to an allegation that defendant is a common carrier.⁵⁰

44. *Smith v. Great Northern R. Co.*, 92 Minn. 11, 99 N. W. 47; *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

45. **Allegations must be definite.**—A complaint that defendant did not exercise due and proper care in the carriage of plaintiff's hogs, but that defendant's agents negligently managed defendant's steamboat, and that by reason of said negligent conduct of defendant and its agents said hogs were destroyed by fire, is sufficiently definite. *Carlisle v. Koe-kuk, etc., Packet Co.*, 82 Mo. 40.

46. *Tuggle v. St. Louis, etc., R. Co.*, 62 Mo. 425.

47. **Use of word "ship" in complaint.**—In an action against a railroad company for failure to carry certain cattle as agreed a complaint averring, among other things, that the company agreed to receive and ship said cattle; that the plaintiff "delivered said cattle, * * * according to the terms of said understanding, at the stock yards of the defendant; * * * and that the defendant, after the cattle had been placed in said yards, refused to ship

said cattle," is good on demurrer, the the word "ship" being equivalent to "receive and carry." *Louisville, etc., R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163.

48. **Stating cause of action for delay in shipment.**—*Cincinnati, etc., R. Co. v. Case*, 122 Ind. 310, 23 N. E. 797.

49. *Evans v. Mobile, etc., R. Co.*, 28 Ky. L. Rep. 834, 90 S. W. 588.

50. **Alleging that defendant is a common carrier.**—Under Const., art. 15, § 4, declaring all railway companies to be common carriers, it is not necessary, in an action against a railway company for injuries to a shipment of live stock, to allege that defendant is a common carrier. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.

All corporations operating railroads being made common carriers by the Indiana statute (Rev. St. 1881, § 3925), an averment, in an action for a breach of contract to carry live stock, that defendant corporation is engaged in operating a line of railroad is equivalent to an averment that it is a common carrier. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 586, 28 N. E. 208.

§ 2068. Averments as to Damages Sustained.—The plaintiff must allege that the loss, injury, or delay has resulted in damage to him.⁵¹ A petition alleging the number of head of live stock shipped, the number injured or killed, the value per head had they been properly transported, the average value per head, and the total loss sustained sufficiently states the damages sustained by the shipper.⁵² In showing the damages sustained by plaintiff, it is good pleading, and usually necessary, for the complaint, petition, or declaration, to state the interest of plaintiff in the animals injured.⁵³

Necessity for Alleging Condition of Animals at Time of Shipment.—In an action against a carrier for injury to live stock during transportation, it is not necessary, in alleging the damages sustained, that the petition expressly allege the good condition of the animal at the time of its shipment.⁵⁴

Necessity for Alleging Value of Animals Lost or Injured.—Where a complaint alleges that a horse was injured in transit and that plaintiff was damaged thereby in a certain sum, an allegation as to the value of the animal was unnecessary.⁵⁵

Necessity for Alleging Number of Each Kind of Animals Killed or Injured.—Where several grades of the same kind of stock are shipped, allegations showing the total number that were killed or injured and their value, but not showing to which grade those killed belonged, are sufficiently definite to show the damages sustained.⁵⁶

Necessity for Stating Number Dying in Transit and Dying after Reaching Destination.—Where the petition alleges the total number of animals killed by the negligence of the carrier and their value per head, it is not necessary for it to further allege the number of them dying in transit and the number that died after reaching their destination.⁵⁷

Averments as to Weight of Cattle.—In a suit by a stock shipper for damages for loss in weight of cattle caused by delay, allegations as to weight must state when and where such weight was taken.⁵⁸

§ 2069. Matters More Properly Coming from Defense.—It is not necessary for the plaintiff to negative matters which may be set up, more properly,

51. Averments as to damages sustained.—*Georgia*.—*Louisville, etc., R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429.

Indiana.—*Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

Iowa.—*Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212.

Minnesota.—*Croff v. Great Northern R. Co.*, 112 Minn. 14, 127 N. W. 490.

Texas.—*Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 89 S. W. 956, affirming 87 S. W. 368; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *Gulf, etc., R. Co. v. Wilhelm*, 3 Texas App. Civ. Cas., § 458.

52. *Texas, etc., R. Co. v. Sherrod (Tex. Civ. App.)*, 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956.

53. Alleging ownership.—An informal complaint, alleging that under an agreement plaintiff, consignor and consignee, shipped cattle which arrived in an emaciated condition, "crippled, damaged, and depreciated in selling and actual market value" in a named sum, sufficiently alleged ownership or interest and damages as against a general demurrer. *Croff v.*

Great Northern R. Co., 112 Minn. 14, 127 N. W. 490.

54. Necessity for alleging condition of animals at time of shipment.—*Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212.

55. Necessity for alleging value of animals lost or injured.—*Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

56. Necessity for alleging number of each kind of animals killed or injured.—*Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 89 S. W. 956, affirming 87 S. W. 363.

57. Need not state number dying in transit after reaching destination.—An allegation in a petition that 500 head of plaintiffs' cattle, reasonably worth \$16 per head, were killed by the negligence of defendant in transporting them, is sufficiently specific, without separately stating the number that died in transit and the number that died after reaching their destination. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

58. Averments as to weight of cattle.—*Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

by the other side as a defense.⁵⁹ Thus, in an action against a carrier for failure to furnish cars, it is not necessary for the plaintiff to allege the ability and facilities of the carrier for the transportation of live stock.⁶⁰ A special contract exacted by a carrier is a defensive weapon to be used by the carrier when sued by the shipper for an alleged violation of duty against which it was designed to afford protection, and a shipper suing to recover damages for negligence, on account of which the carrier is liable notwithstanding the contract, is not required to declare upon such contract.⁶¹

Statutes Creating Right of Action.—Under statutes creating rights of action and providing exceptions, limitations, or conditions precedent, the complaint must show on its face that the case does not fall within the class of exceptions, is not affected by the limitations, and that all conditions precedent have been complied with. This is true even in cases in which, had the right of action been of common-law origin, the exception, limitation, or condition precedent would be more properly set up by way of a defense to the action.⁶²

Federal Twenty-Eight Hour Rule.—Under Rev. Stat. U. S., § 4386, which imposes a penalty on a carrier which transports live stock, if the animals are kept in the cars more than twenty-eight consecutive hours “unless prevented from so unloading by storm or other accidental cause” or unless the animals “have proper food, water, space, and opportunity for rest” on the cars, in order to entitle a shipper to recover damages, he must allege that the case does not fall within one of the exceptions named. The proof of the exceptions in such a case is not a defense more properly coming from the carrier.⁶³

Notice of Need of Cars.—Under statutes requiring carriers to furnish cars upon sufficient notice, the complaint, in an action for failure to furnish cars, must aver that reasonable notice was given the carrier.⁶⁴

§§ 2070-2072. Allegations as to Contracts—§ 2070. Necessity for Setting Out Terms of Contract.—The necessity for the plaintiff to allege or set out the contract which he made with the carrier for the transportation of his live stock, depends upon the form of action brought. Where the action is brought for the violation of the terms of the contract of shipment by the car-

59. *Southern Pac. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849; *St. Louis, etc., R. Co. v. Wilson*, 85 Ark. 257, 107 S. W. 978; *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

60. *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

61. **Special contract.**—*Southern Pac. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849; *St. Louis, etc., R. Co. v. Wilson*, 107 S. W. 978, 85 Ark. 257.

62. **Statutes creating right of action.**—*Hale v. Missouri Pac. R. Co.*, 36 Neb. 266, 54 N. W. 517; *Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883; *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596, 21 N. W. 49.

63. **Federal twenty-eight hours rule.**—*Hale v. Missouri Pac. R. Co.*, 36 Neb. 266, 54 N. W. 517.

A complaint in an action against a carrier of live stock from one state to another, which alleges that the animals were injured by being confined in cars for a longer period than twenty-eight consecutive hours without unloading for rest, food, and water, though not prevented

from being unloaded by storms or other accidental causes, shows a violation of Rev. Stat. U. S., § 4386 [U. S. Comp. St. 1901, p. 2995], making it the duty of railways carrying stock from one state to another to unload the stock after confinement for a period of twenty-eight consecutive hours for rest, food, and water, and hence shows negligence per se. *Reynolds v. Great Northern R. Co.*, 82 Pac. 161, 40 Wash. 163, 111 Am. St. Rep. 883.

64. **Notice of need of cars.**—Rev. St., § 1798, requires that “every railroad corporation shall, upon reasonable notice, when within its power to do so, furnish suitable cars to any person applying therefor for the transportation of freight.” Held, that the complaint in an action to recover for loss occasioned by the failure of a company to have cars in readiness to ship live stock must show that the notice given was a “reasonable notice,” and that, at the time, it was within the power of the company to furnish suitable cars, there being no special contract in the case, or general custom of the company alleged. *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596, 21 N. W. 49.

rier, the contract must be set out either in substance or in hæc verba.⁶⁵ And this is true whether or not the contract be a special one.⁶⁶

Actions Ex Delicto.—It is not incumbent upon a plaintiff, when he elects to bring an action ex delicto against a railway company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to set forth in detail, by way of an exhibit to his petition or otherwise, the precise terms of the contract of affreightment.⁶⁷

§ 2071. Necessity for Alleging Authority of Carrier's Agent.—While it is true that a carrier can be bound by contracts only when they are made by their agents having proper authority, it is not necessary to set out in express terms the authority of the agent making the contract for the shipment of live stock. And this is true even in cases in which the carrier is sued for breach of the contract. There must be some averments, however, showing that the carrier was bound by the contract. Thus, allegations that the contract was made with the company is sufficient against demurrer that it failed to allege the agent of the company with whom the contract was made.⁶⁸

§ 2072. Allegations as to Consideration of Contract.—While contracts for the shipment of live stock, as all other contracts, must be based upon consideration, it is not necessary, in an action against a carrier for loss of or injury to live stock, to allege the consideration for the contract. If there be no consideration, this is a matter to be set up as a defense by the carrier.⁶⁹

Alleging Offer to Pay Freight in Advance.—In an action against the carrier for failure to furnish cars to the shipper, the petition is not bad for failure to set out an offer to pay in advance the freight charges.⁷⁰

§ 2073. Allegations as to Negligence.—In an action against a carrier for injuries to live stock, when the right of action is based on the negligence of the carrier, it is necessary for the plaintiff to allege facts constituting negligence on the part of the carrier.⁷¹ Even in cases in which the burden is on

65. Necessity for setting out terms of contract.—As to necessity for alleging a special contract when its terms should more properly be set out by the defendant as a defense to the action, see ante, "Matters More Properly Coming from Defense," § 2069. As to necessity for alleging a special contract limiting the liability of the carrier, see ante, "Limitation of Liability," chapter 14.

The complaint in an action against a carrier for violations of a special contract of shipment must set out the contract either in substance or in hæc verba, and must declare upon it. *Nelson v. Great Northern R. Co.*, 72 Pac. 642, 28 Mont. 297, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

66. *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

67. *Louisville, etc., R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429.

68. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073.

A complaint in an action against a carrier of live stock for alleged injuries to plaintiff's live stock, which alleges in the alternative that defendant or its servant or agent received the live stock without averring that such servant or agent in receiving the live stock was acting for the

defendant within the scope of his employment, is good on demurrer. *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

69. Where, in an action against a carrier for delay in transporting cattle, the answer admitted that the carrier accepted the cattle for transportation and agreed to transport them to a designated point, a motion for nonsuit on the ground that the complaint did not allege that there was any consideration for the transportation of the cattle was properly denied. *Russell v. Chicago, etc., R. Co.*, 94 Pac. 488, 37 Mont. 1.

70. A petition in an action against a carrier for failure to carry cattle, which alleged that a car was furnished the shipper, that he was directed to load it, that the order was revoked, and that he was kept waiting for a car for an unreasonable time, was not bad for failing to allege an offer to pay the freight charges in advance. *Evans v. Mobile, etc., R. Co.*, 90 S. W. 588, 28 Ky. L. Rep. 834.

71. *Alabama.*—*Nashville, etc., R. Co. v. Parker*, 123 Ala. 683, 27 So. 323; *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

Colorado.—*Atchison, etc., R. Co. v. Baldwin*, 53 Colo. 426, 128 Pac. 453.

Indiana.—*Lake Erie, etc., R. Co. v.*

the carrier to rebut the presumption that the injury resulted from its negligence, the negligence must be pleaded in order to raise this common-law presumption.⁷² An allegation that the injury was caused through no fault of the shipper is not a sufficient averment of the negligence of the carrier.⁷³ In pleading negligence, facts, not conclusions of law, must be set out.⁷⁴ In an action against a railroad company for injuries to horses while being transported over their road, and in consequence of the cars being unfit for the purpose, the wrong or negligence may properly be alleged as a breach of the duty to carry safely.⁷⁵ A petition alleging that defendant railroad, through its "carelessness and negligence," placed plaintiff's cattle in certain yards, and wrongfully exposed them to infection, was sufficient to raise the issue of defendant's knowledge or imputed knowledge that the yards were infected.⁷⁶ Where a complaint in an action to recover for injuries sustained to live stock has stated a cause of action for negligence of the carrier in caring for the live stock after it had received them preparatory to transportation, the nature of the pleading is not affected by the fact that the pleader adds an averment of further and cumulative negligence also affecting the safe receipt and keeping of the animals for shipment.⁷⁷

Negligence of Agent or Servant.—In alleging negligent injury to animals by an employee of the carrier, it is not necessary to expressly allege that the employee was acting in the scope of his duties when he did the act relied upon as negligence; certainly is this true when the nature of the act alleged shows by inference that the act was within the scope of the employee's duties.⁷⁸

Under Code Provisions.—Where the complaint, in an action against a carrier for injury to live stock, is in the form prescribed by statute, the negligence of the carrier, where necessary to establish its liability, is sufficiently pleaded, although the words of the form do not expressly aver that the carrier was negligent.⁷⁹

§ 2074. Amendments.—The general rules as to amendments of pleadings in other civil actions at law apply in cases of amendments of pleadings in actions against a common carrier for loss of or injury to live stock delivered to it for transportation. An amendment can not be allowed where it states an

Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

Iowa.—Dorr Cattle Co. v. Chicago, etc., R. Co., 128 Iowa 359, 103 N. W. 1003.

Kentucky.—Louisville, etc., R. Co. v. Betz, 7 Ky. L. Rep. 606.

Michigan.—Great Western R. Co. v. Hawkins, 18 Mich. 427.

Texas.—Missouri Pac. R. Co. v. Graves, 2 Texas App. Civ. Cas., § 676.

72. Louisville, etc., R. Co. v. Betz, 7 Ky. L. Rep. 606.

73. In an action by the shipper against a carrier, the allegation that the horse which defendant contracted to carry "broke through the floor of defendant's car, and was killed without any fault of plaintiff," does not amount to an allegation of the carrier's negligence. Louisville, etc., R. Co. v. Betz, 7 Ky. L. Rep. 606.

74. Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

75. Great Western R. Co. v. Hawkins, 18 Mich. 427.

76. Dorr Cattle Co. v. Chicago, etc., R. Co., 128 Iowa 359, 103 N. W. 1003.

77. St. Louis, etc., R. Co. v. Cavender, 170 Ala. 601, 54 So. 54.

78. **Negligence of agent or servant.**—In an action against a carrier, where the complaint stated a good cause of action for damages for the carrier's negligence in caring for live stock while held by it, pending the arrangement for its transportation, the addition as a part of one of the good counts of an averment of negligence also affecting the safe receipt and keeping of the live stock for shipment by alleging that a servant of the defendant operating a train negligently blew the whistle of his engine, as a proximate consequence of which the live stock was frightened and damaged, without alleging that the engineer was engaged in defendant's business when he blew the whistle, is good as against a demurrer to the entire count, in view of the statute which requires pleadings to be as brief as is consistent with clearness. St. Louis, etc., R. Co. v. Cavender, 170 Ala. 601, 54 So. 54.

79. Where a complaint against a carrier was in the form prescribed by Code, p. 946, negligence of the carrier is a legal implication where negligence is essential to fix liability, though the words of the form do not expressly aver negligence. Nashville, etc., R. Co. v. Parker, 27 So. 323, 123 Ala. 683.

entirely new cause of action or changes the form of the original action. Thus, where the original pleading states a cause of action *ex delicto*, the amendment, if it states a cause of action *ex contractu*, can not be allowed. So, also, if the pleading states a cause of action *ex contractu* it can not be amended if the proposed amendment states a cause of action *ex delicto*.⁸⁰ Where, however, the right of action stated and the proposed amendment are both based on tort or both on contract, the amendment is permissible.⁸¹ Plaintiff can not declare on a special contract with the carrier for a shipment of stock, and then, by amendment, claim that he is not bound by the terms of such special shipment, and add a new cause of action.⁸²

§ 2075. Answer.—The defendant's answer should not be argumentative. It should state his defenses in direct terms. An answer which pleads facts, which, by inference alone, set up a defense, is bad. Thus, in an action for injury to live stock in transit, the answer setting up by way of defense that the stock was delivered to the consignee in good condition, but not expressly denying the injury in transit, is demurrable.⁸³ Where the answer, in attempting to show that the value of the animal injured was less than that claimed by plaintiff, alleges the value of an animal exchanged for the one injured, before the injury, it is alleging mere facts from which may be inferred the value of the animal injured. Such a part of the answer may properly be stricken out.⁸⁴ In an action against an express company for damages for the death of a hog claimed to have been shipped under a special contract requiring defendant to transfer the hog in a covered wagon, by itself, allegations of the answer that the owner was present when the hog was loaded upon the transfer wagon and accompanied it upon the wagon, and that everything done in connection with its transfer was with his approval and without his protest, were proper to show a waiver of the alleged special contract.⁸⁵

Negligence of Shipper.—In an action against a carrier for damages to live stock in transit, that plaintiff's own act or negligence caused the damage may be shown under the general issue of not guilty; but, if mere contributory negligence

80. Amendments.—*Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

As to stating cause of action *ex delicto* or *ex contractu*, see ante, "Nature and Form of Action," §§ 2055-2058.

A declaration sounding in tort, seeking to recover from the defendant as a common carrier for the breach of its duty to furnish a suitable car for the transportation of live stock, can not be amended by setting up as the basis of recovery a special contract between the parties for the equipment of the car. *Gilleland v. Louisville, etc., R. Co.*, 119 Ga. 789, 47 S. E. 336.

Where a suit was brought against a railroad on a written contract for the shipment of live stock, the declaration could not be amended by alleging that the agents of the railroad company procured the contract by fraud and deceit as to the capacity and construction of the car to be used in the transportation of the stock—such representations not being in the written contract sued on—and that by reason of such deception the animals were badly crowded in loading, and were seriously damaged. The first suit was on a contract; the amendment was based on a tort. Especially was this the case where the contract was to be executed in the

county in which the suit was brought, and the fraudulent statements and loading occurred in another county. *Mitchell v. Georgia R. Co.*, 68 Ga. 644.

81. *Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

82. *Southern R. Co. v. Parramore*, 119 Ga. 690, 46 S. E. 822.

83. Answer.—*Ohio, etc., R. Co. v. Nickless*, 73 Ind. 382.

84. Where the petition in an action against a carrier for the loss of a stallion through defendant's negligence in shipping averred that the horse was purchased for breeding purposes, was young, highly bred, and well-gaited, and the answer denied these allegations, it was proper to strike from the answer an affirmative allegation that plaintiff traded for him an old horse, which he knew was without value, and without seeing the stallion, since such allegation was only material on the question of the value of the stallion, which could be shown under the denials, and the value of the horse traded was not in issue. *Galliers v. Chicago, etc., R. Co.*, 89 N. W. 1109, 116 Iowa 319.

85. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

is relied on as a defense, it must be specially pleaded.⁸⁶ In pleading contributory negligence, the answer must allege that but for the contributory negligence the injury would not have occurred.⁸⁷

Striking Out Unnecessary Averments.—Where the answer contains unnecessary or improper averments the defendant is not prejudiced by the striking out of such averments by the court.⁸⁸ Where, however, the allegation states a proper defense, he is prejudiced if the court wrongfully strikes it out.⁸⁹

§ 2076. Issues Raised by Pleading.—An issue is raised where the pleadings of one party denies matters which are alleged by the pleadings of the other. All matters alleged in the petition are put in issue by the general denial in the answer. Thus, where the petition states the purport of an agreement under which live stock is shipped, the general denial of the defendant puts the agreement in issue.⁹⁰ Where a petition alleges that stock were damaged by delay in delivery and by lack of proper care and attention, and the answer denies lack of care and sets up matter in justification of the delay, the question of negligence in the delay and failure to exercise a proper degree of care is put in issue.⁹¹ Where the complaint alleges the injury of the stock and the negligence of the carrier, the contributory negligence of the shipper is not put in issue by a general denial in the answer.⁹²

86. Negligence of shipper.—Seaboard, etc., *R. Co. v. Rentz*, 60 Fla. 449, 54 So. 20; *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117; *Nelson v. Chicago, etc., R. Co.*, 78 Neb. 57, 110 N. W. 741.

87. In an action against a railroad company for injuries to a horse in unloading him from the car, an answer alleging that plaintiff's agents by their negligence, and by reason of the wildness of the horse, suffered him to rear and fall, and also denying all injury, but not alleging that but for this negligence the horse would not have fallen, does not set up the defense of contributory negligence, and no reply is necessary. *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 9 S. W. 698, 10 Ky. L. Rep. 554.

88. Striking out unnecessary averments.—*Galliers v. Chicago, etc., R. Co.*, 116 Iowa 319, 89 N. W. 1109.

In an action by a shipper of live stock against the carrier, where the gravamen of plaintiff's complaint is the delay in delivery, the fact that plaintiff did not send a man along to feed and water the stock, could, without specific averment, have been proved by defendant for the purpose of reducing the amount of recovery, and therefore defendant was not prejudiced by the action of the court in striking out a paragraph of the answer specifically averring that fact. *Louisville, etc., R. Co. v. Thompson*, 13 Ky. L. Rep. 973.

89. In an action against an express company for damages for the death of a hog shipped, in which the petition relied on a special contract to transfer the hog, by itself, to the car in a covered wagon, and alleged the breach thereof, the answer alleged that the contract of shipment required the shipper to transship the animal at his own risk and to furnish the neces-

sary laborers for loading and unloading, and to cause attendants to accompany the shipment on free transportation furnished, who should be regarded as the shipper's servants; and further alleged that the owner of the hog was present when it was loaded in the transfer wagon and accompanied it without protesting or objecting to anything done while it was being transferred. Held, that the purpose of the allegations was to relieve the carrier from liability for injury in transferring the hog until it was shown by the shipper that the loss was not through his fault, so that they presented a defense, and were improperly stricken. *Winn v. American Exp. Co.*, 149 Iowa 259, 128 N. W. 663.

90. Issues raised by pleading.—As to admissibility of evidence under pleading, see post, "Admissibility under Pleadings," § 2088, and cross references in foot note to that section. As to issue that must be proved, see post, "Presumption and Burden of Proof," §§ 2079-2086.

Where, in an action against a carrier for injuries to cattle shipped, the complaint alleged that the cattle were shipped pursuant to an agreement, and assumed to state its purport in a general way, such agreement was properly put in issue by defendant's general denial. *Quinn v. Pennsylvania R. Co.*, 99 N. Y. S. 980, 114 App. Div. 663.

91. *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192, 9 Am. & Eng. R. Cas., N. S., 669.

92. *Seaboard, etc., R. Co. v. Rentz*, 60 Fla. 449, 54 So. 20; *Nelson v. Chicago, etc., R. Co.*, 78 Neb. 57, 110 N. W. 741.

In an action against a carrier for injury sustained by stock in shipment, evidence that injury to the stock was due to the fault and negligence of plaintiffs to feed

§ 2077. **Proof.**—Matters of proof have been treated along with other matters with which they are so closely related. The reader is referred to those sections treating evidence. See footnote.⁹³

§ 2078. **Variance.**—The evidence must correspond with the theory of the complaint; for a party can not declare upon one theory and recover upon another, and so an action for refusal to carry stock is not sustained by proof that the stock was not shipped because in loading them several escaped because of a defective stock chute and pen.⁹⁴ Where the complaint alleges one kind of negligence, and the proof is of another kind of negligence, there is a fatal variance.⁹⁵

Variance as to Car.—Where the complaint averred that the animals were injured after they had been transferred to the cars of the defendant carrier, and the proof was that they were injured while the car of another carrier, in which they were contained, was being switched preparatory to the transfer of the animals to defendant's car, the variance was held fatal, although the injury was due to the negligence of defendant.⁹⁶ It has been held, however, that where the proof in an action for damages to live stock was that plaintiff shipped 247 lambs in car No. 658165, a reference by defendant's witness to car No. 658135 is not a variance, where it appears that the car referred to by the witness contained 247 lambs shipped by plaintiff, and there is no proof that there were two loads of that number in the train sent by the same shippers and to the same

and take proper care of them is not admissible under the general denial, as it would be evidence of new matter which admits the injury complained of, and goes in avoidance and discharge of the cause of action. *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117.

93. As to matters which must be proved, or are presumed, see post, "Presumption and Burden of Proof," §§ 2079-2086. As to degree of proof required, see post, "Weight and Sufficiency," §§ 2095-2103.

94. **Variance.**—*Louisville, etc., R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163; *Ausk v. Great Northern R. Co.*, 10 N. D. 215, 86 N. W. 719.

95. As to necessity of alleging negligence to admit evidence of negligence, see post, "Admissibility of Evidence," §§ 2087-2094.

Where the complaint, in a shipper's action for injury to live stock, alleged injury occasioned by delays before a certain point was reached, but the proof was that there was no unnecessary delay up to that point, and also that thirteen head of the cattle were thrown down when the train rounded a curve, and that thirteen head had been injured in the pens, when unloaded for feed, by the negligence of the carrier, there could be no recovery for those twenty-six head, since the complaint alleged no such negligence as that proven. *Atchison, etc., R. Co. v. Baldwin*, 53 Colo. 426, 128 Pac. 453.

A shipper can not recover for damages to the shipment because of the carrier's failure to furnish a proper car, where that ground of negligence is not alleged in the declaration. *Moore v. Baltimore, etc., R. Co.*, 48 S. E. 887, 103 Va. 189.

Where, in an action against a railroad

for negligence in failing to transport plaintiff's cattle with reasonable diligence, there was no allegation of negligence in failing to keep in good condition stock pens at a certain point where the cattle were unloaded, but evidence that the condition of such stock pens was such that the cattle could not be fed during their confinement was admitted to explain the loss in weight of the cattle on arriving at their destination, the jury should have been instructed that the basis of the action was defendant's negligence in failing to exercise due care to forward the cattle, and that unless negligence in that respect was shown no recovery could be had, though defendant was negligent in maintaining the stock pens in such condition that the cattle could not be fed there. *St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

96. **Variance as to car.**—In an action against a railway company for injuries to live stock in the course of shipment, the complaint alleged that the injuries occurred while the stock was in defendant's charge, and loaded on its car. The proof showed that the stock had been shipped from Iowa to Denver in the car of another road; that from Denver to Pueblo said car was carried over defendant's road; that from Pueblo to its destination defendant's road was narrow gauge, and it was necessary to transfer the stock to one of defendant's narrow-gauge cars; and that while switching the cars at the stock yards, before the transfer was made, the stock was injured. Held, that the variance between the allegation in the complaint and the proof was fatal. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.

consignee.⁹⁷

Variance as to Contract of Shipment.—Under the rule that, if a plaintiff recover, he must do so upon and in accordance with the allegations of his complaint, a suit against a common carrier for a breach of its common-law duty in the transportation of live stock must fail upon proof that the shipment was made under a special contract.⁹⁸ Thus, where the suit is brought on the liability of the defendant as a common carrier, recovery can not be had on its liability as a warehouseman.⁹⁹ It has been held, however, that, where the complaint is based upon a special contract, and the proof is of an implied contract, or breach of defendant's duties as a common carrier, there is no variance but a failure of proof.¹ Under a petition averring that live stock was to be transported by defendant carrier from L. to T., which was beyond its terminus, and that the stock was injured between L. and N., the terminus of defendant's line, evidence that the stock was to be transported only to N. does not constitute a variance.²

Immaterial Variance.—Under statutes which provide that only a variance which would prejudice the rights of the other party shall be considered material, an allegation of an oral contract and proof of a written contract is immaterial.³ So under such a statute, when the complaint alleges an oral contract and a subsequent written contract, the oral contract being proved and the defendant relying on the written contract, there is no material variance.⁴

§§ 2079-2103. Evidence—§§ 2079-2086. Presumptions and Burden of Proof—§ 2079. In General.—In an action against a carrier for loss of or injury to live stock in transit, the pleadings, unless in its answer the carrier admits the loss or injury, leave a presumption in favor of the carrier. In

97. *McC Campbell v. Louisville, etc., R. Co.*, 150 Ky. 723, 150 S. W. 987.

98. **Variance as to contract of shipment.**—*Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; *Pennsylvania Co. v. Walker*, 29 Ind. App. 285, 64 N. E. 473; *Normile v. Oregon R., etc., Co.*, 41 Ore. 177, 69 Pac. 928.

Where a declaration alleges that defendant railroad company agreed to transport certain mules and deliver them uninjured at the place named, and that by carelessness the animals were injured, and it clearly appears that they were transported under a special contract at reduced rates, by which the railway did not undertake the entire management of the car, and did not undertake to transport them free from injury, and a special contract shows that plaintiff himself agreed to do many things essential to their safe transportation, the plaintiff can not recover, as the variance is fatal. *Dexter v. Seaboard, etc., Railway (Fla.)*, 45 So. 887.

99. *Normile v. Oregon R., etc., Co.*, 41 Ore. 177, 69 Pac. 928; *McC Campbell v. Louisville, etc., R. Co.*, 150 Ky. 723, 150 S. W. 987.

1. *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *Jeffersonville, etc., R. Co. v. Ensley*, 50 Ind. 378.

2. *Louisville, etc., R. Co. v. Wathen*, 22 Ky. L. Rep. 82, 49 S. W. 185.

3. **Immaterial variance.**—Civ. Code Prac., § 129, provides that no variance is material which does not mislead a party

to his prejudice. Section 130 provides that, where a variance is not material, the court may order an amendment. Section 134 provides that the court must in every stage of an action disregard any error or defect which does not affect the substantial rights of the adverse party. In an action against an initial carrier for injuries to live stock during transportation, plaintiff alleged an oral contract, but failed to establish such contract, and judgment in his favor was based on a written contract set up in defendant's answer. The evidence clearly showed that the injury occurred on defendant's line. Held, that the variance was immaterial. *Baltimore, etc., R. Co. v. Wood & Co. (Ky. App.)*, 114 S. W. 734.

4. Civ. Code Prac., § 129, provides that no variance between pleadings and proof is material which does not mislead a party to his prejudice. Section 131 provides that, if the allegation to which the proof is directed be unproved in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof. Held, that where, in an action against connecting carriers for injury to live stock, plaintiff alleged that a verbal contract of shipment was first made and that a written contract was subsequently signed, and proved that a verbal contract was made, and defendants relied on a written contract and proved that one was entered into, there was no variance or failure of proof. *Illinois Cent. R. Co. v. Curry*, 106 S. W. 294, 32 Ky. L. Rep. 513.

other words, the burden is on the shipper to show a prima facie case by proving the material allegations of his complaint, which are put in issue by the pleadings of the carrier.⁵ Until the shipper shows facts upon which may be based a finding to the contrary, it will be presumed that the carrier performed all of its duties in respect to the transportation of the live stock.⁶ Thus, in the absence of evidence to the contrary, it will be presumed that the animals were properly cared for during transportation.⁷

Complaint Stating Two or More Causes of Action.—When the complaint states two or more independent causes of action, proof of any one of which will entitle the shipper to recover, there is no necessity of proving all.⁸

Facilities for Furnishing Cars.—In an action against a railroad company for failure to have stock cars at certain stations at a certain time, the ability of the company to so furnish such cars, with ordinary diligence, upon the notice given, being according to the exigencies of transportation, peculiarly within the knowledge of such company and its agents the burden of proving its inability to do so is on the carrier.⁹

All Presumptions Rebuttable.—All presumptions, properly so called, are capable of being rebutted. A presumption that could not be rebutted would cease to be a presumption and become a positive rule of substantive law.¹⁰ In an action by a shipper for injuries to a horse, where there is proof that a slat in the car was broken during transportation and the horse injured, and where it was shown that one of the horses in the car had been kicking violently the presumption of negligence is rebutted.¹¹ That a horse died from natural causes, or was injured as an ordinary incident of handling a car of live stock, rebuts the presumption of negligence of the carrier, arising from the fact of injury while

5. Presumptions and burden of proof in general.—*Klair v. Philadelphia, etc., R. Co.*, 2 Boyce (25 Del.) 274, 78 Atl. 1085; *Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212; *McDowell v. Louisville, etc., R. Co. (Ky. App.)*, 113 S. W. 519; *Baltimore, etc., R. Co. v. Clift*, 142 Ky. 573, 134 S. W. 917; *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

As to proof of loss or injury in transit as satisfying this burden of proof, see post, "Loss of or Injury to Live Stock and Cause Thereof," §§ 2081-2086. As to the amount of evidence necessary to make a prima facie case against a carrier, see post, "Weight and Sufficiency," §§ 2095-2103.

6. *Peterson v. Chicago, etc., R. Co.*, 19 S. Dak. 122, 102 N. W. 595.

As to proof of loss or injury in transit as overcoming this presumption, see post, "Loss of or Injury to Live Stock and Cause Thereof," §§ 2071-2086.

7. In an action against a railroad for injuries to stock in transit it will be assumed, in the absence of evidence to the contrary, that the railroad's employees did their duty in watering the stock. *Peterson v. Chicago, etc., R. Co.*, 102 N. W. 595, 19 S. Dak. 122.

8. Complaint stating two or more causes of action.—Where the declaration in an action against a carrier charges delay and denial of opportunity to feed and water stock, plaintiff need not prove that the delay was wrongful if the denial was wrongful in view of the delay.

Smith v. Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440.

In an action against a carrier for alleged injuries to a hog during transportation, plaintiff alleged, first, that the animal was handled so roughly by defendant and its agents that it became injured and died as a result thereof; second, that defendant and its agents handled the shipment so roughly as to break the crate in which the same was shipped, and then placed it in a crate having spikes protruding, against which the animal was thrown and thus injured. An amendment alleged that the animal had been injured by defendant in roughly handling the crate and letting it fall to the ground. Held, that the allegations were separate and independent averments, and that a failure to prove the alleged fall of the crate was not fatal to plaintiff's action. *Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212.

9. Facilities for furnishing cars.—*Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

10. All presumptions rebuttable.—As to the amount of evidence necessary to rebut a presumption, see post, "Weight and Sufficiency," §§ 2095-2103.

Upon the proof of loss of one animal and of damage to another, a presumption of negligence arises against the carrier. This presumption, however, is subject to be rebutted. *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

11. *Hayman v. Philadelphia R. Co.*, 8 N. Y. St. Rep. 86.

in the carrier's possession; the same rule applying to stock actually delivered to the consignee in a damaged condition.¹²

Presumptions Created by Statute.—Even presumptions created by statute are capable of being rebutted by proper evidence.¹³ Thus under a state statute providing that an injury to live stock, where two different kinds are shipped in the same car, shall be presumed to result from the mixed shipment, the presumption is rebuttable.¹⁴

§ 2080. Contracts and Relation Created between Parties.—As a general rule, a carrier, in accepting live stock for transportation, there being no valid contract to the contrary, is presumed to have accepted them under duties and liabilities of a common carrier.¹⁶ Where, however, one of the parties claims that the stock was shipped under special contract, the burden of proving such a contract is on the party asserting its existence.¹⁷ As to burden of proving special contracts limiting the liability of the carrier, the reader is referred to the chapter on "Limitations of Liability,"¹⁸ Where the action against a carrier is for damages on tort, the shipper is not required to prove a contract, either oral or written, and is only required to prove that the stock was received for shipment and that there was a violation of the carrier's duty.¹⁹

Route on Which Stock to Be Shipped.—Where a carrier of live stock agrees to carry the drover, who is to accompany the stock, over a certain route, it will be presumed that the parties intended that the stock was to be transported over the same route and the burden is on the carrier of showing the contrary.²⁰

Authority of Agent Making Contract.—An agent of a railroad company is presumed to have such authority as such agents generally exercise. Station agents are presumed to have authority to make contracts for the transportation of such live stock as the carrier generally receives or holds itself out as willing to receive. He may also be presumed to have authority to do whatever is necessary to forward such animals. The burden rests upon the carrier to show any limitation of such implied authority.²¹ An agent at one station, however, is

12. *Jones v. Atlantic, etc., R. Co.*, 148 N. C. 449, 62 S. E. 521.

13. **Presumptions created by statute.**—*Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524, 56 S. W. 453.

14. *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524, 56 S. W. 453.

16. **Contracts and relations between parties.**—*Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

As to carriers of live stock on common carriers, see ante, "Rights, Duties and Liabilities," chapter 19.

17. Where, in an action against a common carrier to recover damages arising from delay in the transportation and delivery of live stock, the complaint is based upon a special contract, the plaintiff can not sustain his action by proof of a breach of an implied contract, or of the legal duty of the defendant as a common carrier, to transport the stock in a reasonable time. In such case, there would be, not a variance, but a failure of proof. *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *Jeffersonville, etc., R. Co. v. Ensley*, 50 Ind. 378.

18. See ante, "Limitation of Liability," chapter 14.

19. *St. Louis, etc., R. Co. v. Wilson*, 85 Ark. 257, 107 S. W. 978.

20. **Route on which stock to be shipped.**

—Defendant contracted to transport plaintiff's live stock from a point in Utah to Chicago, and made a separate contract for the transportation of plaintiff's servant to care for the stock, agreeing to carry him by the way of Omaha. The stock was carried by another route, thereby preventing plaintiff from selling them in the Omaha market. In an action for plaintiff's damage, occasioned by failure of defendant to carry the stock to Omaha, held, that the transportation of the servant by the way of Omaha implied an intention to carry the stock through or to the same place. *Sharp v. Clark*, 13 Utah 510, 45 Pac. 566.

21. **Authority of agent making contract.**

—Station agents are presumed to have power to make contracts for the transportation of freight and to do whatever is necessary to forward it, and where an agent at a station on a railroad holding itself out as a carrier of live stock receives into the carrier's stock yards cattle delivered there for future shipment he must be taken, *prima facie* at last, as acting within the scope of his duty. *St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110.

not presumed to have authority to make contracts in reference to shipments of live stock to be made from another station of the same railroad, and the shipper asserting such authority has the burden of providing it.²²

Ratification of Contract Made by Agents.—When a carrier furnishes cars under an unauthorized contract by an agent, it is presumed to know the terms of the contract so as to render the ratification of the contract binding.²³

§§ 2081-2086. Loss of or Injury to Live Stock and Cause Thereof—
§ 2081. In General.—In sustaining his burden of proving a prima facie case against the carrier, the shipper must prove the loss of or injury to the animals shipped.²⁴ He must also show the extent of the injury and the amount of damages caused thereby.²⁵ Even from the proof of the wrong or negligence of the carrier there is no presumption of injury to the shipper. Proof of delay does not relieve the shipper from the burden of proving injury therefrom.²⁶ The shipper must show that the act of the carrier, relied on in the pleadings, was the proximate cause of the injury.²⁷

Presumptions Must Be Rebutted.—Where the plaintiff's evidence is sufficient to make a prima facie case against the carrier, the burden is cast on the carrier to rebut the presumption arising therefrom, or to show facts which will relieve it of liability.²⁸

22. The law raises no presumption that the local agent of a railway company at one station has any authority to make a contract for a shipment from another station, and, where it is claimed that such authority exists, the burden of proving it rests on the party claiming the existence of such authority. *McManus v. Chicago, etc., R. Co.*, 138 Iowa 150, 115 N. W. 919.

23. Ratification of contracts made by agent.—In an action to recover for loss from defendant's negligent delay in furnishing cars for transporting cattle to market, where defendant's traveling freight agent promised to furnish plaintiff cars, and telegraphed to its chief freight representative for the cars, and the cars were actually furnished, though after the time promised, it may be presumed that defendant was sufficiently informed of the agreement with plaintiff to furnish the cars to constitute its action in furnishing them a ratification of the promise of its freight agent, and a charge submitting the issue of ratification to the jury was proper. *St. Louis, etc., R. Co. v. Boshear* (Tex. Civ. App.), 108 S. W. 1032, judgment affirmed in 102 Tex. 76, 113 S. W. 6.

Defendant not being legally bound to furnish cars on another line, unless it had agreed to do so, and the rule of the other line requiring defendant to do so to insure the passing of the shipment to destination over defendant's line, the fact that it furnished cars to be so used at the instance of its agent would justify an inference that it acted upon the agent's agreement. Judgment (Tex. Civ. App.), 108 S. W. 1032, affirmed. *St. Louis, etc., R. Co. v. Boshear*, 113 S. W. 6, 102 Tex. 76.

24. Loss of injury to live stock and the cause thereof in general.—*Louisville, etc.,*

R. Co. v. Warfield, 30 Ky. L. Rep. 352, 98 S. W. 313; *Knowlton v. Chicago, etc., R. Co.*, 115 Minn. 71, 131 N. W. 858.

25. In an action against a carrier for injury to live stock in transit the burden is on the shipper to show the extent to which the animals were bruised or the extent of depreciation in weight and condition. *Knowlton v. Chicago, etc., R. Co.*, 115 Minn. 71, 131 N. W. 858.

26. In an action against a carrier for injuries to a shipment of mules, it appeared that the mules were left in feed pens at one point something like five hours, and at another point about seventeen hours, but there was no showing that while they were left remaining in the pens, they were not properly cared for, fed and watered. Held, that it was not to be presumed from such evidence that the delay was unusually or calculated to be injurious to the health of the mules. *Louisville, etc., R. Co. v. Warfield*, 98 S. W. 313, 30 Ky. L. Rep. 352.

27. Proximate cause of injury.—In an action against a railroad for injury to stock in transit, the burden is on plaintiffs to establish that the negligence alleged was the proximate cause of the injury. *Peterson v. Chicago, etc., R. Co.*, 102 N. W. 595, 19 S. Dak. 122.

28. Presumptions must be rebutted.—*Gilchrist v. Chicago & A. R. Co.*, 156 Ill. App. 17; *Jones v. Atlantic, etc., R. Co.*, 148 N. C. 449, 62 S. E. 521; *Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290.

As to evidence sufficient to make a prima facie case, see post, "Weight and Sufficiency," §§ 2095-2103.

§ 2082. **Time of Injury.**—The burden is on the shipper of showing that the injury to the animals was due to a cause arising while they were in the carrier's possession.²⁹ When, however, the shipper proves that the live stock were delivered by the carrier at the destination in an injured condition, and that they were in good condition when received by the carrier, a prima facie case is made that the injury occurred while the animals were in the possession of the carrier, and the burden is shifted to the carrier.³⁰ Mere proof of negligence and of an injury to the animals, where it does not appear that they were injured by the negligence, does not relieve the shipper from the burden of proving that the injury occurred after the act of negligence to which the injury is attributed.³¹

§§ 2083-2086. **Negligence—§ 2083. In General.**—While the burden of establishing a prima facie case rests primarily upon the shipper, proof of loss of or injury to live stock while in the possession of the carrier is generally enough to shift the burden upon the carrier. Proof of the delivery of the live stock in good condition to the carrier and the redelivery by the carrier in a damaged or injured condition is said to raise a presumption that the animals were injured while in the possession of the carrier, and that the injury was due to the negligence of the carrier.³² This rule does not apply, however, where the evidence proving the loss of or injury to the animals also shows that the

29. **Time of injury.**—A carrier is not liable for the death of stock several days after its arrival, where it does not appear whether the death was caused by disease contracted before or after carriage or from injury in transit. *McDowell v. Louisville, etc., R. Co.* (Ky. App.), 113 S. W. 519.

30. *Huggins v. Atlantic, etc., R. Co.*, 79 S. C. 341, 60 S. E. 694.

31. **Time of injury.**—It is incumbent on plaintiff in an action for injuries to live stock during shipment to show what injury, if any, resulted after the act of negligence by the company on which the claim for recovery is based, where it appears that most, if not all, of the injury was done before such act. *Heller v. Chicago, etc., R. Co.*, 66 N. W. 667, 109 Mich. 53, 63 Am. St. Rep. 541.

32. **Negligence in general.**—*Alabama.*—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117; *Southern Exp. Co. v. Ramey*, 164 Ala. 206, 51 So. 314.

Georgia.—*Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240, 17 R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Susong v. Florida, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566.

Indiana.—*Chicago, etc., R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

Iowa.—*Swiney v. American Exp. Co.* (Iowa), 115 N. W. 212; *Colsch v. Chicago, etc., R. Co.* (Iowa), 117 N. W. 281; *Mosteller v. Iowa Cent. R. Co.*, 153 Iowa 390, 133 N. W. 748.

Kentucky.—*Louisville, etc., R. Co. v. McCarty*, 9 Ky. L. Rep. 683; *C. N. O. & T. P. Ry. Co. v. Graves*, 11 Ky. L. Rep. 236; *Cincinnati, etc., R. Co. v. Kern*, 15

Ky. L. Rep. 656; *Adams Exp. Co. v. Walker*, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412; *Louisville, etc., R. Co. v. Brown*, 28 Ky. L. Rep. 772, 90 S. W. 567; *Cincinnati, etc., R. Co. v. Greening*, 30 Ky. L. Rep. 1180, 100 S. W. 825; *Louisville, etc., R. Co. v. Spalding, etc., Co.*, 8 Ky. L. Rep. 355; *Louisville, etc., R. Co. v. McClintock*, 151 Ky. 455, 152 S. W. 253.

Minnesota.—*Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

Mississippi.—*Jordan v. Gulf, etc., R. Co.*, 102 Miss. 21, 58 So. 595.

Missouri.—*McFall v. Wabash R. Co.*, 177 Mo. App. 477, 94 S. W. 570; *Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151.

Nevada.—*Chicago, etc., R. Co. v. Slatery*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825; *Church v. Chicago, etc., R. Co.*, 81 Neb. 615, 116 N. W. 520.

North Carolina.—*Jones-Lane Co. v. Atlantic, etc., R. Co.*, 148 N. C. 580, 62 S. E. 701.

Pennsylvania.—*Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466; *Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884.

South Carolina.—*Mayfield v. Southern Railway*, 84 S. C. 393, 66 S. E. 405.

Tennessee.—*Louisville, etc., R. Co. v. Wynn*, 88 Tenn. (4 Pickle) 320, 14 S. W. 311.

Under Ga. Civil Code, §§ 2264, 2321, in the trial of an action brought against a carrier of live stock to recover damages for loss of or injury to stock which he had undertaken to transport, after proof of loss or injury there is a presumption of law that he was at fault. *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240, 17 R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7.

carrier was not negligent.³³ When the proof of gross negligence or wanton or willful injury to the live stock is necessary to establish the case of the shipper, proof of injury to the animals while in transportation will not shift the burden of proof to the carrier.³⁴ Where injuries to live stock in transit are such that they are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the court can not assume that the injuries were due to the latter cause.³⁵

Sickness of Animals.—So, also, where a recovery is sought for the sickness of live stock in transit, or for death resulting from sickness, the burden is on the plaintiff to prove some independent negligence of the carrier as the cause thereof.³⁶

Condition of Car.—Proof by the shipper of the breaking of the car in which the stock was being shipped, and the injury therefrom, is sufficient to shift the burden to the carrier.³⁷ When, however, the shipper accepts as in good condition the cars furnished by the carrier, and his action is based on the car being defective, he must prove the defects.³⁸

Injuries from Fire.—When live stock are injured by the burning of the car in which they are being transported, the burden is on the carrier to excuse itself from liability.³⁹ So if a railroad company employed in the transportation of live stock permits straw or other combustible material to be used on the cars and a fire originates therefrom by which the animals are injured, a presumption of negligence arises against the company, which it must rebut in order to relieve itself from liability for the loss.⁴⁰

§ 2084. Burden on Carrier to Prove That It Was Not Negligent.—When the shipper has thus shifted the burden of proof to the carrier, by proving the delivery to the carrier of the animals in good condition, and the subsequent redelivery in an injured condition, the carrier has the burden of showing that it was not negligent, and that the injury was due to a cause that will relieve it from liability.⁴¹ In showing that the injury was occasioned in such a

33. *Wente v. Chicago, etc., R. Co.*, 79 Neb. 175, 112 N. W. 300.

34. *Mayfield v. Southern Railway*, 84 S. C. 393, 66 S. E. 405.

35. *Hussey v. Saragossa*, Fed. Cas. No. 6949, 3 Woods 380; *Lewis v. Pennsylvania R. Co.*, 71 N. J. L. 339, 59 Atl. 1117.

36. **Sickness of animals.**—*Louisville, etc., R. Co. v. Cecil*, 145 Ky. 271, 140 S. W. 186; *Illinois Cent. R. Co. v. Word*, 149 Ky. 229, 147 S. W. 949.

The burden being on plaintiffs to show that live stock shipped in the charge of their employee over defendant's line, in a car rented by them from another company, was injured by defendant's negligence, they can not recover where the probability that pneumonia, which caused the death of the stock, resulted from injuries received in the rough handling of the car, is no greater than that it was caused by exposure from transferring the stock from warm stables and transporting it in the car. *Louisville, etc., R. Co. v. Wathen*, 49 S. W. 185, 22 Ky. L. Rep. 82.

37. **Condition of car.**—*Adams Exp. Co. v. Hundley*, 145 Ky. 7, 139 S. W. 1084.

38. Where a contract by the shipper of a car load of mules recites that the shipper has examined the car, and found it safe and suitable, the burden is on him,

in an action for damages, to show that it was unsafe. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

In an action by a shipper for injuries to cattle, the burden of showing patent defect in a car accepted by him as sufficient was not sustained by evidence that the crack into which the animal caught its foot was a space between the slats of the car, three or four feet above the floor. *Williams v. Central, etc., R. Co.*, 43 S. E. 980, 117 Ga. 830.

39. **Injuries from fire.**—In an action for injuries to a live stock shipment caused by the burning of the car in which the stock was being transported, plaintiff showed the burning and damages, and that the fire was not caused by the negligence of his employee in charge of the stock, and it was held that a prima facie case had been made against the railroad company, and that, the company having failed to refute it, plaintiff was entitled to recover. *St. Louis, etc., R. Co. v. Farmer* (Tex. Civ. App.), 30 S. W. 1109.

40. *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454; *Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466.

41. **Burden on carrier to prove that it was not negligent.**—*United States*.—*Missouri Pac. R. Co. v. Texas, etc., R. Co.*,

way as not to render it liable, the carrier need not prove the exact cause of injury.⁴² If the carrier, in proving that it was not negligent, introduces evidence tending to show that the injury to plaintiff's live stock was attributable to the vitality or vice of the animals, the burden is cast upon the plaintiff (shipper) to show that the loss or injury was in part due to human agency.⁴³ When the plaintiff has shown that the loss of or injury to his live stock, sus-

41 Fed. 913, 18 Am. & Eng. R. Cas., N. S., 412.

Alabama.—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117; *Southern Exp. Co. v. Ramey*, 164 Ala. 206, 51 So. 314.

Florida.—*Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

Georgia.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240, 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267.

Illinois.—*Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *Toledo, etc., R. Co. v. Durkin*, 76 Ill. 395; *Gilchrist v. Chicago & A. R. Co.*, 156 Ill. App. 117.

Indiana.—*Chicago, etc., R. Co. v. Woodward*, 164 Ill. 360, 72 N. E. 558, 73 N. E. 810, petition for rehearing denied in 78 N. E. 810.

Iowa.—*Chapin v. Chicago, etc., R. Co.*, 79 Iowa 582, 44 N. W. 820; *McCoy v. K. & D. M. R. Co.*, 44 Iowa 424; *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454. So held in *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192, 9 Am. & Eng. R. Cas., N. S., 669; *Powers v. Chicago, etc., R. Co.*, 130 Iowa 615, 105 N. W. 345; *Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212; *Colsch v. Chicago, etc., R. Co. (Iowa)*, 117 N. W. 281; *Moore v. Chicago, etc., R. Co.*, 151 Iowa 353, 131 N. W. 30; *Mosteller v. Iowa Cent. R. Co.*, 153 Iowa 390, 133 N. W. 748.

Kentucky.—*Ohio, etc., R. Co. v. Tabor*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 17 Ky. L. Rep. 568, 34 L. R. A. 685; *Adams Exp. Co. v. Walker*, 119 Ky. 121, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412; *Louisville, etc., R. Co. v. Brown*, 28 Ky. L. Rep. 772, 90 S. W. 567; *Cincinnati, etc., R. Co. v. Greening*, 30 Ky. L. Rep. 1180, 100 S. W. 825; *Adams Exp. Co. v. Hundley*, 145 Ky. 7, 139 S. W. 1084; *Illinois Cent. R. Co. v. Word*, 149 Ky. 229, 147 S. W. 949; *Louisville, etc., R. Co. v. McClintock*, 151 Ky. 455, 152 S. W. 253.

Maine.—*Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945.

Massachusetts.—*Evans v. Fitchburg R. Co.*, 111 Mass. 142, 15 Am. Rep. 19.

Minnesota.—*Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 40 Am. & Eng. R. Cas. 104, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. Rep. 722; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 31 Am. & Eng. R. Cas. 86, 33 N. W. 7, 1 Am. St. Rep. 692; *Smith v. Great Northern R. Co.*, 92 Minn. 11, 99

N. W. 47; *Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

Mississippi.—*Jordan v. Gulf, etc., R. Co.*, 102 Miss. 21, 58 So. 595.

Missouri.—*Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408.

Montana.—*Nelson v. Great Northern R. Co.*, 28 Mont. 297, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, 72 Pac. 642.

Nebraska.—*Church v. Chicago, etc., R. Co.*, 81 Neb. 615, 116 N. W. 520.

New York.—*Giblin v. National Steamship Co.*, 28 N. Y. S. 69, 8 Misc. Rep. 22, 58 N. Y. St. Rep. 311.

North Carolina.—*Jones-Lane Co. v. Atlantic, etc., R. Co.*, 148 N. C. 580, 62 S. E. 701.

South Carolina.—*Walker v. Southern R. Co.*, 76 S. C. 308, 56 S. E. 952; *Huggins v. Atlantic, etc., R. Co.*, 79 S. C. 341, 60 S. E. 694.

Tennessee.—*Louisville, etc., R. Co. v. Wynn*, 88 Tenn. (4 Pickle) 320, 14 S. W. 311.

Texas.—*Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

A carrier, receiving for transportation live stock in good condition, has the burden of proving that its failure to deliver the same in good condition was due to some inevitable accident, or disease, weakness or other defect inhering in the stock, and not chargeable to any want of due care on its part. *Moore v. Chicago, etc., R. Co.*, 151 Iowa 353, 131 N. W. 30.

The burden was on an express company sued for death of young trout to show why it did not deliver the shipment in as good condition as that in which it was received, in the absence of a special contract limiting the company's duty. *Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

42. But after the carrier has thus shown that the loss was due to the vitality of the freight, it is not, as a general rule, required to show the exact cause of the injury. *Burke v. United States Exp. Co.*, 87 Ill. App. 505; *Illinois Cent. R. Co. v. Teams*, 75 Miss. 147, 21 So. 706; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105.

43. *Hussey v. Saragossa*, Fed. Cas. No. 6,949, 3 Woods 380; *Griffin v. Wabash R. Co.*, 115 Mo. App. 549, 91 S. W. 1015; *Hance v. Pacific Exp. Co.*, 66 Mo. App. 486; S. C., 48 Mo. App. 179; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670.

tained while in the carrier's custody, was attributable to human agency, the burden is upon the carrier to excuse itself from liability; and unless this burden is satisfactorily sustained it can not escape liability.⁴⁴

§ 2085. Burden of Proving Negligence on Shipper Accompanying Stock.—Where the shipper or his agent accompanies the shipment of live stock for the purpose of taking proper care of the animals, the reason for placing on the carrier the burden of proving the cause of the injury ceases to exist. The person accompanying the stock is in a position to learn the cause of the injury; he can testify as to the cause of the injury better than any one else. Hence the burden is now on the shipper of showing that the injury occurred under such circumstances as to render the carrier liable.⁴⁵ Where the shipper

44. Alabama.—Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649.

Illinois.—Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; Adams Exp. Co. v. Bratton, 106 Ill. App. 563; Burke v. United States Exp. Co., 87 Ill. App. 505.

Kentucky.—Louisville, etc., R. Co. v. Brown, 28 Ky. L. Rep. 772, 90 S. W. 567.

Louisiana.—Kirk v. Folsom, 23 La. Ann. 584; Mahon v. Olive Branch, 18 La. Ann. 107; Price, etc., Co. v. Uriel, 10 La. Ann. 413.

Michigan.—Bonfiglio v. Lake Shore, etc., R. Co., 125 Mich. 476, 84 N. W. 722.

Minnesota.—Boehl v. Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

Missouri.—Crow v. Chicago, etc., R. Co., 57 Mo. App. 135; George v. Chicago, etc., R. Co., 57 Mo. App. 358.

New York.—Hayman v. Philadelphia R. Co., 8 N. Y. St. Rep. 86.

Tennessee.—Louisville, etc., R. Co. v. Wynn, 88 Tenn. (4 Pickle) 320, 14 S. W. 311.

Texas.—Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239.

45. Burden of proving negligence on shipper accompanying stock.—**Arkansas.**—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Florida.—Atlantic, etc., R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 11 Am. St. Rep. 116.

Iowa.—Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192, 9 Am. & Eng. R. Cas., N. S. 669; McManus v. Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919; Westphalen v. Atlantic, etc., R. Co., 152 Iowa 232, 132 N. W. 57; Wilke v. Illinois Cent. R. Co., 153 Iowa 695, 133 N. W. 746, Ann. Cas. 1913E, 308; Mosteller v. Iowa Cent. R. Co., 153 Iowa 390, 133 N. W. 748; Hanley v. Chicago, etc., R. Co., 154 Iowa 60, 134 N. W. 417.

Kentucky.—Louisville, etc., R. Co. v. Hedger (Ky.), 9 Bush 645, 15 Am. Rep. 740; Louisville, etc., R. Co. v. Spalding, etc., Co., 8 Ky. L. Rep. 355; Louisville, etc., R. Co. v. Martin, 8 Ky. L. Rep. 432; Cincinnati, etc., R. Co. v. Grover, 11 Ky. L. Rep. 236; Illinois Cent. R. Co. v. Word, 149 Ky. 229, 147 S. W. 949; McCampbell

v. Louisville, etc., R. Co., 150 Ky. 723, 150 S. W. 987; Crowley v. Louisville, etc., R. Co., 7 Ky. L. Rep. 743.

Missouri.—McBeath v. Wabash, etc., R. Co., 20 Mo. App. 445; Clark v. St. Louis, etc., R. Co., 64 Mo. 440.

Nebraska.—Cleve v. Chicago, etc., R. Co., 77 Neb. 166, 108 N. W. 982, 15 Am. & Eng. Ann. Cas. 33.

Pennsylvania.—Needy v. Western Maryland R. Co., 22 Pa. Super. Ct. 489; Trexler v. Baltimore, etc., R. Co., 28 Pa. Super. Ct. 198.

Where the shipper of live stock or his agent assumes to take care of the stock during its transportation, and it is found injured on arrival, the burden of proof, under Laws 1891, p. 113, c. 4071, is on the shipper to prove that the injury was caused by the running of the locomotives, or cars or other machinery of the defendant, before the burden shifts to the defendant to show that the injury was not the result of any negligence on its part. Atlantic, etc., R. Co. v. Dexter, 39 So. 634, 50 Fla. 180, 111 Am. St. Rep. 116.

Where an agent of a shipper of live stock accompanied the shipment during a part of the transportation to care for it, and the only undue exposure to heat occurred during that time, the shipper suing the carrier for injuries to the stock from the exposure to heat had the burden of proving that the exposure was the result of the carrier's negligence without the fault of the agent. Wilke v. Illinois Cent. R. Co., 153 Iowa 695, 133 N. W. 746, Ann. Cas. 1913E, 308.

In an action to recover the loss of a horse shipped under a limited liability contract, the burden of proof is on the plaintiff, where it appears that the horse was killed in the burning of a car in which it was being transported, and that the plaintiff's agent in charge of the horse was in the car at the time of the fire and had control of the disposition of the straw and hay in the car. Trexler v. Baltimore, etc., R. Co., 28 Pa. Super. Ct. 198.

A shipper of live stock, who agreed to load, unload, and reload, and feed, water, and tend the stock at his own risk, has the burden of proving that an injury to the stock occurred through the negligence

thus accompanies his stock, he can not satisfy the burden of proving the cause of the injury by proving his own freedom from negligence.⁴⁶ When the injury to the animals occurred under such circumstances as to render it impossible for the shipper accompanying them to know the cause of the injury, the burden remains on the carrier to show the cause of the injury. Thus, where the shipper was required to remain in the caboose, and the injury complained of was from the cars catching on fire, the carrier must show that the fire was not due to its negligence.⁴⁷ When the shipper shows a breach of the carrier's duty and an injury resulting therefrom, he has satisfied his burden of proof.⁴⁸ Thus proof that the injury was due to the carrier's failure to provide proper facilities for watering and feeding the stock shifts the burden back to the carrier to excuse such failure.⁴⁹

Shipper Failing to Accompany Stock as Agreed.—Where the shipper agrees to accompany the stock, but fails to do so, if the carrier accepts the stock knowing that he would not go, that being a waiver of his agreement to go, the burden of proving the cause of an injury in transit remains on the carrier.⁵⁰ Even when the carrier accepts the shipment in ignorance of the shipper's intention of not accompanying it, it is believed that the carrier has the burden of showing the cause of an injury resulting during transit.⁵¹

§ 2086. Burden on Carrier to Excuse Delay.—Proof of failure to deliver cattle at place of destination within the usual or schedule time establishes a prima facie case of negligence, and makes it incumbent upon the railroad company to justify the delay.⁵² So, also where there is unreasonable delay on

of the carrier, and not from a failure on his part to perform the duties assumed by him. *Bartelt v. Orgon R., etc., Co.* (Wash.), 106 Pac. 487.

46. *Hanley v. Chicago, etc., R. Co.*, 154 Iowa 60, 134 N. W. 417; *Mosteller v. Iowa Cent. R. Co.*, 153 Iowa 390, 133 N. W. 748.

47. A contract of shipment contained the following clause: "All persons in charge of live stock will be passed on the train with and to take care of the stock, and will be expected to ride in the caboose attached to the train." Plaintiff, who accompanied the train, was accidentally left at a station. Afterwards the car in which his stock and goods were caught fire, and were destroyed. Held, that an instruction that the burden was upon plaintiff to show, by a preponderance of the testimony, that his loss did not occur by reason of his failure to remain upon the train, was properly refused. *Faust v. Chicago, etc., R. Co.*, 73 N. W. 623, 104 Iowa 241, 65 Am. St. Rep. 454.

48. *Iowa*.—*Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454.

Minnesota.—*Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

Montana.—*Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642, 9 R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

South Carolina.—*Crawford v. Southern R. Co.*, 56 S. C. 136, 34 S. E. 80.

A shipper of live stock who accompanies the shipment to give the stock care and attention has the burden of showing that the injury to the cattle during transporta-

tion was due to some fault of the carrier, but a shipper who shows a fault of the carrier and injury proximately resulting therefrom establishes his case. *Westphalen v. Atlantic, etc., R. Co.*, 152 Iowa 232, 132 N. W. 57.

49. *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192, 9 Am. & Eng. R. Cas., N. S., 669.

50. **Shipper failing to accompany stock as agreed.**—*Louisville, etc., R. Co. v. Martin*, 8 Ky. L. Rep. 432; *Cincinnati, etc., R. Co. v. Kern*, 15 Ky. L. Rep. 656.

51. Where live stock is in good condition when delivered to the carrier, and it is injured while in its possession, the presumption is that the injury resulted from the carrier's negligence, unless the shipper or his agent was in actual charge, even though he agreed to go or send some one in charge. *Louisville, etc., R. Co. v. Spalding, etc., Co.*, 8 Ky. L. Rep. 355.

52. **Burden on carrier to excuse delay.**—*Alabama*.—*Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117.

Colorado.—*Estes v. Denver, etc., R. Co.*, 49 Colo. 378, 113 Pac. 1005.

Iowa.—*Tiller v. Chicago, etc., R. Co.* (Iowa), 112 N. W. 631.

Kentucky.—*Louisville, etc., R. Co. v. Hawley*, 10 Ky. L. Rep. 117; *Louisville, etc., R. Co. v. Lazarus*, 13 Ky. L. Rep. 461; *Illinois Cent. R. Co. v. Hobbs*, 14 Ky. L. Rep. 766; *Louisville, etc., R. Co. v. Smith*, 14 Ky. L. Rep. 814.

Maryland.—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

Texas.—*Texas, etc., R. Co. v. Smith*, 34

the part of a carrier in transporting live stock, and the stock, when delivered, is found to be in an unsound condition, the burden is on the carrier to show that such unsound condition is not due to the unreasonable delay.⁵³ Even when the shipper accompanies the stock, the burden is on the carrier to show the cause of a delay resulting in injury to the shipment of live stock.⁵⁴

§§ 2087-2094. Admissibility of Evidence—§ 2087. In General.—Facts to be admissible in evidence must have some probative value.⁵⁵

To Show Where Injury Occurred.—In an action against a carrier for injuries to a horse in transit, evidence that a bill was presented at the terminus of the journey for feeding the horse at an intermediate station, where it was unloaded for the purpose, was admissible as tending to show where the injury occurred.⁵⁶

To Show Owner's Consent to Unloading Animals.—In an action against a carrier for injuries to a horse while in transit, caused by the horse being unloaded for feeding, where plaintiff testified that such unloading was without his consent, evidence that plaintiff paid the bill for feeding the horse was competent as tending to show that the horse was in fact unloaded with plaintiff's consent.⁵⁷

Similar Agreements of Agent as Showing Agent's Authority.—Evidence that similar agreements of a traveling freight agent to furnish cars at points on other lines for through shipments to points on his line were acted upon by the carrier tends to show that the making of such agreements was within the agent's actual authority.⁵⁸

Showing Verbal Agreement.—A shipper of live stock may testify as to a verbal agreement as to the route on which the stock was to have been shipped,

Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

West Virginia.—*Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871; *Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290.

A delay of nine hours in transporting live stock a distance of seventy-two miles, whereby the stock is exposed to the heat of the day, instead of having been carried at night, raises a presumption that the carrier was negligent. *Louisville, etc., R. Co. v. Lazarus*, 13 Ky. L. Rep. 461.

In an action by a shipper against a live-stock carrier, an unexplained delay of 34 hours in running a distance of about 500 miles raises the presumption that defendant was guilty of negligence, and it must account for the delay. *Illinois Cent. R. Co. v. Hobbs*, 14 Ky. L. Rep. 766.

In an action against a carrier for delay in transporting and delivering cattle, it is not essential that plaintiff prove the delay to have resulted from some independent specific act of negligence. *Baltimore, etc., R. Co. v. Whitehill*, 64 Atl. 1033, 104 Md. 295.

^{53.} *Richmond, etc., R. Co. v. Trousdale & Sons*, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69.

^{54.} In an action by the shipper against a live-stock carrier, the negligence complained of consisted in the carrier's failure to move a double-deck car load of lambs at the time it was agreed they should be

moved, and in allowing them to remain in the cars, and away from destination, twelve hours longer than was usual and customary. It was shown that the train, of which the car containing the stock was a part, was off the track, but why it was off, and what steps were taken to get it on again, were not shown. Held that, considering the kind of stock, the fact that the weather was hot, and the failure to transmit them at night, as would have been done if the train had moved on schedule time, and that there was no excuse offered for the failure, and none within the knowledge of the shipper's agent, there was sufficient evidence to impose the burden on the carrier to explain the delay, though the shipper's agent was, with the stock. *Louisville, etc., R. Co. v. Hawley*, 10 Ky. L. Rep. 117.

^{55.} **Admissibility of evidence in general.**—*Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

^{56.} **To show where injury occurred.**—*Nashville, etc., R. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

^{57.} **To show owner's consent to unloading animals.**—*Nashville, etc., R. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

^{58.} **Similar agreements of agent as showing authority.**—Judgment (*Tex. Civ. App.*), 108 S. W. 1032, affirmed. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

in showing the contents of a lost bill of lading,⁵⁹ or in explaining his conduct in leaving the car containing his stock before it had reached the place of destination.⁶⁰ Evidence of conversations between the shipper and the carrier's agent are admissible to show that a written contract for transportation was abandoned, and the shipment made under a subsequent parol contract.⁶¹ In the absence of fraud or mistake, however, a subsequent written contract for transportation of cattle, signed by the shipper, is the sole evidence of the agreement, though it differs from the previous oral agreement, and the shipper did not read it.⁶²

§ 2088. Admissibility under Pleadings.—Evidence is admissible only to prove issues raised by the pleading. Only such issue may be proved, and evidence to be admissible must be relevant to such an issue.⁶³ When an injury is alleged to have occurred at a certain place, there being no issue raised as to an injury at another place, evidence of an injury at the latter place is inadmissible.⁶⁵ So when an injury is alleged to have occurred at a given time and place, the defendant can not deny an injury at another time or place.⁶⁶ In an action against a carrier for injuries to cattle, evidence that plaintiff received the cattle at their destination in good order and condition is admissible under the general denial, as showing that they were not injured.⁶⁷ Evidence that the consignee of the shipment of live stock, relying upon the bill of lading stating the number of head of stock consigned, accepted a draft drawn by the consignor for the price of the stock, is relevant on an issue of the estoppel of the carrier to deny the bill of lading.⁶⁸ Where the plaintiff sues to recover the value of horses

59. Showing verbal agreement.—*Hanley v. Chicago, etc., R. Co.*, 154 Iowa 60, 134 N. W. 417.

60. *Hanley v. Chicago, etc., R. Co.*, 154 Iowa 60, 134 N. W. 417.

61. *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

62. *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13.

63. Admissibility under pleadings in general.—*Arkansas*.—*St. Louis, etc., R. Co. v. Vaughan*, 84 Ark. 311, 105 S. W. 573.

As to admissibility of evidence of delay under pleadings, see post, "Delay in Transportation," § 2091. As to admissibility to show items of damages under pleadings, see post, "Evidence Admissible to Show Damages Sustained," § 2092. As to admissibility of evidence of negligence under pleadings, see post, "Evidence as to Negligence," § 2094.

Florida.—*Atlantic, etc., R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Am. & Eng. Ann. Cas. 1047.

Georgia.—*Central, etc., R. Co. v. James*, 117 Ga. 832, 45 S. E. 223.

Iowa.—*Stone v. Chicago, etc., R. Co.*, 149 Iowa 240, 128 N. W. 354.

Kentucky.—*Burnside, etc., R. Co. v. Tupman*, 24 Ky. L. Rep. 2052, 72 S. W. 786; *Louisville, etc., R. Co. v. Thompson*, 144 Ky. 765, 139 S. W. 939.

Michigan.—*Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

Minnesota.—*Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4.

North Dakota.—*Ausk v. Great Northern R. Co.*, 10 N. Dak. 215, 86 N. W. 719.

Oklahoma.—*Atchison, etc., R. Co. v. Lambert (Okla.)*, 123 Pac. 428.

South Carolina.—*Smith v. Southern Railway*, 89 S. C. 415, 71 S. E. 989.

Texas.—*Gulf, etc., R. Co. v. McCorkquodale*, 71 Tex. 41, 9 S. W. 80; *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509.

An allegation in a complaint that defendant carrier wrongfully and negligently kept certain sheep confined on the cars without food and water and without unloading for an unusual time did not justify admission of evidence of negligence in failing to provide a proper yard for the sheep when unloaded. *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4.

65. In an action for the value of live stock, where there is no negligence alleged, and the only breach of contract pleaded is the loss of the live stock in New Mexico, is it error to admit evidence of injuries in Arizona; such issue not being raised by the pleadings. *Atchison, etc., R. Co. v. Lambert (Okla.)*, 123 Pac. 428.

66. *Louisville, etc., R. Co. v. Thompson*, 144 Ky. 765, 139 S. W. 939.

67. *Ohio, etc., R. Co. v. Nickless*, 73 Ind. 382.

68. Where the terminal carrier delivering to the consignee one hundred and twenty-seven hogs, while the bill of lading called for one hundred and fifty-seven, sought to escape liability for the shortage by proving that the car contained only one hundred and twenty-seven hogs when received by it, evidence that the consignee in reliance on the bill of lading paid a draft drawn on him by the shipper for one hundred and fifty-seven hogs, was

shipped on defendants' boat, and alleged to have died of a disease contracted in consequence of the negligence and want of skill of those in charge of the boat in removing the horses from one part of the boat to another, under the general denial it is competent for the defendants to give in evidence all circumstances going to relieve the act of removal of the character of a tortious violation of the contract between the parties, by assigning a reasonable necessity for such removal.⁶⁹

Special Inducement.—In an action for delay, that the shipper was induced to ship the stock because of his being told they would be shipped soon, the inducement not being put in issue, is inadmissible in evidence.⁷⁰

Written Contract Admissible.—Where, in an action for injuries to cattle shipped, the complaint alleged that they were shipped pursuant to an agreement, the purport of which plaintiff assumed to state in a general way, defendant, having disavowed the agreement so alleged, was entitled to introduce the written contract in evidence.⁷¹

§ 2089. Secondary Evidence.—When facts have probative value and are relevant to the issue, evidence of them, to be admissible, must be the best evidence available.⁷² Thus, upon an issue of the damage to the shipper of a trotting horse, evidence of the speed of the horse injured is relevant. Testimony concerning the speed, given by a person who claims information from a record published by a recognized trotting association and accepted and acted upon by those interested in such matters as authentic and official, is repugnant to the primary evidence rule and not admissible. To prove the record of the horse the original publication is better than the information a witness may receive therefrom.⁷³

§ 2090. Opinion Evidence.—Where the proper preliminary showing has been made, the opinion of an expert is admissible in evidence, in an action against a carrier.⁷⁴

§ 2091. Delay in Transportation.—To warrant the admissibility of evidence to show the delay of a carrier in the transportation of live stock, the question of delay must have been put in issue by the pleadings.⁷⁵ In an action against a carrier for injuries to cattle in shipment, alleged to have been due to the fact that they were kept too long in the cars without rest or feed or water, caused in part by the slow speed of the train, testimony that the time made was unusually slow for a stock train, and that the bad condition of the cattle on arrival

relevant on the issue of estoppel to deny the bill of lading and admissible. *Smith v. Southern Railway*, 89 S. C. 415, 71 S. E. 989.

69. *Elliott v. James Robb*, 12 La. Ann. 12.

70. Special inducement.—*St. Louis, etc., R. Co. v. Vaughan*, 105 S. W. 573, 84 Ark. 311.

71. Written contract admissible.—*Quinn v. Pennsylvania R. Co.*, 99 N. Y. S. 980, 114 App. Div. 663.

72. Secondary evidence.—*Pittsburgh, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

73. *Pittsburgh, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

74. Opinion evidence.—*Southern Pac. Co. v. Arnett*, 111 Fed. 849, 50 C. C. A. 17.

The opinion that the wound on a horse's head was inflicted eight or ten hours before the arrival of the train at G. was relevant on the issue of its in-

fiction when defendant's liability as a carrier had not terminated; there being evidence that such liability continued up to 8 hours before such arrival. *Alabama, etc., R. Co. v. Gewin & Son*, 5 Ala. App. 584, 59 So. 553.

In an action for injuries to stock arising from the carrier's negligence, one who for ten years has made car building his business, and given special attention to car wheels and their construction, is competent to give an opinion of the value of the hammer test as a means of discovering defects in car wheels. *Pittsburgh, etc., R. Co. v. Sheppard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

75. Delay in transportation.—Where, in an action for injury to stock in transit, plaintiff does not allege that the carrier was negligent in not transporting the stock with due dispatch, proof that there was unusual delay was inadmissible. *Central, etc., R. Co. v. James*, 45 S. E. 223, 117 Ga. 832.

at their destination was due to neglect and bad treatment during the journey, was germane to the issues involved.⁷⁶ In an action for damages to live stock in shipment on the ground of unreasonable delay, evidence that the stock was shipped on a way train, which necessitated many stops, is admissible, though defendants made no contract not to ship on such a train nor to transport at a given rate of speed.⁷⁷

Delay Before Signing Contract of Shipment.—Even though the written contract of shipment of live stock be not signed until some time after the stock was shipped, evidence of delay occurring before the signing of the contract is admissible in an action for delay in transportation.⁷⁸

Evidence of Time Necessary to Transport Another Shipment.—In an action for injury to live stock by delay in transit, evidence is admissible to show delay, that on the same day the plaintiff shipped another car of live stock to the same destination from a point more distant from the destination than the point of shipment of the car delayed, both points of shipment being on defendant's road, and that the car shipped from the more distant point arrived a day earlier than the other.⁷⁹ Evidence of the time required to ship cattle between two points not on defendant's line, though more widely separated than the points in question, is inadmissible.⁸⁰

Justifying Delay.—A common carrier, in an action against it for delay in transporting live stock, can not, in showing that the delay on the day of the injury was inevitable, give evidence that some days before the tracks had been so congested as to render delay inevitable.⁸¹

§ 2092. Evidence Admissible to Show Damages Sustained.—The plaintiff, in an action against a common carrier for injury to live stock, in showing the amount of damages which he has sustained by the negligence of the carrier, may show in evidence depreciation in the value of the stock.⁸² In

76. *Southern Pac. Co. v. Arnett*, 111 Fed. 849, 50 C. C. A. 17.

77. *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

78. **Delay before signing contract.**—P. sued a railroad company for delay in the transportation of cattle. The cattle were received February 12th, and on February 14th duplicate contracts were executed for their transportation. Held, that proof of delay on the part of the company before the signing of the written contracts was admissible. *Cleveland, etc., R. Co. v. Perkins*, 17 Mich. 296.

79. **Evidence of time necessary to transport another shipment.**—*Southerland v. Atlantic, etc., R. Co.*, 74 S. E. 102, 158 N. C. 327.

80. *McManus v. Chicago, etc., R. Co. (Iowa)*, 136 N. W. 769.

81. **Justifying delay.**—*Louisville, etc., R. Co. v. McClintock*, 151 Ky. 455, 152 S. W. 253.

82. **Evidence admissible to show damages sustained.**—See post, "Damages," §§ 2104-2108.

Arkansas.—*St. Louis, etc., R. Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894; *St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

Kentucky.—*Cincinnati, etc., R. Co. v. Logan*, 29 Ky. L. Rep. 1123, 96 S. W. 910.

Maryland.—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

Montana.—*Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

Ohio.—*Pittsburgh, etc., R. Co. v. Shepard*, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

Texas.—*Chicago, etc., R. Co. v. Hallsell*, 98 Tex. 244, 83 S. W. 15.

Virginia.—*Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

A complaint in an action against a carrier for delay in transporting cattle, which alleges that, on account of the negligent delay in transportation, the cattle shrank in weight and depreciated in price, and that plaintiff was informed that during the delay the market price for cattle declined in price, is sufficient to warrant the admission of evidence of depreciation in the market price of cattle, especially in the absence of an effort to make the complaint more definite and certain by demurrer or otherwise. *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

In an action against a carrier for damages from delay in delivering horses, etc., shipper over its road, and their consequent exposure, where plaintiff alleged that as a result of defendant's negligence he was compelled to feed, care for, and doctor the stock, and suffered loss and expense, testimony showing that after keeping one of the horses for a year, plaintiff lost \$200 on him counting the year's feed was competent. *Sanders v. Atlantic, etc., R. Co.*, 60 S. E. 526, 79 S. C. 219.

showing the depreciation in the value of the stock, the plaintiff may show the value of the animals at the time and place of shipments,⁸³ the condition in which they were received,⁸⁴ and the market value of the stock in such condition.⁸⁵ In an action against a railroad for injuries to horses in transportation, testimony of a witness, who had seen the horses immediately before shipment and six weeks afterwards, as to the condition of the horses, and their value at the latter date, was admissible; the length of time, while affecting the weight of the testimony, not affecting its admissibility.⁸⁶ It is also proper to admit evidence as to the difference between the market value of the live stock in the condition in which they were delivered and in the condition in which they would have arrived had they been properly transported.⁸⁷ And it is proper, in an action against a carrier for delay in transportation to show the difference in the market value of the stock on the day on which they were delivered and on the day on which they should have been delivered.⁸⁸ While it is the market value of the animals and not the amount actually received for them that is considered in estimating the amount of damages, it is sometimes proper to consider the selling price as evidence of the market value. Where there is sufficient evidence of the amount of damages, the carrier can not complain that it is not allowed to show the price the shipper received for the injured animals.⁸⁹ Where the shipper shows the selling prices of the live stock, he may also show that the prices which he received were the highest market prices of that day.⁹⁰ So, also, the carrier may show that the prices received by the plaintiff were not a fair test of the value of the animals injured.⁹¹ It has been held, however, that the defendant can not show that the loss in price was due to the live stock not being of the grade represented by plaintiff to the persons who had agreed to buy them.⁹²

^{83.} *Chicago, etc., R. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15; *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

^{84.} In an action against a railroad company for damage to cattle during transportation, the measure of damages being the difference between the market value of the animals, as sound as when received by the defendant, and their value in the condition in which it delivered them, evidence that, after they reached their destination, some died, and others aborted, is admissible, as showing the extent to which they had been injured at the time of delivery, and is not objectionable as allowing a double assignment of damages for the animals that died. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292.

^{85.} *Chicago, etc., R. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15; *Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033; *St. Louis, etc., R. Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894.

^{86.} *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

^{87.} *Chicago, etc., R. Co. v. Halsell*, 80 S. W. 140, 35 Tex. Civ. App. 126, judgment affirmed in 83 S. W. 15, 98 Tex. 244; *Reed v. Rome, etc., R. Co.*, 48 Hun 231, 16 N. Y. St. Rep. 58.

^{88.} In an action against a carrier for delay in transporting and delivering cattle in time for a certain market, evidence was admissible to show the difference in the market value of the cattle at the time the market was held and at the time of their delivery after the market. *Baltimore,*

etc., R. Co. v. Whitehill, 64 Atl. 1033, 104 Md. 295.

^{89.} It has been held that on the issue of damages for the negligence of a railroad in shipping cattle in cars erroneously placarded "Southern Cattle," thereby indicating that the cattle were diseased, evidence as to what the cattle subsequently sold for was properly excluded. *Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346, 3 L. R. A., N. S., 1092, affirming 117 Ill. App. 630.

^{90.} In an action against a carrier for delay in transporting and delivering cattle in time for a certain market, after plaintiff had testified as to the price received for the delayed cattle, it was proper for his attorney to ask him whether the prices received were the best prices. *Baltimore, etc., R. Co. v. Whitehill*, 64 Atl. 1033, 104 Md. 295.

^{91.} **Showing price received was not fair price.**—Where, in an action against a carrier for injury to colts while in transit, the shipper showed as his damages the difference in the value of the colts before and after the injury, by estimating their value at the point of shipment and what they brought at the point of destination at a sale, the carrier was entitled to show that the sale at the point of destination was a failure, and that the price offered for colts there was not a fair test of their value. *Cincinnati, etc., R. Co. v. Logan*, 96 S. W. 910, 29 Ky. L. Rep. 1123.

^{92.} Where damages are claimed for cost of keeping the cattle, and for loss by a depreciated market, it is not proper

Market Value at What Places May Be Shown.—The shipper may show the market value of the animals at the destination, and this is true even though they are not actually delivered there.⁹³ In an action against a carrier for damages to cattle of fine registered breeds, which the plaintiff had bought in Ohio and shipped to South Dakota, and thence to Arkansas, evidence of the market value in Ohio, South Dakota, and West Virginia was competent, in the absence of evidence of a nearer market for cattle of that class.⁹⁴ A witness, in testifying to the injury received by cattle, through the alleged negligent transportation, at a place which would not be a proper market for them, may express the injury by a statement of what its effect would be upon the value of the animals there, since they must there have a value for the purpose of transportation.⁹⁵

Injury Appearing after Delivery to Consignee.—A shipper of stock suing a carrier for injury to it while in transit is not limited to the amount of the damages apparent or discovered when delivered to him at the end of the carrier's line, but may show injury subsequently discovered and after the stock was received from the carrier.⁹⁶

Loss of Weight.—In an action against a carrier for delay in transporting live stock, the plaintiff may show in evidence, as a means of establishing the amount of damages sustained, that the live stock shrunk in weight.⁹⁷ He may also show the effect of excessive shrinkage on the market value of the live stock so damaged.⁹⁸

Injury to Race Horses.—In an action against a carrier for injury to a horse,

to allow defendant to show that the loss in price was caused by the cattle not being of the grade represented by plaintiffs to persons who had agreed to buy them at a specified price. *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

93. Market value at what places may be shown.—In an action for damages for the killing of a race horse while being transported over the isthmus of Panama, evidence as to the market value of such animals in San Francisco, to which place the horse was being shipped, was admissible. *Harris v. Panama R. Co.*, 58 N. Y. 660, affirming 36 N. Y. Super. Ct. 373.

94. St. Louis, etc., R. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894.

95. Leonard v. Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667.

96. Injury appearing after delivery to consignee.—*Cincinnati, etc., R. Co. v. Logan*, 29 Ky. L. Rep. 1123, 96 S. W. 910.

97. Loss of weight.—*Groot v. Oregon, etc., R. Co.*, 34 Utah 152, 96 Pac. 1019; *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

In an action against a carrier based on written claims for loss and damage to cattle, due to rough handling and improper facilities for loading and unloading at an intermediate point, and that they were badly bruised and depreciated in value, evidence of shrinkage was admissible, though not mentioned as one of the items making up the total amount of damages claimed. *Carstens Packing Co. v. Southern Pac. Co.*, 108 Pac. 613, 58 Wash. 239, 27 L. R. A., N. S., 975.

Where, in an action against a carrier for delay in transporting cattle, the shipper testified that the cattle were exceptionally uniform on account of his method of breeding, and showing the average weight of his cattle during several years, that the cattle transported were better than shipments previously made, his testimony as to the average weight of the cattle shipped was competent. *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

Where, in an action against a railroad for negligence in failing to transport plaintiff's cattle with reasonable diligence, there was no allegation of negligence in failing to keep in good condition stock pens, at a certain point where the cattle were unloaded, evidence that the condition of such stock pens was such that the cattle could not be fed during their confinement there was yet competent to explain the loss in weight of the cattle on arriving at their destination. *St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

98. Russell v. Chicago, etc., R. Co., 37 Mont. 1, 94 Pac. 488.

A complaint, against a carrier for negligence in transporting sheep, that the sheep shrunk in flesh and lost in weight, to the damage of the shipper, is sufficient to admit evidence of the effect excessive shrinkage had on the mutton for food, and the effect thereof on the market price of the sheep; the fact that the sheep unduly shrunk in flesh and lost in weight not being controverted. *Groot v. Oregon, etc., R. Co.*, 96 Pac. 1019, 34 Utah 152.

the plaintiff may show the quality of the horse for racing purposes, and that the injury greatly depreciated the value of the horse for such purposes.⁹⁹ In showing the racing quality of the horse injured, records made by the horse and published by a recognized trotting association where the publication is accepted and acted upon by those interested in and conversant with such matters as authentic and official is admissible.¹

§ 2093. Nature, Condition and Character of Animal Injured.—In an action against a carrier for loss or injury to live stock, the shipper may show in evidence the condition of the animal when delivered to the carrier.² Where, in an action against a carrier for injury to cattle alleged to have been due to their negligent handling in shipment, defendant claims that they were in unfit condition when shipped, evidence that they were not in fit condition to stand transportation by rail from the point of shipment to the point of destination at the time of the year when the shipment was made, as the shipment was from a warm to a colder climate, and over high ranges of mountains, and that the effect of the cold would cause them to become numb and lie down in the cars and be unable to get up, was pertinent to the issue and admissible; the witnesses having qualified to express their opinions.³ Where, however, the shipper offers in evidence the condition of the animal at the time of delivery, he must show that the animal whose character is offered in evidence was the one for whose injury the action was brought.⁴ In an action against a carrier for injury to an animal in transportation, where the carrier defends on the ground that the injury was caused by the animal's breaking loose, it is competent for the plaintiff to show the general disposition of the animal prior to the time of shipment.⁵ In an action for the value of a bull calf shipped by express, in which the evidence showed that the calf made a lunge while in the crate, broke it and escaped, evidence that the calf was quiet and gentle while on plaintiff's farm, and that bull calves did not become vicious until two years of age, was material on the question whether the escape was due to innate viciousness.⁶

§ 2094. Evidence as to Negligence.—In an action against a carrier when

99. Injury to race horses.—Pittsburgh, etc., R. Co. v. Sheppard, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

In an action against a carrier for injuries to colts, the shipper showed that the colts were yearlings and finely bred, and showed the condition, temper, disposition, and character of the colts when received by the carrier, and the effect of these traits on the value of race horses, and that the injuries received would affect their racing qualities and value. Held, that the evidence was admissible on the issue of damages. Cincinnati, etc., R. Co. v. Logan, 96 S. W. 910, 29 Ky. L. Rep. 1123.

1. Pittsburgh, etc., R. Co. v. Sheppard, 56 O. St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

2. Hendrick v. Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835.

In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant

was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars. Nelson v. Great Northern R. Co., 72 Pac. 642, 28 Mont. 297, 9 R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

3. Southern Pac. Co. v. Arnett, 111 Fed. 849, 50 C. C. A. 17.

4. In an action against a carrier for death of a hog alleged to have been caused by defendant's agent in requiring his removal from one car to another, evidence that on the night in question, when several hogs were driven to the station with others, witness heard a hog squealing, was inadmissible to support defendant's claim that the hog was very hot and would probably have died, notwithstanding his removal, unless the hog that squealed was identified as that in question. Weisinger v. Southern R. Co., 112 S. W. 660, 33 Ky. L. Rep. 1038.

5. Deake v. United States Exp. Co. (Mich.), 138 N. W. 196.

6. Deake v. United States Exp. Co. (Mich.), 138 N. W. 196.

such issues are raised by the pleadings, the plaintiff may show the negligence of the carrier,⁷ and his own lack of negligence.⁸ The proof of the carrier's negligence must be confined to the negligence raised by the issues.⁹ Allegations that the carrier confined the stock too long without food and water, is not sufficient to admit evidence of negligence in failure to provide proper stock pens for unloading the stock.¹⁰ So, also, where the complaint alleges negligence in respect only to the furnishing of a defective car, no other kind of negligence can be shown in evidence.¹¹ Under allegations of willful and reckless negligence, gross negligence may be shown,¹² and it has been held that under allegations of the complaint that the stock was not "safely" carried, but was injured by defendant's negligence, evidence as to quality of hay and water furnished by defendant is within the issue.¹³ The carrier may show its freedom from negligence, when its liability depends on its negligence,¹⁴ and where such an issue is raised, it may show that the injury resulted from the negligence, or contributory negligence, of the shipper.¹⁵ The pleading of the general issue by a carrier is not sufficient to put in issue the contributory negligence, unless the complaint negated the contributory negligence of the shipper. The negligence of the shipper is matter of avoidance.¹⁶

Course of Trade as Showing Negligence.—In an action for damages to cattle arising from too long confinement in the cars, it is proper to show the general course of business of defendant in shipping cattle received from another road, as bearing on the question of negligence.¹⁷

Shipment on Way Train.—In an action for damages to cattle in shipping on the ground of improper operation of the train, evidence that the cattle were shipped on a way train, which necessitated many stops, is admissible, though

7. *Texas*.—*Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

Wyoming.—*Chicago, etc., R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

Massachusetts.—*Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44, 48 N. E. 835.

Iowa.—*Dorr Cattle Co. v. Chicago, etc., R. Co.*, 128 Iowa 359, 103 N. W. 1003.

Arkansas.—*St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

Where, in an action against a railroad for damages from negligent delay in transporting plaintiff's cattle, it appeared that, while awaiting a through train, the cattle were unloaded into pens so maintained that the cattle could not be fed there, it was competent for plaintiff to show that he notified defendant's agent in advance of his intended shipment of cattle, as bearing on defendant's negligence in failing to arrange the schedule, so that the detention of the cattle at the pens would be unnecessary. *St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

In an action against a railroad for negligently delivering cattle at yards infected with Texas fever, evidence of a notice given by plaintiff to defendant as to what the former intended to do with the cattle after it learned of their infection, and giving defendant the right to make other disposition thereof if not satisfied, was admissible as bearing on plaintiff's conduct with reference to the animals after it became aware of their exposure. *Dorr Cattle Co. v. Chicago, etc., R. Co.*, 103 N. W. 1003, 128 Iowa 359.

8. Plaintiff may testify, to show his due care, that he did not know that a permit to unload the cattle in this commonwealth was necessary. *Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44, 48 N. E. 835.

9. *Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401; *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4; *Stone v. Chicago, etc., R. Co.*, 149 Iowa 240, 128 N. W. 354.

10. *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4.

11. *Stone v. Chicago, etc., R. Co.*, 149 Iowa 240, 128 N. W. 354.

12. Where plaintiff alleged willful and reckless negligence in causing the accident which injured live stock being shipped on defendant's railroad, he had the right to prove gross negligence. Judgment, 96 Ill. App. 337, affirmed. *Chicago, etc., R. Co. v. Calumet Stock Farm*, 61 N. E. 1095, 194 Ill. 9, 88 Am. St. Rep. 68.

13. *Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

14. *Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270; *Colsch v. Chicago, etc., R. Co.*, 149 Iowa 176, 127 N. W. 198, 34 L. R. A., N. S., 1013, Ann. Cas. 1912 C, 915.

15. *Colsch v. Chicago, etc., R. Co.*, 149 Iowa 176, 127 N. W. 198, 34 L. R. A., N. S., 1013, Ann. Cas. 1912 C, 915.

16. *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117.

17. **Course of trade as showing negligence.**—*Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44, 48 N. E. 835.

defendants made no contract not to ship on such train, nor to transport at a given rate of speed; the evidence of rough handling of the train, and that injury resulting from the jerking in stopping and starting so often, is competent, to show carelessness.¹⁸

Condition of Car.—In showing that the carrier was negligent in furnishing an unsafe car, the shipper may show that the car door came open and a part of the animals escaped.¹⁹ When the proper issues are raised, the carrier may show the safe condition of the car,²⁰ or that the car was rendered unsafe by the act of the shipper as by overloading it.²¹

§§ 2095-2103. Weight and Sufficiency—§ 2095. Degree of Proof Required.—In proving an issue in an action against a carrier for loss or injury to live stock or for delay in transportation, a preponderance of evidence is all that is required.²²

§ 2096. Contracts.—A shipper of live stock may show that the written contract upon which the carrier relies as a defense is not the contract under which the stock was shipped. Thus, proof that the shipper made an oral contract with the agent of the carrier at the place of destination for the transportation of a race horse and that the agent of the carrier at the place at which the horse was delivered to the carrier knew of the oral contract and that the agent of the shipper had no authority to sign a written contract varying the terms of the oral contract made by the shipper, is sufficient to show that the oral contract, and not the written contract determines the right and liabilities of the parties.²³ Evidence that the shipper was on the train on which his live stock was being transported is not sufficient proof that the stock was in his care.²⁴

Implied Agreement to Deliver at Certain Time.—To show that a carrier is bound to deliver live stock at the destination at a given time, as in time for the market of a certain day, direct proof of an express contract is not necessary. An implied contract may be inferred from the circumstances of the case.²⁵

18. Shipment on way train.—*Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

19. Condition of car.—The fact that during transit the door of a stock car in which horses were being transported was found partly open, the bull board down, and a horse missing, is evidence of the carrier's negligence in failing to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping. *Chicago, etc., R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

20. Showing safe condition of car.—In an action for injuries to a horse in transit, the carrier may show, by a person qualified, that the car stall was put up in the customary method of erecting stalls for the shipment of horses and was reasonably safe. *Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

21. A carrier of live stock, sued for loss through freezing, could show whether the car was overloaded. *Colsch v. Chicago, etc., R. Co.*, 149 Iowa 176, 127 N. W. 198, 34 L. R. A., N. S., 1013, Ann. Cas. 1912C, 915.

22. *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454; *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27

L. R. A., N. S., 975; *Louisville, etc., R. Co. v. Warfield*, 30 Ky. L. Rep. 352, 98 S. W. 313; *Peterson v. Chicago, etc., R. Co.*, 19 S. Dak. 122, 102 N. W. 595; *Illinois Cent. R. Co. v. Word*, 149 Ky. 229, 147 S. W. 949.

It is not necessary to support a verdict against a railroad company for injuries to cattle that the evidence should connect defendant therewith beyond a reasonable doubt, but a mere preponderance of the evidence is sufficient. *Toledo, etc., R. Co. v. Eastburn*, 54 Ill. 381.

23. *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202.

24. In an action against a carrier for injury to a consignment of stock, the mere fact that plaintiff was on the same train with the stock is insufficient to show that he was in care thereof, though the contract, if it had been read to the jury, might have authorized that presumption. *Cincinnati, etc., R. Co. v. Grover*, 11 Ky. L. Rep. 236.

25. In an action against a carrier for delay in transporting and delivering cattle in time for a certain market, knowledge of defendant that the cattle were intended for delivery and sale at the market on a particular day may be shown from circumstances in the case, and need not

Sufficiency to Show Contract to Ship on Certain Train.—In proving that the carrier agreed to carry live stock to their destination on a specified train, it is not necessary to prove an express contract to that effect. Thus it has been held that proof that the agent of the carrier showed the shipper a waybill which stated that the animals would be shipped on a certain train, is sufficient to show a contract by the carrier to ship on that train.²⁶

Fraud in *Esse Contractus*.—Proof that the agent of the carrier misrepresented to the shipper that the nature of the instrument to be signed by him, and that the shipper in ignorance of the nature of the instrument, and relying on the agent's representation signed the instrument is sufficient to show fraud in the contract which will vitiate it.²⁷ Mere proof of the false representations of the agent, however, is not sufficient. Especially is this true when the shipper signing the contract has had years of experience in shipping live stock and is presumed to know that he will be required to sign a contract of shipment such as the one signed.²⁸ Evidence that the owner of a horse failed to reveal to the carrier the value of the animal is not sufficient proof of fraud. To prove the fraud of the shipper in failing to reveal the value of the animal, it is necessary to prove some act of the shipper or his agent which would tend to conceal from the carrier the value of the animal. Some act or some omission of a duty, some artifice to conceal the value, must be shown.²⁹

§ 2097. Delay in Transportation.—Evidence showing an unusual or unreasonable delay is sufficient to make out a case against a carrier, unless the carrier shows evidence to justify the delay.³⁰ In an action for failure to deliver stock in time for the market of a certain day, evidence showing some short delays is insufficient to make out a case where it also appears that the stock would not have arrived in time for the market of that day even if every train had been on time.³¹ Evidence that the carrier unloaded the live stock at an intermediate station to water and feed them as was necessary is not sufficient to show delay.³²

§ 2098. Damages Sustained.—Evidence showing the negligent or wrong-

be proved by direct and positive evidence of the communication of that fact to defendant. *Baltimore, etc., R. Co. v. Whitehill*, 64 Atl. 1033, 104 Md. 295.

26. Sufficiency to show contract to ship on certain train.—*Kirby v. Chicago, etc., R. Co.*, 242 Ill. 418, 90 N. E. 252.

27. Fraud in *esse contractus*.—*Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

In an action to recover of a railroad company damages to stock from negligence in its transportation, plaintiff is not bound by admissions that the stock was in good condition, made in various reports signed by him along the route, without reading, on the representations of the conductors presenting them that the reports were merely to show that there was no accident during the run. *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692.

28. Proof that a shipper of live stock who had had sixteen years of experience in shipping live stock was told by the carrier's agent that he had to sign the contract offered, as it was his pass, and that he was not asked to read, and did not read, the contract, does not establish either mistake, fraud, or duress in obtaining the signature of the shipper.

Atchison, etc., R. Co. v. Baldwin, 128 Pac. 449, 53 Colo. 416.

29. Central, etc., R. Co. v. Hall, 52 S. E. 679, 124 Ga. 322, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170; *Chesapeake, etc., R. Co. v. Magowan*, 147 Ky. 422, 144 S. W. 80.

30. Delay in transportation.—*Kiser v. Chicago, etc., R. Co.*, 92 Neb. 531, 138 N. W. 735.

A verdict in favor of plaintiff against a railroad company for damages resulting from delay in transporting hogs, causing their death, is sufficiently supported by evidence that the delay, which the company did not explain, was apparently unnecessary, and the weather exceedingly warm, and that the attention of the trainmen was several times called to the suffering condition of the hogs. *Ball v. Wabash, etc., R. Co.*, 83 Mo. 574.

31. Delay insufficient to support judgment.—*Siemonsma v. Chicago, etc., R. Co.*, 137 Iowa 607, 115 N. W. 230; *Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672.

32. Delay.—*Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672; *Siemonsma v. Chicago, etc., R. Co.*, 137 Iowa 607, 115 N. W. 230.

ful conduct of the carrier is not sufficient to prove the damages sustained by the shipper. Unless the carrier admits the damages, there must be some evidence of the extent of the injuries sustained by the animals and the consequent damages to the shipper.³³ The evidence of the damages sustained to be sufficient must be such as to show clearly the extent of the injury and the loss suffered by the shipper. There must be evidence from which the loss in market value may be determined with some degree of accuracy and certainty.³⁴ Evidence showing the number, condition, and average weight of the cattle at the time they were shipped, the average shrinkage in weight during transportation, their average weight at destination, their market value at destination, the condition in which they would have arrived but for defendants' negligence, and the market value of those delivered at destination in their then condition, is sufficient proof of the amount of damages sustained.³⁵ There is no necessity for the evidence showing expressly matters that can easily be calculated from the other evidence. Thus, where several grades of cattle are shipped, if the evidence is such that the number of each class killed or injured can be ascertained, direct evidence as to that point is not necessary.³⁶ It has been held that evidence showing the injuries received by the animals while in the hands of the carrier and the estimated damages per head was sufficient proof of damages.³⁷ So, also, evidence as to the estimated shrinkage per head is sufficient.³⁸ Testimony by an expert

33. Damages sustained.—In an action for injuries to stock in transit, caused by failure to water and feed and by handling of the cars, judgment for plaintiff will be reversed, where no testimony was given as to the extent to which the stock were bruised, or the extent of depreciation in weight and condition. *Knowlton v. Chicago, etc., R. Co.*, 115 Minn. 71, 131 N. W. 558.

34. A verdict against a carrier for damages to a shipment of cattle was not supported by the evidence where it failed to show the value of the cattle "at the time and place of shipment," and the contract of carriage had provided that such value should govern a settlement for damages to the shipment. *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452.

In an action against a railroad company for delay in delivering cattle shipped, it appeared that there was a delay of twenty-six hours in delivering the cattle, during which time the market fell twenty-five cents on the one-hundred pounds, which after deducting the ordinary loss of weight, would have amounted to \$769.25. There was a verdict for \$865. On account of the delay, and because the cattle had not been properly fed and watered, they were in such poor condition that they could not be put on the market on their arrival, but had to be held until the next day, when there was a further decline of ten cents on the one-hundred pounds. The cattle sold for above the average price. Out of thirty-one lots sold on the same day, twenty-six sold for less and only four for more. Held, that the evidence was too unsatisfactory to sustain a judgement for the amount of the verdict. *Missouri Pac. R. Co. v. Russell (Tex.)*, 15 S. W. 206.

Decline in Market.—In a suit for delay in the shipment of cattle, a witness for

the carrier testified that he sold them to the plaintiff at \$2.45 per hundredweight on the 29th of June, and that they would have brought \$2.60 on the 27th. On cross-examination he testified that on the 27th they would have brought \$2.85, and on the 28th \$2.60, and on the 29th \$2.45. Testimony was taken by deposition, and there was no explanation of the discrepancy. This was the only evidence of a decline in the market. Held, that the evidence was not sufficient to support a judgment for damages based on the decline shown by the cross-examination. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

35. *St. Louis, etc., R. Co. v. Dodson (Tex. Civ. App.)*, 97 S. W. 523.

36. Where testimony tends to show average value of cattle killed and injured and number of each can be ascertained, the evidence need not show with absolute certainty the number of cattle of different ages. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

37. *Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

In an action against a carrier for delay in delivering cattle shipped, evidence that the cattle sold for \$5,027.55, and that, had they been delivered in proper time and in proper condition, they would have sold for from 25 to 35 per cent more, warrants a verdict for \$745. *Missouri Pac. R. Co. v. Russell (Tex.)*, 18 S. W. 594.

38. In an action against a carrier for delay in transporting cattle, the testimony of witnesses that they would judge that the shrinkage was from seventy-five to eighty pounds per head on an average is sufficiently definite to warrant the jury in acting on it. *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

that long and careful treatment will remedy the injuries caused by the negligence of the carrier is not sufficient to change the general rule for determining the damages sustained.³⁹

Selling Price Not Conclusion of Value.—The price received for animals after they had been injured by the carrier in transporting them is not conclusive evidence of the value of the animals in the injured condition.⁴⁰

§§ 2099-2101. Negligence—§ 2099. Making Prima Facie Case against Carrier.—As has been seen,⁴¹ the proof of loss or injury to live stock while in the hands of the carrier for transportation raises a presumption of negligence and places the burden on the carrier to excuse itself. It may be well to add here that proof by the shipper of loss or injury to the stock while in the hands of the carrier for transportation, unless explained and justified, is sufficient evidence of the negligence of the carrier.⁴² Proof that the car in which the animals were being shipped was violently handled and coupled with undue force is sufficient to make a prima facie case of negligence.⁴³ So proof that the car broke during transportation is sufficient to make a prima facie case of negligence.⁴⁴

§ 2100. Sufficiency of Proof of Negligence.—Where it is necessary to prove negligence in an action against a carrier, a preponderance of the evidence is sufficient for that purpose.⁴⁵ Evidence that establishes that the injury was due

39. In an action against a railroad company for injuries to cattle in a collision, by reason of which numerous pregnant cows lost their calves, the evidence for plaintiffs tended to show that the fact that a cow had once miscarried permanently lessened her value as a breeder. Defendant's evidence tended to show that the depreciation of value was only temporary, and that by careful treatment for a certain length of time her capacity as a breeder might be restored. Held, that the evidence was not sufficient to warrant a departure from the ordinary rule of measuring damages by the depreciation of the market value at the time of the injury, and to make the expense of restoring the breeding capacity of the animal the measure of damages. *Estill v. New York, etc., R. Co.*, 41 Fed. 849.

40. **Selling price not conclusive of value.**—In an action against a carrier for alleged injuries to thoroughbred colts by negligent transportation to market, evidence of the price at which the colts were sold in the market, while evidence of their market value at the time and place of sale, was not conclusive on that question. *Southern Railway v. Graddy*, 109 S. W. 881, 33 Ky. L. Rep. 183.

41. **Making prima facie case of negligence.**—See ante, "Presumption and Burden of Proof," §§ 2079-2086; "Negligence," §§ 2083-2086.

42. *Georgia*.—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240, 17 R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7.

Illinois.—*Burke v. United States Exp. Co.*, 87 Ill. App. 505.

Iowa.—*Swiney v. American Exp. Co.* (Iowa), 115 N. W. 212; *Gilbert Bros. v.*

Chicago, etc., R. Co. (Iowa), 136 N. W. 911.

Minnesota.—*Cole v. Minneapolis, etc., R. Co.*, 117 Minn. 33, 134 N. W. 296.

Missouri.—*Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151.

Nebraska.—*Chicago, etc., R. Co. v. Slatery*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

North Carolina.—*Jones-Lane Co. v. Atlantic, etc., R. Co.*, 148 N. C. 580, 62 S. E. 701; *Jones v. Atlantic, etc., R. Co.*, 148 N. C. 449, 62 S. E. 521.

Pennsylvania.—*Trace v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 466.

South Carolina.—*Mayfield v. Southern R. Co.*, 84 S. C. 393, 66 S. E. 405.

Texas.—*St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131; *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

Though a contract with a carrier of live stock provides against liability for injuries occasioned by the animals one to another, a prima facie case is made out against the carrier by showing that the stock was in good condition when delivered to the carrier and was damaged when received by the consignee. *Crowley v. Louisville, etc., R. Co.*, 7 Ky. L. Rep. 743.

43. *Chesapeake, etc., R. Co. v. Magowan*, 147 Ky. 422, 144 S. W. 80; *Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151.

44. *Adams Exp. Co. v. Hundley*, 145 Ky. 7, 139 S. W. 1084.

45. **Sufficiency of proof of negligence.**—*Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A., N. S., 975; *Louisville, etc., R. Co. v.*

to the negligence of an employee of the carrier is sufficient to show the carrier's negligence. It is not necessary that the evidence shows the particular employee that was guilty of the negligence. Thus, where the evidence shows that the injury was due either to the negligence of the yardmaster of the carrier in failing to give the conductor of the train orders to take the car containing the live stock or was due to the negligence of the conductor in failing to carry the car without such order, it is unnecessary to go into the duties of the employees to determine which was at fault.⁴⁶ In an action for injuries to horses in transit, evidence that the horses were improperly tied by the carrier's employees on reloading them after feeding, whereby the horses were injured, is sufficient evidence of defendant's negligence.⁴⁷

Failure to Furnish Car.—In an action against a carrier for failure to furnish a car for the transportation of live stock, defendant's negligence was sufficiently shown, where it appeared that it diverted the car originally sent to plaintiff and afterwards forgot to replace it.⁴⁸

Insecure Pens.—In an action against a carrier for injuries to animals in escaping from the stock pens of the carrier, evidence that the fences were not built to the height required by law, and that they were not securely built, is sufficient evidence of the negligence of the carrier.⁴⁹

Failure to Furnish Means of Unloading Live Stock.—Where the evidence shows that the carrier failed to furnish suitable means for unloading live stock at its stations, and that animals were injured thereby, the negligence of the carrier is sufficiently proved.⁵⁰

§ 2101. Gross, Willful or Wanton Negligence.—In an action against a carrier for loss or injury to live stock in transit, when it is necessary to prove gross, willful or wanton negligence, evidence of the loss or injury in transit is insufficient.⁵¹ Evidence that a carrier upon unloading a stallion put him in a pen with other horses whereby he was injured is sufficient proof of gross negligence.⁵² Evidence that the car in which the animals were being carried was struck violently in making a flying switch and that the injury complained of was caused thereby is sufficient proof of gross negligence.⁵³

Warfield, 30 Ky. L. Rep. 352, 98 S. W. 313; *Peterson v. Chicago, etc., R. Co.*, 19 S. Dak. 122, 102 N. W. 595.

Evidence, in an action against a carrier for injuries to live stock, held sufficient to support a recovery for plaintiff, although there was some evidence that the injuries were due to some inherent vice in one or more of the animals. *Illinois Cent. R. Co. v. Word*, 147 S. W. 949, 149 Ky. 229.

46. *Union Pac. R. Co. v. Nelson*, 76 Neb. 72, 106 N. W. 1036.

47. *Louisville, etc., R. Co. v. Smith*, 123 Tenn. 678, 134 S. W. 866.

48. **Failure to furnish car.**—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

49. **Insecure pens.**—In an action for injuries to horses while escaping from stock pens preparatory to loading, evidence held to justify a finding that the plank fence, forty-six inches high, instead of fifty-six inches high, as required by Ky. St., § 1780 (*Russell's St.*, § 4513), was defective, and that the defect caused the injuries complained of. *Louisville, etc., R. Co. v. Thompson*, 144 Ky. 765, 139 S. W. 939.

50. **Failure to furnish means for unloading live stock.**—In an action for in-

juries to horses through failure of the defendant railroad company to provide suitable means for unloading the same, it appeared that defendant did not furnish the usual gangway for unloading stock leading from the car to the ground, but the horses were unloaded directly upon the depot platform, one side of which was unguarded, and that one horse was injured by either being crowded from or jumping from the unguarded side of the platform. Held, that a verdict that defendant failed to furnish suitable means for unloading the stock was supported by the evidence. *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

51. **Gross, willful, or wanton negligence.**—The delivery by a carrier in bad condition of live stock received in good condition warrants, in the absence of explanation, an inference of negligent handling, but not of a wanton or willful breach of duty. *Mayfield v. Southern Railway*, 66 S. E. 405, 84 S. C. 393.

52. *Harden v. Chesapeake, etc., R. Co.*, 157 N. C. 238, 72 S. E. 1042.

53. In an action for injuries to horses being shipped on defendant's railroad, the groom testified that he was in the car

§ 2102. Showing Proximate Cause of Injury.—Where the shipper has the burden of showing the proximate cause of the injury, he must do so by a preponderance of the evidence.⁵⁴ Evidence that several pregnant cows were in a collision during transportation and dropped their calves is sufficient to show that the collision was the proximate cause of the injuries.⁵⁵

Car Infected with Disease.—Where it is claimed that the live stock were shipped in a car infected with disease and that the animals were injured thereby, a preponderance of the evidence is necessary to prove the issue. Mere proof that the stock in some way became diseased, it not being shown where they were exposed to the disease, is insufficient.⁵⁶ Where, however, the evidence shows that they could not have been exposed before they were delivered to the carrier nor after they reached their destination, and that the car in which they had been shipped had been used in transporting other stock, the proof that the animals contracted the disease by being shipped in cars infected with disease is sufficient.⁵⁷

when it was struck in making a flying switch; that he was thrown over, and his lantern knocked over; that the halters of the three horses were broken, and the jolt of the car threw the horses down. Another witness testified that he was sitting in the door of the car, and was thrown out by the jar, and, when he looked in the car, the horses were down, and that one of the doors had struck a sulky, smashing a wheel, and that the drawbar had been smashed. Held, that the evidence sustained a verdict for plaintiff on allegations of negligent, willful, and reckless misconduct. Judgment, 96 Ill. App. 337, affirmed. *Chicago, etc., R. Co. v. Calumet Stock Farm*, 61 N. E. 1095, 194 Ill. 9, 88 Am. St. Rep. 68. But see *Willard v. Chicago, etc., R. Co.*, 150 Wis. 234, 136 N. W. 646.

54. Showing proximate cause of injury.—*Peterson v. Chicago, etc., R. Co.*, 19 S. Dak. 122, 102 N. W. 595.

A calf, shipped by way of defendant railroad company, died some ten days after its delivery to plaintiff. There was no evidence that it was injured while in defendant's possession, or that there was any failure or neglect in feeding, watering, and caring for it. It was sick when delivered to plaintiff, and there was evidence that it was also sick when delivered to defendant, and there was nothing to show that its sickness was not caused by natural causes. There was also evidence that when found dead it was in the horse's stall, and showed bruises which it had not had before. Held, that the evidence would not support a judgment for plaintiff. *Missouri Pac. R. Co. v. Heath (Tex.)*, 18 S. W. 477.

In an action against a railroad company for damages for injury to a mule whose hoof was torn off, it was not shown how the injury occurred, or when; but it was shown that the car which transported the mule was suitable, the track in good condition, the equipments and appliances of the train adequate, that no culpable delay occurred in the transit, and that there was

no negligence on the part of the railroad company in running or managing the train. Held, that the company was not liable. *Louisville, etc., R. Co. v. Bigger*, 66 Miss. 319, 6 So. 234.

55. In an action against a railroad company for injuries to cattle in a collision, it was shown that many of the pregnant cows dropped their calves prematurely—some at the time of the collision; the rest within ninety days thereafter. Testimony for plaintiff tended to show that the long railway journey and change of climate to which the cows were subjected would not seriously affect their condition. Experts for defendant testified that the miscarriage of a few cows in a herd would engender a contagion that would cause other cows to miscarry. Held, that there was sufficient evidence to warrant the jury in finding that the abortions were the result of the collision. *Estill v. New York, etc., R. Co.*, 41 Fed. 849.

56. In an action for negligence in transporting the plaintiff's cattle in a car infected with Texas fever, the evidence did not show that the car had ever been used by cattle affected with fever, nor how plaintiff's cattle contracted the fever. Held, that the evidence failed to show that the car was infected. *St. Louis, etc., R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878.

57. Cattle raised in a locality where a disease known as "Texas Fever" had not existed for many years were shipped from such locality, in cars furnished by defendant, to a point where such disease had not existed for many years. Shortly after their being unloaded, some of them exhibited symptoms of the disease, and subsequently died. The cars in which they were shipped had been used, shortly before they were loaded with plaintiff's cattle, in the transportation of other cattle. Held, to warrant a jury in finding that the cars furnished by defendant were infected with the disease, and that the cattle contracted it therefrom, and hence it was not error to refuse to instruct for defendant

§ 2103. Failure to Unload, Feed, and Water Live Stock.—In an action against a carrier for failure to water, feed and exercise live stock during transit, it is not necessary that a total absence of these attentions be proved. It is sufficient to prove a failure to give an adequate supply of these things.⁵⁸ In an action for failure to feed and water stock at two feeding stations where the evidence shows that the animals were properly cared for at one station and is silent as to the other, the plaintiff has failed to prove his case.⁵⁹

Under Federal Statute.—In an action against a carrier for failure to unload an interstate shipment of live stock as required by the Federal Statute, Rev. Stat. 4386 (U. S. Comp. Stat. 1901, p. 2995), requiring such shipments to be unloaded for food, water and rest once every twenty-eight hours, evidence that the animals were unloaded at the proper time, but when unloaded were crowded into a pen in which there was no facilities for feeding and watering them, and which was too small to allow the animals to lie down, is sufficient to show a violation of the statute.⁶⁰

§§ 2104. Damages.—See ante, "Damages for Wrongful Delivery," § 1781; "Damages for Delay in Transportation and Delivery," §§ 1796-1826; "Damages," §§ 1853-1871.

§§ 2105-2113. Questions for Jury—§ 2105. General Rule.—The matters which are to be submitted to the jury in actions against common carriers for loss of or injury to live stock in their custody for transportation or for delay in transportation are of the same nature as matters submitted to juries in other civil actions at law. Questions of law are for the determination of the court,⁶¹ but questions of fact should be submitted to the jury.⁶² Questions involving both law and facts, as most issues do, should be submitted to the jury under proper instructions explaining the law.⁶³ In all cases, however, there must be some evidence upon an issue to warrant its submission to the jury. Nothing could be accomplished by submitting to the jury a question upon which there is no evidence at all, or so small an amount that the court would have to set aside a finding if made by the jury. The amount of evidence necessary to warrant the submission of a question to the jury depends upon the issue raised and other circumstances of the particular case.⁶⁴ When there is not sufficient evidence to

in an action for such loss. Judgment, 84 Ill. App. 462, affirmed. Illinois Cent. R. Co. v. Harris, 56 N. E. 316, 184 Ill. 57, 48 L. R. A. 175.

58. Failure to unload, feed, and water live stock.—Mosesitt v. St. Joseph, etc., R. Co., 90 Neb. 133, 132 N. W. 929.

Where a complaint against a carrier for damages to a dog in transportation avers the injury was occasioned by failure to give him proper attention in the matter of food, water, and exercise, defendant's liability is established by proof of failure to give an adequate supply of such things, though it may have given some of them. Southern Exp. Co. v. Ashford, 28 So. 732, 126 Ala. 591.

59. Rev. St., art. 284, renders a carrier who shall fail to feed and water live stock sufficiently during transportation, and until delivery, liable for damages, and for a penalty to be recovered by the owner. The cattle were well fed at one of the two feeding stations, and the evidence did not show that they were not so fed at the other. Held, insufficient to authorize the assessment of the penalty. The evidence should clearly establish the statutory grounds for the recovery of a pen-

alty. Good v. Galveston, etc., R. Co., 11 S. W., 854, 4 L. R. A. 801.

60. Under federal statute.—St. Louis, etc., R. Co. v. Piburn, 30 Okla. 262, 120 Pac. 923.

61. Questions for the jury—General rules.—Chicago, etc., R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

62. Louisville, etc., R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Chicago, etc., R. Co. v. Woodward, 164 Ill. 360, 72 N. E. 558, 73 N. E. 810; Louisville, etc., R. Co. v. Wathen, 23 Ky. L. Rep. 2128, 66 S. W. 714; Davis v. Texas, etc., R. Co., 91 Tex. 505, 44 S. W. 822.

63. Louisville, etc., R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Tiller v. Chicago, etc., R. Co., 142 Iowa 309, 120 N. W. 672.

As to instructions, see post, "Instructions to the Jury," § 2114.

64. Cincinnati, etc., R. Co. v. Pendleton, 29 Ky. L. Rep. 721, 96 S. W. 434; Union Pac. R. Co. v. Thompson, 75 Neb. 464, 106 N. W. 598; Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 S. E. 856; Gulf, etc., R. Co. v. Irvine (Tex. Civ. App.), 73 S. W. 540; Jolliffe v. Northern Pac. R. Co., 52 Wash. 433, 100 Pac. 977.

support a finding for the shipper, the case should be taken from the jury and a nonsuit granted.⁶⁵

§ 2106. Contracts.⁶⁶—In an action by a shipper of live stock against a carrier for loss or injury to the shipment during transit, or for delay in transporting it, where an issue is raised as to whether the parties have bound themselves by an express contract or by the contract implied by law, or as to which of two or more express contracts is binding on them, the evidence should be submitted, under proper instructions, to the consideration of the jury.⁶⁷ The existence of a special contract between a shipper and the carrier, when put in issue, is a question of fact for the jury.⁶⁸ Where the evidence was conflicting as to whether a shipment was made under a written or verbal contract, the question is for the jury.⁶⁹ The purpose with which the carrier accepts live stock is a question for the determination of the jury.⁷⁰ So, also, whether or not a mistake was made in drafting a contract, whereby the intention of the parties was not expressed or a material part omitted, is for the jury.⁷¹ So, also, where the liability of the carrier depends upon whether or not it had notice or certain facts at the time the contract was made, the question is for the jury.⁷²

65. *Allen Co. v. Mobile, etc., R. Co.* (Miss.), 58 So. 710.

Where a shipper relieves the carrier from all claims for injury to stock by its viciousness or defects in the cars, and the evidence shows that an injury was caused in one of such ways, a nonsuit is properly granted. *Ragsdale v. Southern R. Co.*, 46 S. E. 832, 119 Ga. 627.

Where the cause or the nature of an injury received by a mule in transit did not appear, and it was shown by every conductor who had had charge of the car that the train met with no accident and was properly handled, and the car was suitable and properly equipped, a verdict should have been directed for the carrier, though witnesses testified that in their opinion the mules, of which the one injured was one, were so crowded together in the car that they could not have injured themselves. *Illinois Cent. R. Co. v. Teams*, 75 Miss. 147, 21 So. 706.

66. **Contracts.**—As to matters pertaining to contracts limiting the liability of the carrier, see ante, "Limitation of Liability," chapter 14. As to waiver or estoppel to assert rights or remedies, see post, "Estoppel and Waiver," § 2107.

67. *Chicago, etc., R. Co. v. Woodward*, 164 Ill. 360, 72 N. E. 558, 73 N. E. 810; *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077; *Houston, etc., R. Co. v. Buchanan*, 38 Tex. Civ. App. 165, 84 S. W. 1073; *Missouri, etc., R. Co. v. Garrett*, 39 Tex. Civ. App. 246, 87 S. W. 172; *Gulf, etc., R. Co. v. Batte* (Tex. Civ. App.), 94 S. W. 345.

68. *Chicago, etc., R. Co. v. Woodward*, 73 N. E. 810, 164 Ill. 360, 72 N. E. 558.

69. *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077; *Gulf, etc., R. Co. v. Batte* (Tex. Civ. App.), 94 S. W. 345; *Missouri, etc., R. Co. v. Garrett*, 87

S. W. 172, 39 Tex. Civ. App. 246; *Houston, etc., R. Co. v. Buchanan*, 84 S. W. 1073, 38 Tex. Civ. App. 165.

70. In an action against a railroad for killing cattle which escaped from the railroad's cattle yard, where they were temporarily restrained, prior to loading, in order to permit the shipper to obtain a United States inspection certificate, evidence held to require submission to the jury of the issue whether defendant accepted the cattle to hold as depository during such time, or whether the cattle were in the exclusive control of the shipper. *Flint v. Boston, etc., Railroad*, 59 Atl. 938, 73 N. H. 141.

71. In an action against a carrier for injury to a shipment of live stock, the carrier relied on the written contract of shipment binding it to turn it over to a particular connecting carrier. The shipper pleaded that there was a mistake in the contract, in that it did not designate the connecting carrier agreed on. The written contract contained blanks headed "Consignee, destination, and route." The blanks were filled with the name of the consignee and the destination, but the route was omitted. Held, that there was sufficient evidence of a mistake in the filling out of the contract to submit the question to the jury. *Cincinnati, etc., R. Co. v. Pendleton*, 96 S. W. 434, 29 Ky. L. Rep. 721.

72. Where a cattle shipper sued for breach of a contract to lease him cattle space on defendant's line of ocean steamers, and the evidence that plaintiff informed defendant that he had a contract for commissions on the purchase and sale of stock intended to be shipped, and was not shipping as owner, was conflicting, the question was for the jury. *Order*, 69 N. Y. S. 465, 34 Misc. Rep. 127, modified. *Brauer v. Oceanic Steam Nav. Co.*, 73 N. Y. S. 291, 66 App. Div. 605.

Authority of Agent to Make Contract.—Where an issue is raised as to the authority of an agent of a carrier to make a contract, the evidence on that question is for the consideration of the jury. The authority of an agent is a question of fact for the jury.⁷³

Ratification of Agent's Contract.—Whether the carrier has ratified the contract made by its agent is a mixed question of law and fact. The question is for the jury under proper instructions from the court.⁷⁴

Interpretation of Contract.—It is for the jury to determine the intention expressed by the parties in the contract entered into by them.⁷⁵ The rights, duties, and obligations created by a contract of shipment between a shipper and carrier, however, are questions of law for the court.⁷⁶

§ 2107. **Estoppel and Waiver.**—Where the issue is raised, it is for the jury to weight the evidence and determine whether or not a right or remedy has been waived, or the party estopped to claim it.⁷⁷ Thus it is for the jury to decide whether the shipper accepted the car, in which he shipped live stock, with knowledge of any defects therein, whether he has waived his right to a safe car and estopped himself to show the defects.⁷⁸

Waiver of Notice of Injury.—Where the shipper was bound to give notice of loss or injury to his live stock while in the possession of the carrier for transportation, and there is an issue as to the waiver by the carrier of its right to demand notice, the question is for the consideration of the jury.⁷⁹

73. Authority of agent.—*St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

74. Ratification of agent's contract.—*St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

75. Interpretation of contract.—Animals shipped for transportation were a mare and colt, and the bill of lading gave their value as follows: "One horse, value at \$100; one colt." Held, that it was a question for the jury to determine whether the figures "\$100" were meant to indicate the value of the mare and colt, or only the value of the mare. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Whether a shipper who had been keeping horses in a railroad stock pen, under his personal control, arranged with the carrier for the delivery in the same pen of the horses for transportation held for the jury. *Chicago, etc., R. Co. v. Pollock* (Wyo.), 93 Pac. 847.

A traveling freight agent solicited shippers of live stock to send the same over his road, and represented that the stock would be transshipped at an intermediate point and forwarded without delay. The stock was forwarded accordingly, without any notice until the time of the shipment, and the carrier notified of such fact. Held, in an action to recover damages for failure to receive and forward the stock without delay, that it was for the jury to determine whether it was intended that the proposition might be accepted by shipping the stock, without any other notice than the shipment itself and notification at the time. *Baker v. Chicago, etc., R. Co.*, 97 N. W. 650, 91 Minn. 118.

76. Chicago, etc., R. Co. v. Morris, 16

Wyo. 308, 93 Pac. 664; *Comer v. Columbia, etc., R. Co.*, 52 S. C. 36, 29 S. E. 637.

77. Estoppel and waiver.—*Schroeder Lumber Co. v. Chicago, etc., R. Co.*, 135 Wis. 575, 116 N. W. 179.

78. Blair v. Wells Fargo & Co., 155 Iowa 190, 135 N. W. 615; *Schroeder Lumber Co. v. Chicago, etc., R. Co.*, 135 Wis. 575, 116 N. W. 179; *Nevius v. Chicago, etc., R. Co.*, 124 Wis. 313, 102 N. W. 489, 109 Am. St. Rep. 935.

Assuming risks of defective car.—Plaintiff knew of the existence of defects in a box car in which he shipped a horse, and was informed by defendant before shipment that he could have a special horse car on payment of a reasonable rate additional, which plaintiff refused, and thereupon attempted to correct the defects in the box car, and the animal was sent therein without his objection. Held, that it was for the jury to determine from the facts whether plaintiff assumed the risks incident to the defects in question, and whether defendant furnished a suitable car. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

79. Waiver of notice of injury.—*Klair v. Philadelphia, etc., R. Co.* 2 Boyce (25 Del.) 274, 78 Atl. 1085; *St. Louis, etc., R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461; *Gilliland v. Southern Railway*, 85 S. C. 26, 67 S. E. 20; *Davis Bros. v. Blue Ridge R. Co.*, 81 S. C. 466, 62 S. E. 856.

Where the freight claim agent receives a claim for damages to live stock after the time limited by the shipping contract, treats it as a pending claim, and rejects it on other grounds, the question whether it was intended to waive the limitation is for the jury. *St. Louis, etc., R. Co. v. James* (Okla.), 128 Pac. 279.

§ 2108. Cause of Injury.—Where an issue is raised as to the cause of the injury complained of, as where the carrier claims that the live stock were injured under such circumstances that it is not liable, it is a question for the determination of the jury. The jury must weigh the evidence and decide what was the cause of the injury.⁸⁰ Thus, where the carrier claims immunity upon the grounds that the injury was caused by the inherent nature or latent infirmity of the animals transported, the question as to the cause of the injury is one for the jury.⁸¹ So, also, it is for the jury to determine from the evidence whether the injury, as claimed by the carrier, was caused by an act of God.⁸² Where an issue is raised as to whether the condition of the car was the cause of the injury, the question is for the jury.⁸³ In an action for injuries to animals in transit, whether the carrier's confinement of the animals during transportation without unloading for rest, water, and feeding was the proximate cause of their subsequent sickening and death, is for the jury.⁸⁴

Delay as Cause of Injury.—Where cattle were delayed en route, the question whether they were forwarded with reasonable dispatch, and, if not, whether injury arose from default in transportation, or in the mode of keeping them while in the carrier's care, are for the jury.⁸⁵

§§ 2109-2111. Negligence—§ 2109. While Awaiting Transportation or Delivery.—It is for the jury to weigh the evidence and decide whether a carrier is guilty of negligence in handling live stock while awaiting transportation.⁸⁶ In an action for escape of live stock from a yard, whether the escape was by reason of a defective latch on the gate is for the jury.⁸⁷ So, also, it is for the jury to decide whether the acts of a carrier in respect to stock transported to their destination and awaiting delivery amount to negligence.⁸⁸ In an

80. Cause of injury.—*Olds v. New York, etc., R. Co.*, 94 N. Y. S. 924, 107 App. Div. 26; *Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

As to the negligence of the parties as the cause of the injury, see post, "Negligence," §§ 2113-2115.

81. *Indiana, etc., R. Co. v. James*, 18 Ill. App. 655.

In a suit against an express company for death of young trout in transit, it is error to assume as a matter of law that the fish were afflicted with such latent infirmity as to require the shipper to notify the company what to do in caring for them in transit; the necessity for such notice being properly found upon evidence as a question of fact. *Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

In an action against a carrier for the loss of a horse after delivery to defendant for transportation, the court properly refused to charge that "the proximate cause of the accident was the unmanageable condition of the horse," as that is a question for the jury. *Giblin v. National Steamship Co.*, 8 Misc. Rep. 22, 28 N. Y. S. 69, 58 N. Y. St. Rep. 311.

82. *Owens Bros. v. Chicago, etc., R. Co.*, 139 Iowa 538, 117 N. W. 762.

83. *Howze v. New Orleans, etc., R. Co.*, 91 Miss. 695, 45 So. 837.

84. *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999.

In an action against a carrier for injuries to a shipment of hogs, the question whether the hogs were injured because of the carrier's failure to provide a

suitable yard for them while they were being held awaiting a delayed train, and because of the failure of the carrier to water them after being loaded, was for the jury. *St. Louis, etc., R. Co. v. Keys*, 6 Ind. T. 396, 98 S. W. 138.

85. Delay as cause of injury.—*Alexander v. Pennsylvania R. Co.*, 7 Pa. Super. Ct. 183; *Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

86. Negligence while awaiting transportation or delivery.—*Carter v. Pennsylvania R. Co.*, 120 Fed. 663, 57 C. C. A. 125.

Whether it is negligence for a carrier to drive horses loose into a pen, instead of leading them separately, is a question for the jury. *Loeser v. Chicago, etc., R. Co.*, 69 N. W. 372, 94 Wis. 571.

In an action for injuries to a horse alleged to have taken cold during a night that it was kept in a car, an instruction that if the carrier had stables and knew that it would not be able to forward the horse, and kept it in a car all night, it was negligence, was erroneous as invading the province of the jury. *Fuller v. Atlantic, etc., R. Co.*, 53 S. E. 297, 140 N. C. 480.

87. *Buck v. Oregon, R., etc., Co.*, 52 Wash. 113, 101 Pac. 491.

88. Where, upon the arrival of a stock car at its destination, the carrier's agent unloaded the same, and turned the stock loose in an open and unprotected lot, on a bitter cold morning, the question of negligence is for the jury. *Cooper v. Raleigh, etc., R. Co.*, 30 S. E. 731, 105 Ga. 83.

Evidence that a railroad had unloaded several cars or "ticky cattle," under quar-

action against a carrier for injuries sustained by horses through its alleged negligence, in keeping them on a plank floor, in its cattle pen, for several days after reaching their destination, though such animals had been confined for some time in cars, the question as to whether or not their subsequent confinement on a plank floor would necessarily be injurious to them, and as to whether or not defendant was therefore negligent, were questions of fact, for the jury.⁸⁹ In an action against a carrier for loss from Texas fever of cattle transported by it, the question of the disease having been communicated to them through the negligence of defendant while in stockpens, in which defendant unloaded them for the purpose of feeding them, is for the jury.⁹⁰

§ 2110. While in Transit.—Where an issue is raised as to the negligence of the carrier in the transportation of live stock whereby the live stock are injured, it is for the jury to weigh the evidence and determine whether or not the carrier was guilty of negligence.⁹¹ Thus where there was testimony tending to show that a racing mare, while being transported by defendant railroad company, was thrown down seven or eight times by reason of the unusual manner in which the train was handled in going around curves, the question of negligence was for the jury.⁹² The negligence of a carrier in furnishing a defective car is a question for the jury.⁹³ Where the evidence is in conflict as to

antine regulations, at certain yards prior to the time it unloaded plaintiff's cattle at the same yards, was sufficient to carry to the jury the question of the railroad's knowledge or imputed knowledge that the yards were infected. *Dorr Cattle Co. v. Chicago, etc., R. Co.*, 103 N. W. 1003, 128 Iowa 359.

Whether a carrier's liability as such has ceased where it unloads a mule, and secures it only to a light plow, is a question for the jury. *Normile v. Oregon R., etc., Co.*, 69 Pac. 928, 41 Ore. 177.

89. *Moses v. Port Townsend, etc., R. Co.*, 5 Wash. 595, 32 Pac. 488.

90. *Baltimore, etc., R. Co. v. Dever*, 112 Md. 296, 75 Atl. 352, 26 L. R. A., N. S., 712, 21 Am. & Eng. Ann. Cas. 169.

91. *While in transit.*—*Alabama.*—*St. Louis, etc., R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54.

Arkansas.—*St. Louis, etc., R. Co. v. Crowder*, 82 Ark. 562, 103 S. W. 172.

Georgia.—*Central, etc., R. Co. v. Hall*, 52 S. E. 679, 124 Ga. 322, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170.

Illinois.—*Indiana, etc., R. Co. v. James*, 18 Ill. App. 655; *Illinois Cent. R. Co. v. Light*, 39 Ill. App. 530.

Indian Territory.—*St. Louis, etc., R. Co. v. Keys*, 6 Ind. T. 396, 98 S. W. 138.

Iowa.—*Peck v. Chicago, etc., R. Co.*, 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883; *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202.

Kansas.—*Darling v. Atchison, etc., R. Co.*, 76 Kan. 893, 93 Pac. 612, rehearing denied in 94 Pac. 202.

Kentucky.—*Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 9 S. W. 698, 10 Ky. L. Rep. 554.

Massachusetts.—*Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44, 48 N. E. 835.

Michigan.—*Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750.

Mississippi.—*Howze v. New Orleans, etc., R. Co.*, 91 Miss. 695, 45 So. 837; *Mobile, etc., R. Co. v. Mullins*, 70 Miss. 730, 12 So. 826; *Laurel Mercantile Co. v. Mobile, etc., R. Co.*, 87 Miss. 675, 40 So. 259.

Missouri.—*Lachner Bros. v. Adams Exp. Co.*, 72 Mo. App. 13; *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co.*, 105 Mo. App. 556, 80 S. W. 53.

Nebraska.—*Wente v. Chicago, etc., R. Co.*, 79 Neb. 179, 115 N. W. 859, 15 L. R. A., N. S., 756.

New York.—*Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

North Carolina.—*Pace Mule Co. v. Seaboard, etc., R. Co.*, 160 N. C. 252, 75 S. E. 994.

South Carolina.—*Sanders v. Atlantic, etc., R. Co.*, 79 S. C. 219, 60 S. E. 526.

Texas.—*Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Missouri, etc., R. Co. v. Garrett*, 39 Tex. Civ. App. 246, 87 S. W. 172; *Houston, etc., R. Co. v. Gray*, 38 Tex. Civ. App. 249, 85 S. W. 838.

Pennsylvania.—*Stewart v. Baltimore, R. Co.*, 37 Pa. Super. Ct. 272.

Washington.—*Buck v. Oregon R., etc., Co.*, 52 Wash. 113, 101 Pac. 491; *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999.

92. *Louisville, etc., R. Co. v. Harned*, 66 S. W. 25, 23 Ky. L. Rep. 1651.

93. In an action for an injury to plaintiff's horses while being transported by defendant, where there was evidence that after they were placed in the car plaintiff's superintendent called the attention of defendant's agent to the insufficiency of the partitions in the car and requested that they be strengthened, which was refused, and that the horses

whether the animals were unloaded, fed, and watered, as required by statute, the question is for the jury.⁹⁴

Gross Negligence.—Whether delays in the transportation of horses and broken timbers on the side of the car upon which the horses injured themselves were the result of gross negligence was for the jury, where different conclusions might have been drawn from the evidence.⁹⁵

§ 2111. Contributory Negligence.—Where the evidence as to the contributory negligence of the shipper is conflicting, or such as not to establish contributory negligence as a matter of law, the question should be submitted to the jury. Questions of contributory negligence, as other negligence, are for the determination of the jury.⁹⁶ Thus in an action against a railroad company for the loss of a horse killed by the burning of a car in which he was being carried, where defendant claimed that the plaintiff's agent in charge of the car had been guilty of contributory negligence in scattering straw all over the car so that it was exposed at the door left partially open for ventilation, the question of such contributory negligence was for the jury.⁹⁷ Where a shipper undertakes the duty of feeding and watering a carload of mules and starts with the car for that purpose, but at a divisional point where a new train is made up becomes separated from the car and fails to find it before it has started, and thereafter the carrier fails to feed and water the animals, except at one point where it

were injured by reason of the insufficiency of such partitions, although contradicted, made a case requiring the submission of the question of defendant's negligence to the jury. *Wells Fargo & Co. v. Potter*, 188 Fed. 888, 110 C. C. A. 522.

94. *Comer v. Columbia, etc., R. Co.*, 52 S. C. 36, 29 S. E. 637; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077.

Under Rev. St. U. S., § 4386 [U. S. Comp. St. 1901, p. 2995], providing that no railroad shall confine animals in cars longer than twenty-eight hours without unloading them, and § 4388 [U. S. Comp. St. 1901, p. 2996], providing that the law shall not apply to transportation in cars in which they can obtain food, water, and an opportunity to rest, it is for the jury to determine whether or not a railway company was negligent in keeping horses on cars thirty-two hours without affording an opportunity to unload and care for them. *St. Louis, etc., R. Co. v. Dolan* (Tex. Civ. App.), 77 S. W. 415.

Where, in an action for damages to horses in shipment, there was evidence that they appeared lean and gaunt on arrival, and several of them died a few days after, and defendant had fed them every twenty-eight hours during shipment and rested them five hours after each feeding, a motion for a nonsuit was properly overruled, since the question of their improper care was for the jury. *Milam v. Southern R. Co.*, 36 S. E. 571, 58 S. C. 247.

95. **Gross negligence.**—*Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

96. **Contributory negligence.**—*Blair v. Wells Fargo & Co.*, 155 Iowa 190, 135 N. W. 615.

In an action for damages for the death of live stock in transit, whether the shipper was negligent in any regard with respect to the failure to sufficiently shower the stock to keep down its temperature held for the jury. *Peck v. Chicago, etc., R. Co.*, 138 Iowa 187, 115 N. W. 1113, 16 L. R. A., N. S., 883.

Where an owner of a stallion taken sick while being shipped, after the stallion was unloaded, acting under the supervision of a competent veterinary surgeon, led him in a storm for a distance of two miles to the veterinary hospital, held, in an action against the carrier for the death of the stallion, a question for the jury whether a reasonably prudent man, under like circumstances, would have so done. Judgment 112 N. W. 300, reversed on rehearing. *Wente v. Chicago, etc., R. Co.*, 79 Neb. 179, 115 N. W. 859, 15 L. R. A., N. S., 756.

The fact that plaintiff, in loading his horse on defendant's cars, took it upon a platform which he knew to be unsafe and dangerous, does not, as matter of law, render him guilty of contributory negligence, such question being always for the jury. *Gulf, etc., R. Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715.

Evidence that the horses became frightened while passing through a tunnel, and broke down the partitions, that plaintiff's servants assisted in placing them in the car and accompanied them, and that they had lanterns which they might have lighted when the tunnel was reached, was not sufficient to establish contributory negligence as matter of law. *Wells Fargo & Co. v. Potter*, 188 Fed. 888, 110 C. C. A. 522.

97. *Trexler v. Baltimore, etc., R. Co.*, 28 Pa. Super. Ct. 198.

was improperly done, and as a result some of the mules are dead when the car reaches its destination, and others are injured so as to depreciate their market value, the questions of the carrier's negligence and of the shipper's contributory negligence are for the jury.⁹⁸

§ 2112. Delay.—In an action against a carrier for delay in the transportation of live stock, the question of the reasonableness of the delay is for the jury.⁹⁹ What is reasonable time for the transportation of a shipment of live stock in question for the jury, depending upon the facts and circumstances of each particular case.¹ Whether the delay was the result of the negligence or other wrong of the carrier, is also for the consideration of the jury.² In an action against a carrier for a delay in the shipment of cattle, the question of the reasonableness and sufficiency of the carrier's excuse for the delay is for the jury.³

Delay in Furnishing Cars.—In an action for delay in the transportation of plaintiff's cattle, evidence that defendant's agent assured plaintiff that cars were at hand, knowing that plaintiff would act on such assurance and drive his cattle to the pens for shipment, coupled with the facts that no cars were available, and that the forwarding of the shipment was delayed thereby, was evidence of the carrier's negligence sufficient to authorize submission of such issue to the jury.⁴

§ 2113. Extent of Injury and Damages.—In an action against a carrier for loss of or injury to live stock while in its possession for transportation, the question whether the animals were in fact lost or injured is, where the evidence does not show this beyond a possibility, a question for the jury.⁵ Where, however, it is shown that the animals were injured under such circumstances that the carrier is liable, it is for the jury to determine to what extent they were injured.⁶ The question as to the amount of damages sustained is also

98. *Stewart v. Baltimore, etc., R. Co.*, 37 Pa. Super. Ct. 272.

99. **Delay in transportation.**—As to delay in furnishing cars as a question for the jury, see ante, "While Awaiting Transportation or Delivery," § 2113.

Alabama.—*Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117.

Kentucky.—*Adams Exp. Co. v. Hundley*, 145 Ky. 7, 139 S. W. 1084; *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750.

Missouri.—*Sloop v. Wabash R. Co.*, 93 Mo. App. 605, 67 S. W. 956; *S. C.*, 117 Mo. App. 204, 84 S. W. 111; *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576, 75 S. W. 375; *Bushnell v. Wabash R. Co.*, 118 Mo. App. 618, 94 S. W. 1001.

Nebraska.—*Allen v. Chicago, etc., R. Co.*, 82 Neb. 726, 118 N. W. 655, 23 L. R. A. N. S., 278; *Union Pac. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598.

New York.—*Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077.

North Carolina.—*Southerland v. Atlantic, etc., R. Co.*, 158 N. C. 327, 74 S. E. 102.

Pennsylvania.—*Alexander v. Pennsylvania R. Co.*, 17 Pa. Super. Ct. 183.

South Carolina.—*Sanders v. Atlantic, etc., R. Co.*, 79 S. C. 219, 60 S. E. 526.

Texas.—*Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822.

West Virginia.—*Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290.

1. *Woodford v. Baltimore, etc., R. Co.*, 70 W. Va. 195, 73 S. E. 290; *Tiller v. Chicago, etc., R. Co.*, 142 Iowa 309, 120 N. W. 672.

2. *United States.*—*Missouri Pac. R. Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153.

Illinois.—*Wabash, etc., R. Co. v. McCasland*, 11 Ill. App. 491.

Kentucky.—*Louisville, etc., R. Co. v. Cooper*, 142 Ky. 533, 134 S. W. 920.

Montana.—*Russell v. Chicago, etc., R. Co.*, 37 Mont. 1, 94 Pac. 488.

Nebraska.—*Union Pac. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598.

North Carolina.—*Southerland v. Atlantic, etc., R. Co.*, 158 N. C. 327, 74 S. E. 102.

3. *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576, 75 S. W. 375; *Fulbright v. Wabash R. Co.*, 118 Mo. App. 482, 94 S. W. 992; *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871.

4. **Delay in furnishing cars.**—*Ficklin v. Wabash R. Co.*, 93 S. W. 861, 117 Mo. App. 211.

5. **Extent of injury and damages.**—*Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050.

6. *Louisville, etc., R. Co. v. Wathen*, 23 Ky. L. Rep. 2128, 66 S. W. 714; *Chicago, etc., R. Co. v. Pollock (Wyo.)*, 93 Pac. 847.

one for the jury.⁷

§ 2114. Instructions to the Jury.—The rules in respect to instructions to the jury, as they exist in the various states as to other civil actions at law, may be said to apply in general with equal force in actions against common carriers for loss of or injury to live stock in their possession for transportation or for delay in transporting them. Thus, there can be no doubt of the right of a party in such an action to require the opinion of the court on any point of law pertinent to an issue, nor that the refusal of the court to give such opinion furnishes a cause for an exception. A party desiring the court to give the jury an opinion as to the law involved in an issue has the privilege of requesting an instruction upon it, which, if not given, may be brought to the notice of the appellate court by proper procedure.⁸ By this, it is not meant that a party is entitled to any or every instruction he may desire, nor even to all that properly state the law. There are several limitations upon this right to require instructions. It is not enough that the instruction requested properly states the law it purports to expound, it must also conform to the issues raised and the facts of the case as they appear in the evidence.⁹ It is not error to refuse an instruction, though it conform to the issues and properly states the law, where, by another instruction, the same matter is properly treated.¹⁰ Where an improper

7. *Connecticut*.—*Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Texas.—*Texas, etc., R. Co. v. Slator* (Tex. Civ. App.), 102 S. W. 156.

Washington.—*Jolliffe v. Northern Pac. R. Co.*, 52 Wash. 433, 100 Pac. 977.

Where there was evidence, in an action for damages caused by delay in transporting a shipment of hogs, that there was no market value for the hogs on Saturday, the court was justified in submitting to the jury the question of whether they could in fact have been sold on Saturday, and, if they could not have been sold, to allow for expenses, shrinkage, and depreciation until Monday. *Ayres v. Chicago, etc., R. Co.*, 75 Wis. 215, 43 N. W. 1122.

8. **Instructions to the jury.**—*North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183.

Kansas.—*St. Louis, etc., R. Co. v. Clark*, 48 Kan. 321, 29 Pac. 312.

Montana.—*Heitman v. Chicago, etc., R. Co.*, 45 Mont. 406, 123 Pac. 401.

In an action against a carrier for injury to a horse during transportation, where the whole case, outside of the extent of the injury, turned upon the point as to whether or not the owner of the horse voluntarily undertook to take it from the car at the junction point of the connecting line, or whether he did so under the order or direction of the carrier, and all the proof taken was directed along that line, and it was conceded that the carrier had no suitable means at that point for loading or unloading stock, it was error to refuse to instruct on the issue as to the circumstances under which the horse was taken from the car, and to instruct on the question whether the means provided for unloading live stock at the junction point were suitable. *Louisville, etc.,*

R. Co. v. Gormley, 33 Ky. L. Rep. 188, 109 S. W. 346.

Where there is evidence that, on reaching their destination, plaintiffs' cattle had the appearance of having been trampled on, and were much bruised, and that this was caused by the fact that plaintiffs had loaded the cattle promiscuously, without reference to their age, sex, condition, or size, it is error to refuse an instruction that plaintiffs are not entitled to recover for injuries resulting from the promiscuous intermingling of the cattle, and this error is not cured by an instruction that defendant is not liable for injuries resulting from "overloading" the cars. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

9. *Illinois*.—*Illinois Cent. R. Co. v. Bundy*, 97 Ill. App. 202.

Iowa.—*Swiney v. American Exp. Co. (Iowa)*, 115 N. W. 212.

Maryland.—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

Texas.—*Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834.

10. *Iowa*.—*Chapin v. Chicago, etc., R. Co.*, 79 Iowa 582, 44 N. W. 820.

Missouri.—*Pacific Exp. Co. v. Emerson*, 101 Mo. App. 62, 74 S. W. 132.

Texas.—*Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

An instruction in an action for loss of cattle shipped that if the cattle destroyed themselves by getting together occasioned by plaintiff's fault in not accompanying the car, or in not properly loading them, or in not erecting a proper partition between the two classes of cattle, and the carrier took charge of the carcasses of the cattle, and they were of any value, plaintiff would be entitled to recover the same, irrespective of whether the carrier

instruction is given by the court, only the party who is prejudiced thereby can complain.¹¹

Conformity to the Law.—An instruction must, first of all, correctly expound the law which it purports to clarify for the jury. Thus, an instruction relieving a carrier from liability if the injuries be found to have been caused by certain acts or conditions, when under the law such would not relieve the carrier, is erroneous.¹²

Conformity to Issues.—An instruction must be applicable to an issue raised by the pleadings. A party can not complain of the court's refusal to instruct upon the law which is not involved in the determination of the issues raised in the action.¹³ Where the requested instruction would not, if given, in any way determine the rights and liabilities of the party, there is no error in refusing it.¹⁴

Conformity to the Facts.—An instruction must be applicable to the facts of the case as they appear in the evidence submitted to the jury, and an instruction that is contrary to such facts is erroneous.¹⁵ It is proper to refuse

was liable for the full value of the cattle, was not calculated to mislead the jury into the belief that, if plaintiff was entitled to recover the value of the cattle killed, he would be entitled in addition thereto to the value of their carcasses, where the court further charged that, if the death of the cattle was caused in any of the ways set forth, plaintiff could not recover their value as live stock at the time of their death. *Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93.

A charge that failure to obtain anticipated premiums at a fair was too speculative an injury to warrant a recovery from a carrier for injury to a horse was sufficiently covered by a charge excluding speculative damages, and fixing the measure of damages at the difference between the horse's value before and after he was hurt. *East Tennessee, etc., R. Co. v. Herrman*, 92 Ga. 384, 17 S. E. 344.

11. *Chapin v. Chicago, etc., R. Co.*, 79 Iowa 582, 44 N. W. 820.

12. **Conformity to the law.**—*Alabama*.—*Louisville, etc., R. Co. v. Smitha*, 40 So. 117, 145 Ala. 686.

Nebraska.—*Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

Texas.—*Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

A request to charge that, if injury to horses was as likely to have been caused by their natural propensity to kick and fight as by negligence of the carrier, the shipper was not entitled to recover was properly refused, where under the evidence the shipper might have recovered even if the jury found for the carrier on such proposition, as it was not restricted to damages resulting only from kicking and biting. *Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

An instruction, in an action for injuries to live stock, for defendant, if one or more of the oxen were injured while being transported, which injuries were proximately caused by the physical con-

dition of the oxen when they were delivered for shipment, without negligence on defendant's part, held erroneous as prohibiting a recovery as to any of the oxen, if one or two of them was injured because of physical condition when received. *Jordan v. Gulf, etc., R. Co.*, 102 Miss. 21, 58 So. 595.

13. **Conformity to issues.**—In an action against a carrier for injury to cattle by reason of a wreck due to its negligence, an instruction that defendant is not liable for injuries done to the cattle by each other by reason of their inherent viciousness is properly refused, if defendant has not raised such issue by pleading and proof, and no evidence of such injuries is brought out by plaintiff. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

In an action against a carrier of live stock for failure to transport and deliver cattle in time for the regular market of a certain day, it was proper to refuse an instruction that there was no evidence sufficient to show that the cattle were not sold in "open market" on that day; there being no question of "open market" in the case. *Baltimore, etc., R. Co. v. Whitehill*, 64 Atl. 1033, 104 Md. 295.

14. *Missouri Pac. R. Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153.

Maryland.—*Baltimore, etc., R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033.

Nebraska.—*Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

South Dakota.—*Berry v. Chicago, etc., R. Co.*, 24 S. Dak. 611, 124 N. W. 859.

15. **Conformity to the facts.**—*Missouri Pac. R. Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153.

Kansas.—*St. Louis, etc., R. Co. v. Clark*, 48 Kan. 321, 29 Pac. 312.

Kentucky.—*Cincinnati, etc., R. Co. v. Green*, 14 Ky. L. Rep. 815.

Mississippi.—*Mobile, etc., R. Co. v. Francis (Miss.)*, 9 So. 508; *Johnson v.*

to give a requested instruction which bases a defense upon circumstances which the evidence shows not to exist.¹⁶

Instruction Ignoring Material Element of Case.—An instruction which ignores material facts, a duty of the carrier, a cause of liability, or a matter of defense, is erroneous.¹⁷ Where there is evidence that the injury occurred under such circumstances that the carrier would not be liable, it is error to refuse a requested instruction relieving the carrier from liability if those circumstances be found to have caused the injury.¹⁸ An instruction as to the care required of a carrier in loading stock should take into consideration the nature of the

Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

Montana.—Heitman v. Chicago, etc., R. Co., 45 Mont. 406, 123 Pac. 401.

In an action against a carrier for injury to live stock, the shipper testified that when the stock was unloaded the agent of the company was near the gangway, and that the stock, which consisted of horses and mules, had to be supported and steadied, so as to keep them from falling down the gangway. Held, that an instruction that if the evidence of plaintiff was believed, the jury should find that no notice was given to the carrier of the injuries was erroneous, being contrary to the testimony in question. Kime v. Southern R. Co., 72 S. E. 485, 156 N. C. 451.

In an action against a carrier of live stock for failure to transport and deliver cattle in time for the market of a certain morning, a prayer for an instruction denying plaintiff's right to recover if the cattle were delivered at a certain station before the opening of the market on that morning was properly refused, where the evidence showed that delivery at the stockyards was not made until the cattle were placed at the pens, and that they had to be so placed by a switch engine, and that such delivery was not made until after market hours. Baltimore, etc., R. Co. v. Whitehill, 64 Atl. 1032, 104 Md. 295.

16. In an action for damages caused by defendant's delay in delivering cattle to a connecting carrier, an instruction that defendant was not liable if the delay was no longer than was necessary to comply with Rev. St., § 4386, requiring carriers of cattle to unload them, at the end of every twenty-eight hours, for feed, water, and five hours' rest, excepting only where they are transported in cars provided with facilities for that purpose, was properly refused, as misleading, where the cattle were delayed eleven hours after being en route only fourteen hours, and were loaded in cars in which they could be fed and watered without unloading, and, but for such delay, would have arrived on time, even if the connecting carrier had unloaded them for rest. Missouri Pac. R. Co. v. Hall, 66 Fed. 868, 14 C. C. A. 153.

17. Instructions ignoring material element of case.—Alabama.—Louisville, etc.,

R. Co. v. Smitha, 145 Ala. 686, 40 So. 117.

Mississippi.—Jones v. Memphis, etc., Packet Co. (Miss.), 31 So. 201; Johnson v. Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

Texas.—St. Louis, etc., R. Co. v. Lovelady, 81 S. W. 1040, 36 Tex. Civ. App. 282.

In an action against a carrier for the escape of cattle from pens into which the cattle had been put for the purpose of shipment, an instruction that the liability of the carrier for the safe-keeping and damages to the cattle began when the same were put into its stock pens at the place of shipment, and received by the carrier or its agent knew that the cattle were put therein for shipment over its line of railroad, was erroneous, where there was evidence that the cattle were not delivered or accepted for immediate shipment, and that the carrier refused to accept the cattle for shipment until the consignor loaded the cars with them. Kansas, etc., R. Co. v. Barnett, 61 S. W. 919, 69 Ark. 150.

18. Cincinnati, etc., R. Co. v. Green, 14 Ky. L. Rep. 815.

In an action against a carrier for loss and injury of stock shipped over its line, the court, in its instructions on the common-law liability of defendant, treated it as an insurer of the animals against all loss or injury from whatever cause except the acts of God or the public enemy, while there was testimony tending to show that the loss may have resulted from the intrinsic qualities and propensities of the animals, without the fault of the company. Held, that the court should have added a further exception, relieving defendant from liability if the loss or injury was attributable to the nature and propensities of the animals, and could not have been prevented by the ordinary diligence of defendant. St. Louis, etc., R. Co. v. Clark, 48 Kan. 321, 329, 29 Pac. 312.

An instruction, in an action against a carrier for damages, that the responsibility of a carrier of live stock continued from the time the stock was intrusted to and received by it until it reached its destination, is not erroneous, as asserting an absolute liability for the loss of or injury to the stock, irrespective of any defense set up by the carrier. McCollom v. Indianapolis, etc., R. Co., 94 Ill. 534.

animal. What would be proper care in loading some animals would be negligence as to others.¹⁹ In an action against a carrier for injuries to a horse while in transit, an instruction that, if the injury occurred by the horse slipping on the bridge while being reloaded after unloading for feeding, the verdict should be for defendant, was erroneous, as ignoring the propriety of unloading the horse at the time, and the good order of the facilities for reloading, and whether due care was observed by defendant's servants.²⁰ When the conductor of a freight train refused to allow the shipper to unload at an intermediate point animals becoming sick in transit, an instruction basing the right of the shipper to recover on the promptness in delivering the animals, and ignoring the right to recover for the improper refusal of the conductor to allow the animals to be unloaded at the intermediate point, is erroneous.²¹ Where a complaint against a carrier for damages to an animal in transportation avers the injury was occasioned by failure to give it proper food and water, an instruction postulating that plaintiff must show defendant's failure to give it food, water, and exercise is properly refused, as the carrier is liable for failure to give a proper amount, even though it gave some of these things.²² In an action against a carrier for injuries to live stock, an instruction that the carrier owed no duty to guard the animals against fever was properly refused, as exempting the carrier from liability, though the fever resulted from its negligence.²³ In an action against a carrier for injury to a horse shipped, an instruction that if defendant furnished a safe means of unloading the horse in question, and the injury did not occur on account of the unsafe condition of the same, plaintiff could not recover, was erroneous, in eliminating the question whether defendant was negligent in furnishing a suitable place for unloading and in the use of the appliances at hand.²⁴

§ 2115. Verdict and Findings.—The verdict and findings of the jury, when no error appears on the face thereof, are to be read and construed with respect to the pleadings and charges given the jury.²⁵ On its findings, the jury must dispose of all the issues necessary to the decision of the case. This need not be done in express words, however. Thus, in an action against a carrier for injuries to a shipment of live stock, where the answer alleged that the condition of the stock pens and facilities for unloading at a station were known to the shipper, and that he assumed the risk, and was guilty of contributory negligence, a finding that he was not guilty of contributory negligence disposed of the issue raised.²⁶

Negative Findings.—The rule that a negative finding may be made where there is no evidence to sustain an affirmative issue applies only where the burden of proof is upon the party against whom the finding is made.²⁷ A finding that there is not sufficient evidence to support an affirmative issue is a finding against

19. An instruction, in an action against a carrier for injuries inflicted on a jack in loading him on a steamboat, that defendant is not liable for the injuries produced by his stubbornness or obstinacy in resisting the efforts to load him, if its agents did not mistreat him, and used only such force as was necessary to load him, and exercised ordinary care in loading him, is misleading, as the servants should have used the care required in dealing with the particular animal, reference being had to his known instincts and habits. *Jones v. Memphis, etc., Packet Co.* (Miss.), 31 So. 201.

20. *Nashville, etc., R. Co. v. Parker*, 27 So. 323, 123 Ala. 663.

21. *Johnson v. Alabama, etc., R. Co.*,

69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

22. *Southern Exp. Co. v. Ashford*, 126 Ala. 591, 28 So. 732.

23. *Louisville, etc., R. Co. v. Smitha*, 40 So. 117, 145 Ala. 686.

24. *Frasier v. Charleston, etc., R. Co.*, 52 S. E. 964, 73 S. C. 140.

25. **Verdict and findings.**—*Texas, etc., R. Co. v. Scharbauer* (Tex. Civ. App.), 52 S. W. 590.

26. *Chicago, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 85 S. W. 286.

27. **Negative findings.**—*Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991; *Atchison, etc., R. Co. v. Means*, 71 Kan. 845, 80 Pac. 604.

the party having the burden of proving that issue.²⁸ Where, to a special question as to whether notice in writing was given to the company of the claim for damages before the cattle were removed from the station and stockyards, the jury answered: "Yes; after the cattle were sold; but we don't know whether the cattle were removed or not,"—this answer is equivalent to a finding that no such notice was given before the cattle were removed.²⁹ So, where the burden is on the carrier to show the exercise of a proper degree of care, a finding that there is not sufficient evidence to show negligence is not equivalent to a finding that the carrier used proper care, nor will such a finding discharge the carrier.³⁰

²⁸. *Atchison, etc., R. Co. v. Means*, 71 Kan. 845, 80 Pac. 604; *Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

²⁹. *Atchison, etc., R. Co. v. Means*, 71 Kan. 845, 80 Pac. 604.

³⁰. *Rick v. Wells Fargo Co.*, 39 Utah 130, 115 Pac. 991.

PART IV

CARRIERS OF PASSENGERS

CHAPTER XXI.

RELATION OF CARRIER AND PASSENGER.

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§ 2116. Who Are Carriers of Passengers.—A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who

may apply for passage, so long as there is room and no legal excuse for refusing,¹ and a railroad operating its trains over the tracks,² or using the depot grounds and station and station facilities,³ of another railroad company is a carrier of passengers. But railroads operated for private purposes are not carriers of passengers by reason of their nature alone,⁴ although under appropriate circumstances and conditions they may be such and subject to the liabilities of such carriers.⁵ Nor does a railroad company which is in the habit of occasionally carrying passengers on its freight trains thereby make itself a common carrier of passengers on such trains.⁶

Street Railways.—A street railroad company is a common carrier of passengers for hire.⁷

Steamboats.—The proprietors of steamboats engaged regularly in carrying passengers between certain points are common carriers, and are bound to re-

1. Who are carriers of passengers.—*Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827, 51 Am. & Eng. R. Cas. 222.

An instruction that, if defendant was engaged in the business of transporting passengers for hire on a railroad operated by him, the law denominates him a "common carrier," is correct. *Davis v. Button*, 78 Cal. 247, 20 Pac. 545, 18 Pac. 133.

One who undertakes for hire to carry all persons, indifferently, who may employ him, is a common carrier. *Verner v. Sweitzer*, 32 Pa. 208.

2. Using other tracks.—A railroad company is liable at common law, as a common carrier of passengers, while operating its trains over the road of another company. *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690.

3. A railroad company, having by lease the right to use the depot grounds and tracks of another company, owes the same duty to passengers of that company lawfully on the ground as it does to its own. *Haff v. Minneapolis, etc., R. Co.*, 4 McCrary 622, 14 Fed. 558.

4. The responsibility and duties of a private carrier, operating a railroad for the purposes of its own business, and permitting persons to travel gratuitously on such road, are different from those of common carriers for hire; and, in an action against such a private carrier for damages caused by its alleged negligence, it is not error to refuse instructions to the jury based upon the rules as to the liability of common carriers. *Wade v. Lutchter, etc., Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255.

Article 244 of the constitution of Louisiana, providing that all railroads are public highways, and all railroad companies common carriers, does not have the effect of making a business corporation organized to construct and operate a saw-mill and a railroad in connection therewith, which constructs a logging railroad on its private grounds, and operates the same for private purposes, a common carrier, charged with the duties and responsibilities imposed by law on such car-

riers. *Wade v. Lutchter, etc., Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255.

5. In an action against a logging company for personal injuries caused by the derailment of a train on its logging road, on which the plaintiff was riding, it appeared that the defendant's sole business was logging, and it had never authorized the use of its road for carrying passengers; but there was evidence that the defendant's general superintendent had instructed the plaintiff, who had come to the logging camp in search of work, to get on the train, and go for his blankets, so as to return and go to work, and also evidence that the trains were used, with the knowledge of defendant, for carrying people up and down the road. Held, that it was not error to refuse to direct a verdict for defendant. *Albion Lumber Co. v. De Nobra*, 72 Fed. 739, 19 C. C. A. 168.

6. Carrying passengers on freights.—*Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631.

7. Street railway.—*Dean v. Chicago General R. Co.*, 64 Ill. App. 165; *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192; *Redmon v. Metropolitan St. R. Co.*, 84 S. W. 26, 185 Mo. 1, 105 Am. St. Rep. 558; *East Omaha St. R. Co. v. Godola*, 70 N. W. 491, 50 Neb. 906; *Lincoln Tract. Co. v. Heller*, 100 N. W. 197, 72 Neb. 127, reversed on rehearing, 102 N. W. 262; *Lincoln Tract. Co. v. Webb*, 102 N. W. 258, 73 Neb. 136, 119 Am. St. Rep. 879; *State v. Spokane St. R. Co.*, 53 Pac. 719, 19 Wash. 518, 41 L. R. A. 515, 67 Am. St. Rep. 739.

Street-railway companies are common carriers of passengers, and are liable as such on common-law principles. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Street-railway companies are common carriers, and presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injury to passengers. *Pray v. Omaha St. R. Co.*, 44 Neb. 167, 62 N. W. 447, 43 Am. St. Rep. 717.

ceive all persons on board to whose character and conduct there is no reasonable objection.⁸

Scenic Railway.—A company owning an amusement park and operating a scenic railway is subject, when it has accepted passengers upon such railway for hire, to the liabilities of carriers of passengers generally.⁹

Cable Cars.—Companies operating cable cars are common carriers of persons, and are bound to the highest degree of care and diligence.¹⁰

Ferryman.—Where a servant is usually employed by his master to ferry over travelers and others for him, the master, as to such travelers, is a common carrier.¹¹

Elevators.—The general rule seems to be that the operator of a passenger elevator is a common carrier of passengers.¹² This rule has been applied to a merchant who operates an elevator in his store for the transportation of his customers who are directed by him to take the elevator,¹³ to the owner of a building in which a freight elevator is operated, who permits an employee of his tenant to ride thereon in the discharge of his duties,¹⁴ to the persons engaged in operating and managing an office building, and in connection therewith operating a passenger elevator for the use of tenants and others,¹⁵ and to the owner of an apartment house conducting it himself, in the operating of its passenger elevator, as to all having a right to use it.¹⁶ It is held, however, that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier.¹⁷

Liveryman.—A company engaged in the livery business does not hold itself out to serve any and all persons, but operates only under a special contract, and

8. **Steamboats.**—*Jencks v. Coleman*, Fed. Cas. No. 7,258, 2 Sumn. 221. See post, "Carriers by Water," Part VII.

9. **Scenic railways.**—*O'Callaghan v. Dellwood Park Co.*, 149 Ill. App. 34, affirmed in 89 N. E. 1005.

10. **Cable cars.**—*Van de Venter v. Chicago City R. Co.*, 26 Fed. 32.

11. **Ferryman.**—*Spivey v. Farmer*, 3 N. C. 339.

12. **Elevators.**—*Atkeson v. Jackson* (Wash.), 130 Pac. 102; *Chicago Exch. Bldg. Co. v. Nelson*, 64 N. E. 369, 197 Ill. 334, affirming judgment, 98 Ill. App. 189; *Field v. French*, 80 Ill. App. 78; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *Springer v. Schultz*, 105 Ill. App. 544, judgment affirmed, 68 N. E. 753, 205 Ill. 144; *Anderson Art Co. v. Greenburg*, 118 Ill. App. 220; *Goldsmith v. Holland Bldg. Co.*, 81 S. W. 1112, 182 Mo. 597; *Hensler v. Stix*, 88 S. W. 108, 113 Mo. App. 162.

Where defendants use an elevator for the purpose of lifting persons forty feet vertically, they are carriers of passengers, and are liable for any defect or flaw in the machinery which is discoverable on a reasonable and careful examination according to the best-known tests reasonably practicable. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Whether a person or corporation running an elevator is a common carrier or has the responsibilities of one, *quære*. *Gibson v. International Trust Co.*, 117 Mass. 100, 58 N. E. 278, 52 L. R. A. 928.

An elevator used to carry passengers is a common carrier. *Perrault v. Emporium Department Store Co.*, 128 Pac. 1049, 71 Wash. 523.

13. **Rule applied to merchant.**—*Morgan v. Saks*, 143 Ala. 139, 38 So. 848.

14. **Owner of freight elevator.**—*Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464.

15. **Office building.**—*Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S. W. 848.

The owner of an office building, who maintains and operates therein a passenger elevator for the use of his tenants and the public who choose to use the same, is, as to those who ride in the elevator, a "common carrier of passengers" for hire. *Ohio Valley Trust Co. v. Wernke*, 42 Ind. App. 326, 84 N. E. 999.

16. **Owner of apartment house.**—*Tippecanoe Loan, etc., Co. v. Jester* (Ind.), 101 N. E. 915.

17. **Elevator in private building.**—*Edwards v. Manufacturers' Bldg. Co.*, 27 R. I. 248, 61 Atl. 646, 114 Am. St. Rep. 37, 2 L. R. A., N. S., 744.

The owner of a passenger elevator for the use of tenants and others in a building, being under no obligation to carry passengers, is not a common carrier of passengers, within the meaning of Pub. St., c. 73, § 6, relating to the liabilities of common carriers of passengers, and hence is not liable for the death of a passenger caused by the elevator being out of repair. *Seaver v. Bradley*, 60 N. E. 795, 179 Mass. 329, 88 Am. St. Rep. 384.

deals with such persons only as it chooses, and is in no sense a common carrier.¹⁸

Mail Contractor.—A contractor to carry the mail between a railroad station and the postoffice in a town is not a common carrier and owes a railroad mail clerk no further duty than the exercise of reasonable care.¹⁹

Vehicle for Transportation of Employees.—A lumber company operating an engine and flat cars to haul timber and transport its employees to and from their work is not a carrier of passengers, and its employees while being transported are not passengers.²⁰

§ 2117. What Law Governs Relationship.—Performance of Contract.—Generally, as to its formalities and its interpretation, obligation and effect a contract is governed by the laws of the place where it is made, and if it is valid there, it is valid everywhere.²¹ Hence, a contract for the conveyance of passengers is governed by the law of the place where it is made, and not that of the shipowner's domicile.²² But when a contract of carriage is made in one state or country to be performed in another and solely with reference to the laws of that state, it is governed by the laws of the state or country where it is to be performed.²³ It is to be presumed that parties enter into a contract with

18. Liveryman.—*Trout v. Watkins Livery, etc., Co.*, 148 Mo. App. 621, 130 S. W. 136.

19. Mail carrier.—*Davis v. Crisham*, 213 Mass. 151, 99 N. E. 959.

20. Vehicles for employees.—*Self v. Adel Lumber Co.*, 5 Ga. App. 846, 64 S. E. 112.

21. Performance of contract.—*Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; *Michigan R. Co. v. Boyd*, 91 Ill. 268; *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271; *Burnett v. Pennsylvania R. Co.*, 176 Pa. 45, 34 Atl. 972.

A contract evidenced by a railroad ticket is governed by the law of the place where it is made. *Robert v. Chicago, etc., R. Co.* (Mo. App.), 127 S. W. 925.

A contract by a railroad to carry a passenger and baggage from a point in one state to a point in another state, when made in the former, is a contract of that state, governed by its laws and is not affected by a statute of the latter making of a carrier liable for the loss of property caused either by its own or some connecting carrier's negligence. *Hubbard v. Mobile, etc., R. Co.*, 112 Mo. App. 459, 87 S. W. 52.

Since, under the law of Canada, a carrier granting a shipper a free pass to care for his stock and goods in transit, may by contract relieve itself from liability for injuries to such caretaker, even though arising from the negligence of the carrier or its servants, a contract so made in Canada, governing a shipment wholly between Canadian points, would be enforced in an action in the federal court sitting in Minnesota for injuries to a shipper in Canada, though such contract was contrary to the public policy of Minnesota or of the United States in so

far as it attempted to exempt the railway from liability for negligence. *Shelton v. Canadian Northern R. Co.*, 189 Fed. 153.

22. Carriers of passengers by water.—*Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286.

23. Pennsylvania Co. v. Fairchild, 69 Ill. 260; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253; *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271.

The *lex loci contractus* determines the nature, validity, obligation and legal effect of a contract and gives the rules of instruction and interpretation unless it appears to have been made with reference to the laws and usages of some other state or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rules of interpretation. *Dyke v. Erie, R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43, citing *Prentiss v. Savage*, 13 Mass. 20; *Medbury v. Hopkins*, 3 Conn. 472; *Everett v. Venable*, 19 N. Y. 436; *Hoyt v. Thompson*, 19 N. Y. 207; *Curtis v. Leavitt*, 15 N. Y. 227; *Carnegie v. Morrison* (Mass.), 2 Metc. 381.

Defendant railroad, a Pennsylvania corporation, issued and delivered to plaintiff, in the state of New Jersey, a pass from Philadelphia to Elmira, N. Y., which provided that plaintiff assumed all risks of accident. Plaintiff was injured, within the state of Pennsylvania, by the admitted negligence of defendant's employees. Held, that the contract of carriage, since it was to be performed in Pennsylvania, was governed by the laws of that state, and not by the laws of the place where it was made. *Burnett v.*

reference to the laws of the place of performance, and unless it appears that the intention was otherwise, those laws determine the mode of fulfillment and obligation and the measure of liability for the breach.²⁴ It is held, however, that the fact that a contract is to be partly performed in a state or country other than the *lex loci contractus*, is not sufficient to show an intent upon the part of the parties to abide by the laws of the former state or country.²⁵ These same rules apply whether the action is to be regarded as an action of *assumpsit* upon a contract or as an action on the case for negligence and the rights and liabilities of the parties must be adjudged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the carrier and the rights of the passenger are based upon the contract.²⁶ It is conceded that the statutes of one state have no intrinsic extraterritorial force and that they bind only within the jurisdictional limits of that state. However, upon principles of comity, effect is sometimes given by the courts of a state to foreign laws. In matters of contract such effect is accorded to statutes of other states, only to carry out the intent of, and do justice between the parties, never to qualify or vary the effect of a contract between parties not citizens of such foreign states, or subject to its laws, and not made in view of the laws of such state. Effect will not be given by the courts of a state to foreign laws in derogation of the contract, or prejudicial of the rights of a citizen.²⁷

Pennsylvania R. Co., 176 Pa. 45, 34 Atl. 972.

Where a passenger going from New York to her destination in New Jersey failed to find her trunk at the station of departure so she could check it, but accepted a check therefor from the baggage master on his promise to forward the trunk, and presented the check at her destination, but failed to receive the trunk, the contract for the transportation of the baggage was governed by the New Jersey law. *Williams v. Central R. Co.*, 88 N. Y. S. 434, 93 App. Div. 582, affirmed in 76 N. E. 1116, 183 N. Y. 518.

24. *Western, etc., R. Co. v. Exposition Cotton Mills Co.*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412; *Burnett v. Pennsylvania R. Co.*, 176 Pa. 45, 34 Atl. 972; *Brown v. Camden, etc., R. Co.*, 83 Pa. 316.

In *Brown v. Camden, etc., R. Co.*, 83 Pa. 316, a ticket was issued in Philadelphia by a New Jersey Corporation operating a railroad in that state, and the plaintiff's trunk was delivered to the defendant in Philadelphia, and it did not appear where it had been lost. The liability being admitted, the question was whether the laws of Pennsylvania, limiting the amount of liability, applied. It was held that, as the service was to be rendered by a New Jersey corporation, in New Jersey, the laws of the place of performance controlled. It was said, in the opinion, by Sharswood, J.: "The negligence of which the defendants are presumed to have been guilty was in the course of the exercise of their franchises

as a New Jersey corporation, and the extent of their liability is therefore to be determined by the laws of that state." *Burnett v. Pennsylvania R. Co.*, 176 Pa. 45, 34 Atl. 972.

25. Part performance.—*P. & L. E. R. Co. v. Bishop*, 13 O. C. C. 380, 7 O. C. D. 73; *Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 W. S. (Eng.), 397, 455; *Cox v. United States (U. S.)*, 6 Pet. 172, 8 L. Ed. 359.

In *Peninsula, etc., Co. v. Shand (Eng.)*, 3 Moores P. C. 272, a passenger by an English vessel belonging to an English company from South Hampton to Mauritius, via Alexandria and Suez, sustained the loss of his baggage after leaving Alexandria and it was held that the contract for the passage was to be interpreted according to the law of England, the place where the contract was made.

Limitation of liability.—Where a contract of transportation, limiting the liability of the company for personal injuries, is made in one state, and the passenger under such contract is killed in another state, if such limitation is against the laws of the former state and the contract to be construed according to those laws, it can have no binding effect in the latter state. *Illinois Cent. R. Co. v. Beebe*, 69 Ill. App. 363, affirmed in 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253.

26. *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43.

27. *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43, citing *Liverpool, etc., Co. v. Benhan*, 2 L. Rep. P. C. Cases, 193; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Arnott v. Redfern*, 2 Car. & Payne 88; *Gale v. Eastman (Mass.)*, 7 Metc. 14.

Return Trip Contract.—A contract for the carriage of a passenger and his baggage to his destination in a foreign country and return, made by the initial carrier in one of the states, is governed by the laws of the state,²⁸ and the same rule applies as between the states of the Union.²⁹

Personal Injuries.—The *lex loci delicti* governs in a passenger's action for personal injuries, and not the law of the place where the contract of carriage was made, so that rights given by the law of the place of the injury can only be defeated by defenses permitted by that law.³⁰ An action against a carrier for an injury received by plaintiff while a passenger in a state other than that in which the action is brought is governed by the law of that state.³¹ In a common-law suit for damages on account of injuries received in another state, the court should charge as to the common law applicable to the case.³²

Ejection of Passengers.—An action for ejecting a passenger is governed by the law of that state where the ejection took place.³³

Amount of Damages.—When a passenger in the cars of a railroad company created by the laws of one state, who had purchased a ticket entitling him to be carried between two places in that state, was injured by the negligence of the company during his passage over a portion of the road situated within another state, the amount of damages recoverable by him was not affected by the statute of the latter state limiting the amount recoverable in such cases.³⁴

§§ 2118-2121. Duty to Receive and Carry—§ 2118. In General.—The public character of the business of a common carrier of passengers imposes on such carrier the duty of receiving and carrying without discrimination in vehicles, in use by it for public carriage, all persons fit to be carried, or, as some say, all proper persons, who may properly present themselves for transportation to proper points along the line, so long as there are accommodations for passengers in such vehicle,³⁵ unless some special reason exists for refus-

28. **Return trip contract.**—Mexican Nat. R. Co. v. Ware (Tex. Civ. App.), 60 S. W. 343.

29. **Between the states.**—Robert v. Chicago, etc., R. Co. (Mo. App.), 127 S. W. 925.

30. **Lex loci delicti.**—Pittsburg, etc., R. Co. v. Grom, 142 Ky. 51, 133 S. W. 977.

Limitation by stipulation on pass.—Whether a waiver of liability for injuries, printed on the back of a pass, is valid and a defense to an action for injuries to the person riding on the pass, by the carrier's negligence, depends on the law of the place where the injury occurred. Smith v. Atchison, etc., R. Co., 114 C. C. A. 157, 194 Fed. 79.

31. **Action brought in another state.**—Louisville, etc., R. Co. v. Harmon, 23 Ky. L. Rep. 871, 64 S. W. 640.

Where a passenger upon a railroad train was killed in a foreign state, an action by his administratrix, though brought in the domestic forum, is governed by the laws of the foreign state. Dallas v. Illinois Cent. R. Co., 139 S. W. 953, 144 Ky. 737.

In such an action it is proper to instruct that defendant was bound to use "the utmost human care and foresight known to prudent and careful men," where it was alleged, and not denied, that by the law of the state where the injury occurred defendant understood to use that degree of

care. Louisville, etc., R. Co. v. Harmon, 64 S. W. 640, 23 Ky. L. Rep. 871.

32. **Personal injuries.**—Alabama Mid. R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655.

33. **Ejection.**—Magill v. Seaboard, etc., Railway, 84 S. C. 416, 66 S. E. 561.

34. **Amount of damages.**—Dyke v. Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43.

35. **Duty to receive and carry.**—Birmingham R., etc., Co. v. Anderson, 3 Ala. App. 424, 57 So. 103; Bogard v. Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 36 L. R. A., N. S., 337; Meisner v. Detroit, etc., Ferry Co., 154 Mich. 545, 118 N. W. 14, 19 L. R. A., N. S., 872.

The law requires the carrier to transport with impartiality and safety those who offer. Winnegar v. Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237, 9 Ky. L. Rep. 156.

If the passenger is ready and willing and offers to pay the legal fare when demanded by the conductor of the train, the railroad company is bound to carry him, provided there is room in the cars and the passenger is a fit person to be admitted. Tarbell v. Central Pac. R. Co., 34 Cal. 616.

A tender to a street railway company of the requisite fare and the ability of a passenger to find a place of safety on the car impose an obligation on the company to receive and transport the passenger. De Glopper v. Nashville R., etc., Co., 123

ing,³⁶ and every person is *prima facie* entitled to become a passenger and be treated with impartiality and equal safety.³⁷ Carriers of passengers have no right to discriminate between proper persons.³⁸ The duty of common carriers with respect to the transportation of passengers is a duty independent of contract, arising by implication of law from the fact that persons are received in the course of business of such employment.³⁹ Railroads are public highways only in the sense of being compelled to accept and carry all passengers to the extent of their ability.⁴⁰ It is an indispensable condition to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with a surrender of its corporate privileges. It is, therefore, a right that the public have to enter upon the premises of the company at points designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry.⁴¹ As a general rule, the law makes all railroads "public highways"

Tenn. 633, 134 S. W. 609, 33 L. R. A., N. S., 913.

Steamboats.—*Jencks v. Coleman*, Fed. Cas. No. 7, 258, 2 Sumn. 221.

As to duty of sleeping car companies, to receive passengers, see post, "Palace Cars and Sleeping Car Companies," chapter 30.

Stage coach.—*Bennett v. Dutton*, 10 N. H. 481.

To designated stations or proper points.—*Georgia R., etc., Co. v. Greer*, 7 Ga. App. 292, 66 S. E. 961.

As dependent upon status as common carrier, see ante, "Who Are Carriers of Passengers," § 2119.

36. *Pearson v. Duane* (U. S.), 4 Wall. 605, 18 L. Ed. 447; *Shoemaker v. Kingsbury* (U. S.), 12 Wall. 369, 20 L. Ed. 432; *Hall v. Decuir*, 95 U. S. 485, 24 L. Ed. 547; *St. Louis, etc., R. Co. v. Lawrence* (Ark.), 153 S. W. 799; *Pittsburg, etc., R. Co. v. Bingham*, 29 O. St. 364; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457; *Wallen v. McHenry*, 22 Tenn. (3 Humph.) 245.

"Steamers carrying passengers for hire are bound, if they have suitable accommodation, to take all who apply, unless there is objection to the character or conduct of the applicant. Applicants to whom there is no such valid objection have a right to a passage, but it is not an unlimited right. On the contrary, it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and the due arrangement of the business of the carrier." *Hall v. Decuir*, 95 U. S. 485, 24 L. Ed. 547.

37. *United States*.—*Thurston v. Union Pac. R. Co.*, 4 Dill. 321, Fed. Cas. No. 14,019; *Saltonstall v. Stockton*, Fed. Cas. No. 12,271, 1 Taney 11.

Dakota.—*Waldron v. Chicago, etc., R. Co.*, 1 Dak. 351, 46 N. W. 456.

Illinois.—*Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 26 Am. & Eng. R. Cas. 241, 5 Am. St. Rep. 483.

Iowa.—*State v. Chovin*, 7 Iowa 204.

Kentucky.—*Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, 9 Ky. L. Rep. 156, 4 S. W. 237, 34 Am. & Eng. R. Cas. 462.

New York.—*Beekman v. Saratoga, etc., R. Co.* (N. Y.), 3 Paige 45, 22 Am. Dec. 679.

Virginia.—*Norfolk, etc., R. Co. v. Gallier*, 89 Va. 639, 16 S. E. 935.

West Virginia.—*Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 14 L. R. A. 798, 29 Am. St. Rep. 827.

38. Discrimination.—*Indianapolis, etc., R. Co. v. Rinard*, 46 Ind. 293.

The proprietors of a stage coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage so long as they have room, and it is not a lawful excuse that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers that come from such place on certain days unless they should come in his coach. *Bennett v. Dutton*, 10 N. H. 481.

When a railroad company has established commutation rates for a certain locality, and commutation tickets are sold there to the public, it must sell such a ticket to every individual who applies therefor under the same circumstances and conditions under which such tickets are sold to the public. *Atwater v. Delaware, etc., R. Co.*, 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

39. Duty arising by implication of law.—*Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, 17 S. E. 121; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L. R. A. 435, 19 Atl. 178, 19 Am. St. Rep. 442; *Bogard v. Illincis Cent. R. Co.*, 144 Ky. 649, 139 S. W. 855, 36 L. R. A., N. S., 337.

40. Railroads are public highways.—*Toledo, etc., R. Co. v. Pence*, 68 Ill. 524.

41. Condition to right to exercise function.—*Pittsburgh, etc., R. Co. v. Bingham*, 29 O. St. 364.

open to the use of all person for the transportation of their person under such regulations as may be properly prescribed by law, without discrimination as to persons.⁴² So it may be laid down as a general rule that it is the duty of railroad companies, subject to such reasonable rules as may be adopted for the transaction of its business as a common carrier,⁴³ to receive and transport all passengers offered for transportation to proper stations and stopping places along its line or to its terminus.⁴⁴ The same reasonable construction of the contract of carrier and passenger, applicable to carriers of passengers by ships or steamers, and hacks or stage coaches, is applicable to carriers and passengers upon railroads.⁴⁵ In some states this duty is expressly imposed on carrier's by statute,⁴⁶ and penalties provided for a refusal to perform it.⁴⁷ But a state statute providing for punishment and ejection of disorderly passengers, enacted for the protection of the carrier, applies only to persons received on a train, and does not change the common-law rule as to what passengers carriers must receive.⁴⁸

Beyond Termini.—When a railroad company makes contracts beyond the limits of its own road, and holds itself out as ready to do so with all, it becomes a common carrier beyond its own limits, and is bound to receive passengers when the proper fare is paid.⁴⁹

Connecting Carrier.—See post, "Connecting Carriers," Part V; "Interstate and International Commerce," Part VI.

Designated Stations—Proper Point.—When it is duly provided by the proper authority, either of the state or of the railroad, that a particular point shall be as to some or all trains a flag or regular stop, it becomes the duty of the carrier to contract with all prospective passengers for transportation to or from that point. To refuse to make such a contract is a breach of the carrier's legal duty, and a tort.⁵⁰ An interurban street railway company is not abso-

42. Railroads "public highways."—*Pioria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135.

A railroad is a common carrier and every man has the right to compel a common carrier to carry him on payment to the carrier on what the law deems compensation. *Powers v. Inferior Court*, 23 Ga. 65.

43. Rules and regulations.—See ante, "Rules and Regulations of Carriers," chapter III.

44. All passengers offered for transportation.—*Fremont, etc., R. Co. v. Waters*, 59 Neb. 592, 70 N. W. 225.

It is the duty of a carrier of passengers to receive, carry and transport persons from one point on its road to another, under such reasonable rules and regulations as it may prescribe to itself, or as may be prescribed by more general law. *Pittsburgh, etc., R. Co. v. Bingham*, 29 O. St. 364; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457; *State v. Kimber*, 4 W. L. Gaz. 359, 3 O. Dec. 197.

45. Construction of contract.—*Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457, followed in *Hatten v. Railroad Co.*, 39 O. St. 375.

46. Statutory provisions.—Articles 4494, 4495, 4496, Tex. Rev. Stat., requires railroad companies to take and transport passengers on due payment of fare, legally authorized for the transpor-

ation. *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; see *Paris, etc., R. Co. v. Robinson*, 53 Tex. Civ. App. 12, 114 S. W. 658.

47. Penalty.—Article 4227 provides that "In case of refusal by such corporation or their agents so to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit." *Houston, etc., R. Co. v. Smith*, 63 Tex. 322. See ante, "Penalties for Violation of Regulations," § 181 et seq.

48. Statute providing punishment.—*Chesapeake, etc., R. Co. v. Selsor*, 142 Ky. 163, 134 S. W. 143, 33 L. R. A., N. S., 165, construing Kentucky Stat., § 806, Russell's Stat., § 350.

49. Beyond termini.—*Wheeler v. San Francisco, etc., R. Co.*, 31 Cal. 46, 89 Am. Dec. 147.

Rule operates between termini of route.—See ante, "General Statement and Explanation of Rule," § 333.

50. Designated stations—Proper point.—*Georgia R., etc., Co. v. Greer*, 7 Ga. App. 292, 66 S. E. 961.

A railroad commission having ordered that a point on a railroad's line be made a flag station for the reception and dis-

lutely bound to carry a passenger to a particular town where there is no agreement therefor.⁵¹

Freight and Similar Trains.—It can not be denied that as a general rule carriers of passengers have the right to make and enforce rules preventing passengers from riding on trains not intended to carry passengers.⁵² But if a carrier holds itself out as carrying passengers on freight trains, it is bound to so carry a passenger who tenders the fare.⁵³ In some states, certain specified persons, such as physicians,⁵⁴ or sheriffs, and deputies,⁵⁵ are given the right to ride on freight under certain circumstances.

On Special Trains.—A railroad company providing sufficient trains and cars to accommodate all the traveling public over its line has the legal right to run special trains over its road for the purpose of carrying provisions and paying its employees, and to prohibit any persons from traveling on such trains, and a passenger who enters a car attached to the same, knowing its character, without the consent of the corporation or its agent, becomes a trespasser.⁵⁶

Passenger Vehicles Not in Service.—A street railroad has the right to

charge of passengers, the railroad company's refusal to sell tickets to that point, whether in bad faith or merely negligence, is tortious, for which general or special damages may be recovered. *Georgia R., etc., Co. v. Greer*, 66 S. E. 961, 7 Ga. App. 292.

51. Interurban car.—*Sullivan v. Old Colony St. Railway*, 200 Mass. 303, 86 N. E. 511.

52. Right to make rule.—*Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113.

Railroad companies may prescribe the conditions on which passengers may ride on freight trains. *Greenfield v. Detroit, etc., R. Co.*, 95 N. W. 546, 133 Mich. 557.

The carriage of passengers on freight trains is not compulsory upon the company either by law or by any rule of the railroad commission, but the several trains are run for distinct and separate purposes, the one for the transportation of freight, the other for the transportation of passengers. *Partee v. Georgia Railroad*, 72 Ga. 347; *Central R., etc., Co. v. Smith*, 80 Ga. 527, 5 S. E. 772.

Therefore, conductors of through freight trains may, if the rules of the company so direct, or if the exigencies of the case require it, refuse to carry passengers in their cabs or on their trains. *Western, etc., R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842, 28 Am. & Eng. R. Cas. 455.

A railroad company is not bound to receive passengers on a train consisting of an engine and freight car, made up to meet an emergency caused by a wreck on the line; and one who, with knowledge thereof, by permission of the conductor, takes passage on such train, cannot recover damages for refusal of the railroad company to give him a return passage on the same train, the refusal being due entirely to the existence of the emergency referred to. *Louisville, etc., R. Co. v. Du Bose*, 47 S. E. 917, 120 Ga. 339.

Vehicle or position occupied.—As to persons occupying conveyances and places not proper for passengers as affecting relation of parties, see post, "Relation as Affected by Character of Vehicle or Position Occupied," §§ 2161-2169.

53. Eddy v. Rider, 79 Tex. 53, 15 S. W. 113.

54. Physicians.—*Allen v. Lake Shore, etc., R. Co.*, 57 O. St. 79, 47 N. E. 1037; *Ohio Rev. Stat.*, § 3375a.

55. Right of sheriffs and physicians to ride on freight trains.—By § 3375a of the Revised Statutes sheriffs and deputy sheriffs, in the performance of their official duties, shall be permitted to ride, at their own risk, and take a prisoner or prisoners, upon freight trains, between stations where such trains stop, paying therefor a regular passenger fare. *Allen v. Lake Shore, etc., R. Co.*, 57 O. St. 79, 47 N. E. 1037.

When right exists.—The right of a sheriff to ride upon a freight train is not confined to cases in which a prisoner is taken upon such train; but the right exists whenever the sheriff is in the performance of any official duty, and complies in other respects with the statute. *Allen v. Lake Shore, etc., R. Co.*, 57 O. St. 79, 47 N. E. 1037.

To give a sheriff the right to ride on freight trains in the performance of his official duties, "between stations where such trains stop," as provided in § 3375a of the Revised Statutes, it is not necessary that such trains should regularly stop at such station, or be scheduled to stop there; it is sufficient if they are in fact stopping at the time the sheriff gets aboard. *Allen v. Lake Shore, etc., R. Co.*, 57 O. St. 79, 47 N. E. 1037, reversing 14 O. C. C. 320, 6 O. C. D. 343.

56. Special trains.—*Southwestern Railroad v. Singleton*, 66 Ga. 252.

refuse to carry passengers on cars during their passage between the barns and the lines where they are to be put in service.⁵⁷

§ 2119. Offer for Transportation.—In order to render a carrier liable for refusing to receive a passenger for transportation the passenger must offer himself for transportation at the proper place and time,⁵⁸ and be ready and willing to pay the required fare.⁵⁹

§ 2120. Grounds for Refusal Considered.—General Statement.—It follows from the general statement of the carrier's duty that it is under a general obligation to receive and carry on its train all proper persons who apply for transportation and offer to pay the regular fare for such service.⁶⁰ And it is held that the term "proper persons" should be defined to mean persons whose status or condition apparently entitles them to be carried as passengers.⁶¹ A company as a common carrier is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form or committing any crime;⁶² a carrier's public duty to transport passengers is confined to those who are prepared to conduct themselves according to regulations reasonably necessary for the protection of passengers, and for the safe and convenient transaction of the carrier's business, in the light of its severe obligations.⁶³

Particular Grounds for Refusal.—Illness or Physical Infirmary.—The right to railway passenger carriage is not confined to persons who are physically sound, but is open, within a reasonable degree, to those ailing and infirm.⁶⁴ Persons who are ill,⁶⁵ or blind,⁶⁶ or otherwise physically infirm,⁶⁷ must be carried, subject, however, to reasonable rules and regulations. Thus it is proper to require persons laboring under physical infirmities or otherwise unable to take care of themselves, who travel on railroad trains, to provide proper assistance for themselves, and it is not the duty of the conductor in the absence of instructions from the company, to render such assistance.⁶⁸ Some courts, how-

57. Vehicle not in service.—*Hermann v. St. Joseph R., etc., Co.* (Mo. App.), 129 S. W. 414.

58. Proper time and place.—*Sullivan v. Boston Elevated R. Co.*, 199 Mass. 73, 84 N. E. 844, 21 L. R. A., N. S., 36.

59. Willingness to pay fare.—*St. Louis, etc., R. Co. v. Thomas* (Tex. Civ. App.), 27 S. W. 419.

60. General statement.—See ante, "In General," § 2121.

61. Bogard v. Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 36 L. R. A., N. S., 337.

62. Persons who may be refused.—*Thurston v. Union Pac. R. Co.*, 4 Dill. 321, Fed. Cas. No. 14,019.

Gamblers.—Nor is it bound to carry gamblers whose purpose is to ply their vocation on the train. *Thurston v. Union Pac. R. Co.*, 4 Dill. 321, Fed. Cas. No. 14,019.

63. To whom duty due.—*Renaud v. New York, etc., R. Co.*, 210 Mass. 553, 97 N. E. 98, 38 L. R. A., N. S., 689.

64. Mathew v. Wabash R. Co., 78 S. W. 271, 115 Mo. App. 468, affirmed in 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

65. Pullman Palace Car Co. v. Barker,

4 Colo. 344, 38 Am. St. Rep. 557, 34 Am. Rep. 89.

66. Blind persons.—A carrier can not reject a person as a passenger, otherwise qualified, on the sole ground that he is blind. *Zackery v. Mobile, etc., R. Co.*, 74 Miss. 520, 21 So. 246, 36 L. R. A. 546, 60 Am. St. Rep. 529.

67. Physically infirm persons.—*Denver, etc., R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 36 R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 27 L. R. A., N. S., 761; *Croom v. Chicago, etc., R. Co.*, 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602.

68. Requiring assistance and attendants.—*Louisville, etc., R. Co. v. Fleming*, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347, approving *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Willets v. Buffalo, etc., R. Co.* (N. Y.), 14 Barb. 585, quoting *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39.

While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental

ever, say that afflicted persons can not be excluded by an arbitrary rule, but the exclusion should depend upon the ability of each person to travel alone.⁶⁹ This rule is applied to cases where the agent of carrier knows or has reasonable grounds to believe that the person demanding transportation is fit to travel, notwithstanding his infirmity.⁷⁰ Thus, it is the duty of the agent of a carrier to whom a blind person applies for transportation to listen to explanations made by him of his experience and capacity to travel alone, and to judge of his competency in the light of the facts then made known to him.⁷¹ The reasonableness or unreasonableness of the refusal of the agent of a carrier to sell a ticket to a blind person, who offers an explanation of his ability to travel alone, is a question for the jury.⁷²

Insanity, Drunkenness and Similar Causes.—A common carrier is not obliged as a matter of law to receive as a passenger an insane or drunken person, or one whose physical or mental condition is such that his presence may cause injury or subsequent discomfort to the other passengers; and the carrier may exclude any one whose condition is such that possibility of danger may be thrown upon the other passengers if he be admitted as a passenger.⁷³

disability, is unable to take care of himself; but should the carrier voluntarily accept as a passenger such a person without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent or made known at the time of his application for carriage to the servants of the carrier, the latter will be held responsible if such care and assistance are not afforded. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, 38 Am. St. Rep. 557; *Croon v. Chicago, etc.*, R. Co., 52 Minn. 236, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557.

A carrier is not bound to receive as a passenger one who is helpless or blind or otherwise incapable of properly caring for himself unless accompanied by a competent attendant. *Denver, etc.*, R. Co. v. *Derry*, 108 Pac. 172, 47 Colo. 584, 36 R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 27 L. R. A., N. S., 761.

"Sick persons have the right to enter the cars of a railroad company. As common carriers of passengers, they can not prevent their entering their cars." *New Orleans, etc.*, R. Co. v. *Statham*, 42 Miss. 607, 97 Am. Dec. 478.

A blind man, seventy-seven years of age, applied to a railway agent for a ticket for a journey necessitating the changing of cars two or three times. When he applied for the ticket, he was accompanied by an attendant. He frequently took short trips involving no change of cars, and on these trips some one would assist him getting on and off the train. On taking a trip involving a change of cars, he depended on the assistance of chance acquaintances, or the employees in charge of the train. Held, that the carrier was justified in refusing to sell him a ticket unless he secured an attendant. *Illinois Cent. R. Co. v. Allen*, 89 S. W. 150, 28 Ky. L. Rep. 108.

69. Arbitrary rule.—*Zachery v. Mobile, etc.*, R. Co., 75 Miss. 746, 23 So. 434, 41 L. R. A. 385, 65 Am. St. Rep. 617.

A carrier may deny transportation to a person who, on account of physical or mental disability, is unable to care for himself, or liable to require extra attention from the carrier or the passengers; but where a person seemingly disabled is in fact able to travel alone without requiring extra care or attention, and this fact is known to the carrier, it is bound to carry him. *Illinois Cent. R. Co. v. Smith*, 37 So. 643, 85 Miss. 349, 70 L. R. A. 642, 107 Am. St. Rep. 293.

70. Knowledge of agent.—*Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293.

71. Duty to hear explanation.—*Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293.

72. Question for jury.—*Illinois Cent. R. Co. v. Smith*, 37 So. 643, 85 Miss. 349, 70 L. R. A. 642, 107 Am. St. Rep. 293.

73. Insane or drunken persons.—*Meyer v. St. Louis, etc.*, R. Co., 54 Fed. 116, 58 Am. & Eng. R. Cas. 111. See, also, *Pearson v. Duane* (U. S.), 4 Wall. 605, 18 L. Ed. 447; *Hall v. Decuir*, 95 U. S. 485, 501, 24 L. Ed. 547.

"They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the vessel, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, dissolute, suspicious, or unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests of the patronage of the age of the proprietors, so as to make their business less lucrative or their management less acceptable to the public." *Hall v. Decuir*, 95 U. S. 485, 24 L. Ed. 547.

A carrier may refuse to carry passengers whose condition or conduct, from intoxication, disorderly conduct, contagious disease, or other things, is such as to make their presence on the train dangerous to the lives and health of other passengers; and if the condition or conduct of the person, after having been received

An insane person may be refused where he is known to be insane, though at the time of offering to become a passenger he is apparently harmless and conducts himself in no way differently from other persons.⁷⁴ But a carrier is not entitled to absolutely refuse to carry an insane person, although it may insist that he shall be in charge of an attendant.⁷⁵ And even though he is attended, if he is loudly cursing at the time of boarding the train the carrier may refuse to carry him, as the rights of other travelers to a safe passage must be respected.⁷⁶ Where it becomes necessary to transport a lunatic, who may endanger the safety or interfere with the comfort of other travelers, the carrier is entitled to seasonable notice, that it might make proper arrangements for his transportation.⁷⁷ A railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying, and a person so drunk as to be likely to violate the common proprieties, civilities, and decencies of life has no right to a passage while in that condition. The comfort and convenience of passengers generally must be protected, their opinions and feelings regarded, and proper decorum observed; and although in a railroad passenger car neither the highest breeding of the drawing-room nor the fastidious delicacy of the parlor is required, yet the behavior of all persons therein should be becoming to the place and the general character of the passengers.⁷⁸ So a carrier, is not required to accept as a passenger,

as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the duty of the carrier's servants, on receiving notice thereof, to eject the offending person, exercising due care to protect his health and person from danger or unnecessary discomfort. *Bogard v. Illinois Cent. R. Co.*, 139 S. W. 855, 144 Ky. 649, 36 L. R. A., N. S., 337.

A carrier need not receive as a passenger one who is intoxicated or otherwise in an improper condition. *Chesapeake, etc., R. Co. v. Selsor*, 134 S. W. 143, 142 Ky. 163, 33 L. R. A., N. S., 165.

74. *Meyer v. St. Louis, etc., R. Co.*, 54 Fed. 116, 58 Am. & Eng. R. Cas. 111, following *Putnam v. Broadway, etc., R. Co.*, 55 N. 108, 15 Abb. Prac., N. S., 383, 14 Am. Rep. 190; *Pearson v. Duane (U. S.)*, 4 Wall. 605, 18 L. Ed. 447.

75. Right to insist on his being attended.—*Louisville, etc., R. Co. v. Brewer*, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A., N. S., 647, Ann. Cas. 1913D, 151.

Common carriers can not absolutely refuse to transport insane persons, but may in all cases insist that they be properly attended and sufficiently restrained. *Owens v. Macon, etc., R. Co.*, 46 S. E. 87, 119 Ga. 230; 63 L. R. A. 946.

76. Disorderly conduct though attended.—*Owens v. Macon, etc., R. Co.*, 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946.

77. Notice.—*Owens v. Macon, etc., R. Co.*, 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946.

78. Drunken person.—*Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. R. Rep. 454; *Vinton v. Middlesex R. Co. (Mass.)*, 11 Allen 304, 87 Am. Dec. 714; *Atchison, etc., R. Co. v.*

Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418; *Paris, etc., R. Co. v. Robinson*, 53 Tex. Civ. App. 12, 114 S. W. 658.

A railroad company can refuse to admit on its trains a person who is drunk, though he has a ticket. *Story v. Norfolk, etc., R. Co.*, 45 S. E. 349, 133 N. C. 59.

A carrier may refuse to receive and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable, or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. Ry. Rep. 454.

A carrier of passengers is not bound to afford accommodations to intoxicated persons. *Lemont v. Washington, etc., R. Co.*, 1 Mackey (12 D. C.) 180, 47 Am. Rep. 238, 1 Am. & Eng. R. Cas. 263; *Murphy v. Union R. Co.*, 118 Mass. 228; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 15 Abb. Prac., N. S., 383, 14 Am. Rep. 190. Drunken men should not be permitted on the cars, or, if permitted, should be so guarded or separated from the orderly part of the passengers as to prevent injury from them. *Pittsburg, etc., R. Co. v. Pilow*, 76 Pa. 510.

Plaintiff testified that while approaching a train he was so drunk that he walked irregularly, and that he had to have assistance in reaching a passenger car. Shortly afterwards he was arrested for being drunk in a public place, and pleaded guilty. Witness testified that he was so drunk and helpless that his head fell over on one side, and that he was almost unconscious. Held, that the railroad company had the right to prevent him from entering the car. *Freedon v. New York*,

without an attendant, one who, from intoxication, is mentally or physically incapable of taking care of himself.⁷⁹ But if such objectionable character has bought a ticket the amount should be paid back or tendered before he is expelled.⁸⁰

Disorderly Conduct.—Common carriers of passengers have the right to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or probable.⁸¹ Thus it is held that a passenger who on previous trips had been intoxicated, and while so had been obscene, may be rightfully excluded, when intoxicated, on a subsequent trip.⁸² But a carrier has no right to refuse to carry a sober and orderly passenger, merely because he had conducted himself in a disorderly manner on a former trip,⁸³ or on other trains.⁸⁴ Nor is the act

etc., R. Co., 48 N. Y. S. 584, 24 App. Div. 306.

The conductor of a street-railway car may exclude or expel therefrom a person whose condition, by reason of intoxication or otherwise, is such that it is reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance. *Vinton v. Middlesex R. Co. (Mass.)*, 11 Allen 304, 87 Am. Dec. 714. See post, "Ejection of Passengers," chapter 25.

79. Right to require attendant.—*Price v. St. Louis, etc., R. Co.*, 88 S. W. 575, 75 Ark. 479, 112 Am. St. Rep. 79.

But the mere fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car; nor does it free the company from its duty to render to him, as a passenger, due care. *Milliman v. New York, etc., R. Co.*, 66 N. Y. 642, affirming 4 Hun 409; 6 *Thomp. & C.* 585, explaining *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190, 15 Abb. Prac., N. S., 383.

Slight intoxication.—But where a person applying for passage upon a railroad train is only slightly intoxicated, and shows no sign that he will not conduct himself properly, he can not be refused carriage. In *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. R. Rep. 454, it is said that "slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage in a public car, although his behavior might not be in all respects becoming."

While a carrier may refuse to receive as a passenger an unattended person so drunk as to be incapable of taking care of himself, yet the fact that a person is drunk and staggering but capable of transacting with intelligence important business, and with foresight to provide for his own safety, does not authorize a carrier to refuse to receive him as a passenger, especially in view of *Sayles' Ann. Civ. St.* 1897, arts. 4494, 4496, requiring carriers to receive all persons offering themselves as passengers, and authorizing a person refused transportation to sue

for the damages sustained. *Paris, etc., R. Co. v. Robinson*, 53 Tex. Civ. App. 12, 114 S. W. 658.

Intoxicated passenger entitled to due care.—The mere fact that a man is intoxicated does not of itself deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him as a passenger due care. *Milliman v. New York, etc., R. Co.*, 66 N. Y. 642, affirming 4 Hun 409; 6 *Thomp. & C.* 586, explaining *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 15 Abb. Prac., N. S., 383, 14 Am. Rep. 190.

In *Robinson v. Pioche, etc., Co.*, 5 Cal. 460, *Heydenfeldt, J.*, observes: "A drunken man is as much entitled to a safe seat as a sober one, and much more in need of it." And in *Giles v. Great Western R. Co.*, 36 Upper Canada 369, *Wilson, J.*, discussing the liability of the company for the injury of a passenger who was, as the conductor said, "pretty drunk" when he got on the train, observed that the defendant would not be liable for his injury "unless the conductor knew the deceased was intoxicated and unable to take care of himself, in which case the conductor would certainly, having taken him as a passenger, be bound to give him that degree of attention as to his safety while under his care which a man in the state of the deceased is fairly entitled to beyond that of an ordinary passenger."

80. Must return fare.—*Thurston v. Union Pac. R. Co. (U. S.)*, 4 Dill. 321, Fed. Cas. No. 14,019.

81. Prohibiting disorder, etc.—*Vinton v. Middlesex R. Co. (Mass.)*, 11 Allen 304, 87 Am. Dec. 714; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418.

82. Former misconduct.—*Louisville, etc., R. Co. v. McNally*, 31 Ky. L. Rep. 1357, 105 S. W. 124, 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642.

83. Prior conduct not alone sufficient.—*Reasor v. Paducah, etc., Ferry Co.*, 152 Ky. 220, 153 S. W. 222, 43 L. R. A., N. S., 820.

84. On other trains.—Under Code 1883, § 1963, requiring railroad companies to take and discharge passengers at the usual stopping places on payment of fare, a

of spitting on the floor of a station such as to oblige the offender to leave at the command of an official or to warrant an assault upon him for the purpose of ejecting him in case he refuses to leave.⁸⁵

Social Status.—It has been said that a railroad can not refuse to carry a nonunion laborer because he is objectionable to his neighbors.⁸⁶ This statement, however, was a dictum of the court, which is not affected by the fact that the opinion in this case seems to be rejected on rehearing.⁸⁷

Character or Business.—A person presenting himself to a carrier for transportation on paying fare is entitled to be transported, provided there is nothing in his conduct when he presents himself to justify his exclusion, no matter what his character is or has been.⁸⁸

Persons of Bad Character.—Common carriers may inquire into the habits and motives of persons offering themselves as passengers, and exclude all persons of bad character or habits, or those whose objects are to interfere with their interests, or to disturb their line of patronage, or who refuse to obey reasonable regulations.⁸⁹

Moral Character.—A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theaters, and other public places can not be imported into the law of common carriers, nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women.⁹⁰ It would seem that a railroad company is not obliged to transport or afford accommodations for prostitutes whose manner and behavior they have reasonable cause to suppose will be immodest and obscene.⁹¹ Where, however, the prostitute's manners are chaste and decent and there is no reason to suppose that she will act in any other manner, the company can not refuse her accommodation.⁹²

Competitive Soliciting.—A carrier may exclude a person who wishes to travel for the purpose of soliciting business in conflict or competition with that in which the carrier is engaged, and may refuse transportation to such person, though he is willing to pay the regular fare.⁹³

railroad company can not exclude a person from its trains because on other trains he had been offensive and troublesome to other passengers. *Story v. Norfolk, etc., R. Co.*, 45 S. E. 349, 133 N. C. 59.

85. Improper behavior at station.—*People v. McKay*, 46 Mich. 439, 8 Am. & Eng. R. Cas. 205.

86. Nonunion laborer.—*Chicago, etc., R. Co. v. Pillsbury*, 8 N. E. 803.

87. *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 S. E. 22, 26 Am. & Eng. R. Cas. 241, 5 Am. St. Rep. 483.

88. Character or business.—*Meisner v. Detroit, etc., Ferry Co.*, 118 N. W. 14, 154 Mich. 545, 19 L. R. A., N. S., 872.

89. Person of bad character.—*Jencks v. Coleman*, Fed. Cas. No. 7,258, 2 Sumn. 221.

Gamblers and montemen, whose purpose in traveling upon a train is to ply their vocation, may be excluded. *Thurston v. Union Pac. R. Co.*, Fed. Cas. No. 14,019, 4 Dill. 321.

It is not error for the court, in charging the jury in an action for the exclusion of plaintiff from a car, justified by defendant on the ground of her bad character, to say that a given regulation is unreasonable, when the court explains to the

jury what would be the rules of law by which the reasonableness or unreasonableness is to be tested, and leaves to the jury the determination of the facts of the particular case. *Brown v. Memphis, etc., R. Co.*, 7 Fed. 51.

90. Bad reputation.—*Brown v. Memphis, etc., R. Co.*, 5 Fed. 499.

91. Prostitutes.—*Beeson v. Chicago, etc., R. Co.*, 62 Iowa 173, 17 N. W. 448.

A railroad company may rightfully exclude from the ladies' car a female passenger whose reputation is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive, or whose demeanor at the time is annoying to other passengers; but she can not be excluded for unchastity not affecting her conduct, or furnishing reasonable ground to believe she will misbehave herself in the car, when her demeanor at the time was ladylike and unexceptionable. *Brown v. Memphis, etc., R. Co.*, 7 Fed. 51.

92. Dependent upon conduct.—*Brown v. Memphis, etc., R. Co.*, 1 Am. & Eng. R. Cas. 247.

93. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115.

A steamboat company may exclude the agents of a rival express, unless they

Ticket Scalper.—A person who scalps railway tickets other than on the train is a part of the general public, and a railroad company can not deny him transportation, though he scalps in the tickets of such company.⁹⁴

Previous Refusal to Pay Fare.—The fact that an individual has on some previous occasion refused to pay his fare on one of the company's trains will not justify it in thereafter refusing him privileges which it offers to the public.⁹⁵

Special Excursion.—The fact that a steamboat company, operating as a common carrier, is running a special excursion does not relieve it from its duty to carry without discrimination, so far as practicable, all persons applying and tendering payment for passage.⁹⁶

Carrying Unwieldy Articles.—While a carrier undoubtedly has a right to make and enforce a rule excluding passengers carrying large and unwieldy articles, it may waive this rule by permitting a passenger to bring a graphophone horn into the car with him, and if it does so waive it, it will be liable in punitive damages for afterwards refusing to allow the person to become a passenger with a graphophone horn.⁹⁸

Carrying Live Animals.—Whether or not a corporation operating a street railway is liable in damages for the refusal of one of its conductors to accept a passenger carrying in his arms a live goat, depends upon the reasonableness of a regulation of the company forbidding the carrying of live animals in the cars and this particular question is one for the court.⁹⁹ However, it can not be stated as a general proposition, that the question as to the reasonableness of such corporate regulations is always for the court. It may be that it is one for the court only when it is free from doubt.¹

§ 2121. **Enforcement of Duty—Mandamus.**—The writ of mandamus has been awarded to compel a railroad company to run passenger trains to the terminus of its road,² and there is no question but what a state may in this manner compel common carriers to furnish requisite facilities for carrying passengers and to carry them in such manner and at such times as the public needs may require.³ As has been said, the carrying of passengers and freight is the ultimate ratio of the existence of railroad companies, and it would be strangely illogical to say that a state can not compel the performance of such duties.⁴ This power to enforce the performance of such duties rests upon the grounds that the duty is a business trust accepted by the corporation and that it is a result of a contract between the corporation and the state expressed or implied from the issuance and acceptance of the charter of the franchise.⁵

will refrain from soliciting baggage. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115.

Rival drummers.—A railroad company is not bound to afford accommodations to drummers or agents of rival lines whose ostensible purpose is to hurt the company's business by soliciting patronage of their own lines. *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *The D. R. Martin*, 11 Blatchf. 233, Fed. Cas. No. 1030.

94. Ticket scalper.—*Ford v. East Louisiana R. Co.*, 110 La. 414, 34 So. 585.

95. Previous refusal to pay fare.—*Atwater v. Delaware, etc., R. Co.*, 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

96. Special excursion.—*Reasor v. Paducah, etc., Ferry Co.*, 152 Ky. 220, 153 S. W. 222, 43 L. R. A., N. S., 820.

98. Waiver of rule—Effect of waiver.—*Vlasservitch v. Augusta, etc., R. Co.*, 85 S. C. 291, 67 S. E. 306.

99. Carrying live animals.—*Daniel v. North Jersey St. R. Co.*, 64 N. J. L., 603, 46 Atl. 625.

1. See ante, "Rules and Regulations of Carriers," chapter III.

2. Compelling running of passenger trains.—*State v. Hartford, etc., R. Co.*, 29 Conn. 538.

3. *People v. New York, etc., R. Co. (N. Y.)*, 9 Am. & Eng. R. Cas. 1, 28 Hun 543.

4. *People v. New York, etc., R. Co. (N. Y.)*, 9 Am. & Eng. R. Cas. 1, 28 Hun 543.

5. *People v. New York, etc., R. Co. (N. Y.)*, 9 Am. & Eng. R. Cas. 1, 28 Hun 543, citing *Abbott v. Johnson R. Co.*, 80 N. Y. 27.

Interest of State.—It has been maintained that the state in such cases is not injured and has no interest in the question whether such carriers perform their duties or not. Although it may be true that the state suffers no pecuniary injury, yet the sovereignty of the state is injured whenever any public function vested by it in any person, natural or artificial, for the public good, is not used or is misused or abused,⁶ nor is the state bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit.⁷ The right of the state seems to depend upon the fact that the state in such cases has no other adequate remedy. It is true the state may annul the corporation, as has been held in many cases.⁸ But that remedy is not adequate, and it merely destroys function where the public interest requires their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue.⁹

§§ 2122-2125. Creation of Relation—§ 2122. Who May Become Passenger.—It is the lawful right of every citizen, *prima facie*, to become a passenger of a railway train.¹⁰

Carriage of Slaves.—The liability of a carrier for negligence resulting in injury to slaves carried on its trains has been held to be governed by the rules as to its liability with respect to passengers and not by those governing the carriage of goods.¹¹

§ 2123. Relation Created by Contract.—It may be stated as a general rule that the relation of carrier and passenger can be created only by contract, either express or implied.¹² Proof of a formal contract is not required. The

6. **Interest of state.**—*People v. New York, etc., R. Co.* (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543.

7. *People v. New York, etc., R. Co.* (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543.

8. **Corporation annulled.**—*People v. Fishkill, etc., Road Co.* (N. Y.), 27 Barb. 445; *People v. Hillsdale, etc., Turnpike Road* (N. Y.), 23 Wend. 254; *Turnpike Co. v. State* (U. S.), 3 Wall. 210, 18 L. Ed. 180; *People v. K. & N. Turnpike* (N. Y.), 23 Wend. 208; *People v. B. & B. Turnpike* (N. Y.), 23 Wend. 222; *Charles River Bridge Co. v. Warren Bridge* (Mass.), 7 Pick. 344.

9. *People v. New York, etc., R. Co.* (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543; *State v. Hartford, etc., R. Co.*, 29 Conn. 538; *People v. New York Cent. R. Co.*, 24 N. Y. 485; *Talcott v. Pine Grove, Fed. Cas.*, No. 13735, 1 Flipp. 120.

10. **Who may become passenger.**—*Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935. See post, "Duty to Receive and Carry," §§ 2121-2124.

By application for transportation.—Any one may become a passenger by applying for transportation to a carrier of passengers. *Altemeier v. Cincinnati, etc., R. Co.*, 4 N. P. 224, 5 O. Dec. 655, affirmed in 60 O. St. 10.

11. **Slaves as passengers.**—*Boyce v. Anderson* (U. S.), 2 Pet. 150, 7 L. Ed. 379.

The rules that apply to slaves, and govern the liability of carriers in relation to them, more nearly resemble those which relate to passengers, than common goods. The case of slaves, seems, as is remarked

by the court, in *Stokes v. Saltonstall*, 13 Peters 192, to be a sort of intermediate one between goods and passengers. *Scruggs v. Davis*, 40 Tenn. (3 Head) 664.

12. **Relation created by contract.**—*United States.*—*Chicago, etc., R. Co. v. Thurlow*, 102 C. C. A. 128, 37 R. R. 546, 60 Am. & Eng. R. Cas., N. S., 546, 178 Fed. 894, 30 L. R. A., N. S., 571; *Farley v. Cincinnati, etc., R. Co.*, 47 C. C. A. 156, 21 Am. & Eng. R. Cas., N. S., 404, 108 Fed. 14.

Georgia.—*DeVane v. Atlantic, etc., R. Co.*, 4 Ga. App. 136, 60 S. E. 1079.

Illinois.—*Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *O'Donnell v. Chicago, etc., R. Co.*, 106 Ill. App. 287; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

Maryland.—*Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 9 Am. Dec. 49.

Massachusetts.—*Hogner v. Boston Elevated R. Co.*, 198 Mass. 260, 28 R. R. 756, 51 Am. & Eng. R. Cas., N. S., 756, 84 N. E. 464, 15 L. R. A., N. S., 960.

Missouri.—*O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680; *Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64, 30 S. W. 331; *Schepers v. Union Depot R. Co.*, 126 Mo. 665, 29 S. W. 712, 2 Am. & Eng. R. Cas., N. S., 9; *Canaday v. United R. Co.*, 114 S. W. 88, 134 Mo. App. 282.

Montana.—*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.

Nebraska.—*Fremon, etc., R. Co. v. French*, 48 Neb. 638, 67 N. W. 472; *Fremon, etc., R. Co. v. Hagblad*, 72 Neb. 773, 15 R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226, 101 N. W. 1033, 106 N.

obligation of the carrier is implied from his undertaking to transport the passenger.¹³ It is generally said that a passenger, in the legal sense of the word, is one who travels in some public conveyance by virtue of an express or implied contract with the carrier, as by the payment of a fare or that which is accepted as the equivalent thereof,¹⁴ and who, in the course of the performance of such contract, has been received by the carrier under its care, either upon the means of conveyance, or at the point of departure of that conveyance.¹⁵ The true test determining who are passengers is whether the person desiring passage has in good faith offered himself for the purpose of being carried as a passenger, and that he was as such accepted and received by the carrier, who undertook to transport him.¹⁶ The passenger must, in all cases where compensation is ex-

W. 1041, 9 Am. & Eng. Ann. Cas. 1096, 4 L. R. A., N. S., 254.

New York.—*Dumphy v. Erie R. Co.*, 42 N. Y. Super. Ct. 128.

Oregon.—*Radley v. Columbia Southern R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Pennsylvania.—*Pennsylvania R. Co. v. Price*, 96 Pa. 256, 2 Ky. L. Rep. 183, 1 Am. & Eng. R. Cas. 234; *Blair v. Philadelphia, etc., Co.*, 36 Pa. Super. Ct. 319.

South Carolina.—*Mims v. Seaboard, etc., Railway*, 69 S. C. 338, 48 S. E. 269.

Texas.—*Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 257, 42 S. W. 855 reversing 40 S. W. 350; *Cook v. Houston, etc., Nav. Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; *Southerland v. Texas, etc., R. Co.* (Tex. Civ. App.), 40 S. W. 193, affirmed in 93 Tex. 739, no op.

13. No formal contract required.—*The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061; *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502; *Hannibal R. Co. v. Swift* (U. S.), 12 Wall. 262, 20 L. Ed. 423.

Contract may be implied.—*Illinois Cent. R. Co. v. O'Keefe*, 102 Ill. App. 102; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *Kane v. Cicero, etc., R. Co.*, 100 Ill. App. 181; *Bricker v. Philadelphia, etc., R. Co.*, 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585; *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. Cas. 234, 96 Pa. 256, 2 Ky. L. Rep. 183; *Southern R. Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292, 40 L. R. A. 746; *Illinois Cent. R. Co. v. Meacham*, 91 Tenn. (7 Pickle) 428, 19 S. W. 232; *Brown v. Scarboro*, 97 Ala. 316, 12 So. 289, 58 Am. & Eng. R. Cas. 364; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855; *Gardner v. New Haven, etc., Co.*, 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170; *Cleveland, etc., R. Co. v. Best*, 169 Ill. 301, 48 N. E. 684; *Farley v. Cincinnati, etc., R. Co.*, 47 C. C. A. 156, 108 Fed. 14, 21 Am. & Eng. R. Cas., N. S., 404, 408; *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 42 S. E. 522, 94 Am. St. Rep. 125, 5 R. R. R. 433, 38 Am. & Eng. R. Cas., N. S., 433, 59 L. R. A. 107; *Galveston, etc., R. Co. v. Fink*, 99 S. W. 204, 44 Tex. Civ. App. 544.

A contract between a common carrier and a passenger is implied from the fact

of receiving the passenger to carry for hire. *Chudnovski v. Eckels*, 83 N. E. 846, 232 Ill. 312.

14. Passenger defined.—*Pennsylvania R. Co. v. Price*, 96 Pa. 256, 2 Ky. L. Rep. 183, 1 Am. & Eng. R. Cas. 234; *Bricker v. Philadelphia, etc., R. Co.*, 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585; *Illinois Cent. R. Co. v. Dallas* (Ky. App.), 150 S. W. 536; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

15. Received for carriage.—*Blair v. Philadelphia Rapid Transit Co.*, 36 Pa. Super. Ct. 319.

16. The test.—*Schuyler v. Southern Pac. Co.*, 37 Utah 581, 60 Am. & Eng. R. Cas., N. S., 521, 109 Pac. 458, 37 R. R. 521.

Person employed by foreman of railroad's bridge crew to cook for and board hands in cars.—Person employed by the foreman of a bridge crew of a railroad company to cook for the men in cars furnished by it for that purpose, and to board the men in such cars, and paid by the men for the services rendered, was not a passenger when injured, nor an employee of the company, while engaged in rendering such services, by the sudden stoppage of the train she was on. *Tinkle v. St. Louis, etc., R. Co.*, 212 Mo. 445, 30 R. R. R. 470, 53 Am. & Eng. R. Cas., N. S., 470, 110 S. W. 1086.

Elevator passengers.—A person riding in a passenger elevator in a building on his way to the office of a physician occupying rooms on an upper floor in a building as a tenant, to find out whether the physician wanted him for an errand, is a passenger. *Ferguson v. Truax*, 132 Wis. 478, 110 N. W. 395, rehearing granted 111 N. W. 657, and judgment reversed in 112 N. W. 513.

Where one engaged in moving the effects of a tenant from a building was, according to custom, riding on a freight elevator, the relation of passenger and carrier existed between him and the owner of the building, who was liable for injuries sustained by such person through the negligence of the operatives of the elevator. *Orcutt v. Century Bldg. Co.*,

pected or required, expressly or impliedly, have agreed to compensate the carrier to transport him and the carrier must expressly or impliedly have agreed to carry him and performance of the contract must have been commenced and the passenger be under the care of the carrier.¹⁷ So to constitute one a passenger on a train, it is essential that such person should be rightfully on the train or should be thereon with the knowledge or consent of the carrier or its agent in charge of the train.¹⁸ And the general rule seems to be that the fact of a party getting on a passenger car for the purpose of travel, of itself creates by operation of law a contract, or the law defines the terms of the contract, the obligations of which bind both parties.¹⁹ Proof that plaintiff either purchased a ticket before he boarded a train, or that he had money to pay his fare and did pay it after entering the train, establishes the relation of carrier and passenger between himself and the railway company, and it is not necessary for him to prove any express contract for carriage.²⁰

Public Policy and Not Contract.—It has been said that the rights, privileges, and protection attaching to the relation of a passenger are imposed by law upon common carriers upon considerations of public policy, independent of contract, and arise from the nature of their public employment.²¹ And it has been held that a mail agent who is transported by a railroad company under a contract with the United States government to carry its mail agents free of charge, may maintain an action against the company for injuries arising from negligence, not upon the contract with the government, but upon the duty the law imposes upon the company.²² But these decisions do not seem to vary in principle from the rule stated at the outset, for while the rights of a passenger

99 S. W. 1062, 201 Mo. 424, 8 L. R. A., N. S., 929.

Must intend to become passenger.—

One who takes his position upon the steps of the platform of a car, having no intention of becoming a passenger and not presenting himself to the carrier as such, does not acquire the rights of a passenger. *Chicago, etc., R. Co. v. Moran*, 129 Ill. App. 38.

17. Implied agreement to pay fare in lieu of transportation.—*Cincinnati Tract. Co. v. Holzenkamp*, 74 O. St. 379, 78 N. E. 529, 6 L. R. A., N. S., 800, 113 Am. St. Rep. 980, affirmed in 2 N. P., N. S., 157, affirming 3 N. P., N. S., 537, 16 O. D. N. P. 673.

18. Must be rightfully on vehicle.—*Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79.

Shipper's employee on locomotive while cars are being switched toward rest of train.—Where a carrier contracted to transport cars of cattle, and to carry an agent of the shipper upon the "freight train," and the cars, after being loaded by the shipper, were met by a switching crew with a locomotive, which was to take the cars to yards, where they were to be put into a train being made up, but there was no caboose attached to the cars during the run to the yards, a servant of the shipper, who had been instructed to accompany the cars, and who rode upon the locomotive, was a passenger. *Southern R. Co. v. Cullen*, 221 Ill. 392, 24 R. R. R. 195, 47 Am. & Eng. R. Cas., N. S., 195, 77 N. E. 470.

19. Act of getting on as creating con-

tract.—*Louisville, etc., R. Co. v. Garrett*, 76 Tenn. (8 Lea) 438, 41 Am. Rep. 640.

A passenger is one who has taken a place on a public conveyance for the purpose of being transported from one place to another. *Altmeier v. Cincinnati, etc., R. Co.*, 4 N. P. 224, 5 O. Dec. 655, affirmed in 60 O. St. 10.

20. Payment of fare—Purchase of ticket.—*Galveston, etc., R. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204.

A person entering a passenger coach with a ticket purchased from an agent of the carrier giving him passage from the starting point to the point named is a passenger, and entitled to extraordinary diligence. *Louisville, etc., R. Co. v. Forrest*, 65 S. E. 808, 6 Ga. App. 766.

21. Consideration of public policy.—*McNeill v. Durham, etc., R. Co.*, 135 N. C. 682, 47 S. E. 765. See, also, *Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458, 60 Am. & Eng. R. Cas., N. S., 521, 37 R. R. R. 521.

22. Mail agent—Suit not based on contract with government.—*Hammond v. Northeastern R. Co.*, 6 S. C. 130, 24 Am. Rep. 467. See post, "Postal Clerks," § 218.

While they can not rely upon the contract between the carrier and the government to impose a liability on the carrier in their favor, they may rely upon the legal duty of one undertaking to perform even a gratuitous service to exercise the care which the nature of the undertaking requires. *Southern R. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 36 R. R. R. 148, 59 Am. & Eng. R. Cas., N. S., 148.

may not be founded in contract, but upon public policy, yet the existence of the relation depends upon the existence of an undertaking to transport.

Between Whom Contract Made.—It is immaterial whether the agreement to carry be by contract between the carrier and the person to be carried, or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer as in the case of mail agents, express agents or messengers, and others having duties to their employers to perform, which can be performed only by such person, traveling on railway trains or other public conveyances.²³

§ 2124. Notice of Intention Essential.—A person can not become a passenger without so offering himself as to give the carrier sufficient notice, express or implied, of his wish and intention to obtain a contract right to transportation by the carrier.²⁴ And it is held that the presence of a person in the waiting room of a railroad station about train time is notice to the company's agents of his intention to become a passenger.²⁵ And if plaintiff gets upon the platform of a street car when it has stopped to allow passengers to get aboard, with the intention of taking passage thereon, he is a passenger.²⁶ But the mere fact that one has a ticket and intends to become a passenger on a train does not create the relation of carrier and passenger. Where there is no formal delivery of the passenger's person to the carrier, the circumstances must be such as to warrant an implication that he has offered himself to be carried, and that the offer has been accepted by the carrier. If he has not been expressly or impliedly received as a passenger by the carrier, the relation does not exist.²⁷ So where a party, instead of waiting in the station house for a train, remains at a boarding house some two or three hundred feet from the depot until the arrival of the train, and endeavors to get on the train after it is in motion and is injured he is not

23. Between whom contract made.—*Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op. See post, "Postal Clerks," § 2180; "Express Messengers," § 2181; "Employees of Third Persons," § 2190.

24. Notice of intention essential.—*United States.*—*Southern R. Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292, 40 L. R. A. 746.

Illinois.—*Chicago, etc., R. Co. v. Jennings*, 22 Am. & Eng. R. Cas., N. S., 127, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; *O'Donnell v. Chicago, etc., R. Co.*, 106 Ill. App. 287; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

Massachusetts.—*Dodge v. Boston, etc., Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

Missouri.—*Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268.

Montana.—*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.

New York.—*Schurr v. Houston*, 10 N. Y. St. Rep. 262.

Washington.—*Foster v. Seattle Elect. Co.*, 35 Wash. 177, 76 Pac. 995, 36 Am. & Eng. R. Cas., N. S., 640, 13 R. R. R. 640.

Creation by bona fide intention of passenger.—The relation of carrier and passenger can be created by the exhibition of a bona fide intention on the part of a

passenger. *Altemeier v. Cincinnati, etc., R. Co.*, 4 N. P. 224, 5 O. Dec. 655, affirmed in 60 O. St. 10.

Arises from passenger's submission of himself for transportation.—The relation of carrier and passenger arises out of the passenger's submission of himself to the carrier for safe transport. *Holzenkamp v. Cincinnati Tract. Co.*, 14 O. D. N. P. 586.

No ticket—Crossing side track—Switch left open.—Plaintiff, without having procured a ticket, was crossing a side track of a railroad, in the night, to get upon a passenger train at its usual place of stopping, on the main track, but by the negligence of the employees of the company, a switch had been left open, and the train was thrown upon the side track, and ran against plaintiff. It was held that he was not a passenger at the time of the injury. *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254.

25. Presence in waiting room at train time.—*Texas, etc., R. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124.

26. Getting upon car platform.—*Scott v. Metropolitan St. R. Co.*, 120 S. W. 131, 138 Mo. App. 196.

27. Mere possession of fare insufficient.—*O'Donnell v. Chicago, etc., R. Co.*, 106 Ill. App. 287.

Mere purchase of ticket does not create relation.—See *Schurr v. Houston*, 10 N. Y. St. Rep. 262; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

a passenger.²⁸ A person who is crossing the track, with a ticket in his pocket, to board a train, but has not been to the depot, and has not notified the officers or agents of the company that he is a prospective passenger, is not a person to whom the company owes extraordinary care and diligence as a passenger.²⁹ And a person accompanying horses is not a passenger where he goes into the car of a connecting carrier, with the horses, without giving notice of his presence and intention, and such carrier is not chargeable with notice by reason of the knowledge possessed by the initial carrier.³⁰

§ 2125. Acceptance by Carrier Essential.—The giving of notice of an intention to become a passenger is not of itself sufficient, and in order to create the relation of carrier and passenger it is essential that one be accepted as a passenger, either expressly or by implication.³¹ The existence of the rela-

28. Remaining at house—Attempting to board moving train.—*Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

29. Crossing track to board train prior to going to depot.—*Southern R. Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292, 40 L. R. A. 746.

30. Person accompanying horses going into car of connecting carrier without giving notice.—In *Jenkins v. Chicago, etc., R. Co.*, 41 Wis. 112, it appeared that the owner of horses destined for a certain point shipped them in a common stock box car of the defendant, which was to be run on its road to A., and thence on its branch road to its destination; that plaintiff, who was employed by the shipper to accompany him and aid in taking care of the stock, rode with the horses in such car to A., with the consent of the conductor who ran the train to that point, and who received fare for plaintiff's ride from A. to the destination, which part of the route was not in his run, though he had no authority to do so; that some hours after the arrival of such car at A., when the train of which it was then a part was about starting for the destination of the horses, plaintiff went into their car without the knowledge or consent of the conductor or other persons in charge of such train and without doing anything to bring such fact to their attention before the accident complained of; that before the train started, such car was locked by one of defendant's employees, and afterwards, while in motion, goods therein took fire from defendant's alleged negligence, and plaintiff was injured before he could have the door opened. It was held that defendant was not chargeable with notice of plaintiff's presence in the car between A. and the destination of the horses merely by reason of the knowledge possessed by the first conductor.

31. Acceptance essential.—*Delaware.*—*McFeat v. Philadelphia, etc., R. Co.*, 6 Pen. 513, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254, 69 Atl. 744.

Illinois.—*Chicago, etc., R. Co. v. Jennings*, 22 Am. & Eng. R. Cas., N. S., 127, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827;

O'Donnell v. Chicago, etc., R. Co., 106 Ill. App. 287; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

The acceptance of a passenger need not be direct or expressed, but there must be something from which it may be fairly implied. *Devine v. Chicago, etc., R. Co.*, 162 Ill. App. 243.

When a party comes upon the platform at which a train has arrived, and asks if he can ride thereon and is properly refused by the carrier (such train being a freight train), he does not become a passenger, and is not entitled to the rights of a passenger. *Illinois Cent. R. Co. v. McMillion*, 129 Ill. App. 27, 37.

Maine.—*Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299.

Massachusetts.—*Dodge v. Boston, etc., Steamship Co.*, 37 Am. & Eng. R. Cas., 67, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; *Hogner v. Boston Elevated R. Co.*, 198 Mass. 260, 28 R. R. R. 756, 51 Am. & Eng. R. Cas., N. S., 756, 84 N. E. 464, 15 L. R. A., N. S., 960; *Jones v. Boston, etc., R. Co.*, 163 Mass. 245, 39 N. E. 1019; *Robertson v. Boston, etc., R. Co.*, 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123, 190 Mass. 108, 76 N. E. 513, 3 L. R. A., N. S., 588, 112 Am. St. Rep. 314; *Webster v. Fitchburg R. Co.*, 58 Am. & Eng. R. Cas. 1, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521.

Mississippi.—*Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 So. 60.

Missouri.—*Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64, 30 S. W. 331.

Montana.—*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.

North Carolina.—*Pincus v. Atlantic, etc., R. Co.*, 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856.

Washington.—*Foster v. Seattle Elect. Co.*, 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640, 35 Wash. 177, 76 Pac. 995.

Only one man allowed with stock—Intention to pay fare on stock train—Notice to railroad.—Plaintiff desired to procure the transportation of a horse in his charge, and applied to A, who had sev-

tion of passenger and carrier is only to be implied from such circumstances as will warrant an implication that the one has offered himself to be carried and the other has accepted the offer and has received him to be properly cared for throughout the trip.³² And, where the existence of the relation is in contro-

eral horses to go by the same train, to take his horse with his own and have them billed together in A's name. This was done. A printed rule of the company provided that only one person should go free with stock, and on A's stating to defendant's agent that there might be another man to go with him, the latter replied he would have to pay fare. A did not mention plaintiff's name and the company had no other knowledge of his intention to go by the train. He assisted A to get the horses aboard and intended to get a ticket, but had no time, and expected to pay his fare when called upon by the conductor. The train was a freight one. On the passage, and before plaintiff had paid any fare, the train was run into by another, through the negligence of the defendant, and the plaintiff was injured. It was held that the defendant was not liable, the intention of plaintiff to pay his fare, and his good faith in the whole matter, being immaterial, the company having had no knowledge of it, and having come into no contract relation with him. *Gardner v. New Haven, etc., Co.*, 18 Am. & Eng. R. Cas. 170, 51 Conn. 143, 50 Am. Rep. 12.

Train stopped only to discharge passengers—Custom to permit passengers to board.—Injured while boarding moving train.—In *Jones v. Boston, etc., R. Co.*, 163 Mass. 245, 39 N. E. 1019, it appeared that at the station in question defendant's train stopped only to allow passengers to alight; that when it stopped for such purpose, persons who were ready to take the train were permitted to do so; that plaintiff ran to catch the train, and attempted to board it just as it started, and was injured; that it was dark, and he saw none of defendant's employees, and none of them saw him; and that the failure of the conductor to know that he intended to get on the train at the time he gave the signal to start the train was not due to negligence. It was held that plaintiff had not been received or accepted as a passenger, and did not have the rights of one.

32. Implied notice.—*Webster v. Fitchburg R. Co.*, 58 Am. & Eng. R. Cas. 1, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Dodge v. Boston, etc., Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; *Illinois Cent. R. Co. v. McMillion*, 129 Ill. App. 27, 37; *Devine v. Chicago, etc., R. Co.*, 162 Ill. App. 243; *St. Louis, etc., R. Co. v. Hill* (Tex. Civ. App.), 103 S. W. 227.

Street car on way to car stables.—Where plaintiff boarded a street car, and

on the conductor's announcement that the car only went to the stables plaintiff attempted to leave the same, and was injured by the sudden starting of the car as he attempted to do so, plaintiff not having been accepted as a passenger at the time of the accident, the carrier was only bound to exercise ordinary care. *Robertson v. Boston, etc., R. Co.*, 19 R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123, 190 Mass. 108, 76 N. E. 513, 3 L. R. A., N. S., 588, 112 Am. St. Rep. 314.

Upon train by mistake—Standing upon car steps.—One who gets on the train of one railway company, mistaking it for that of another road, and, discovering his mistake after the cars are in motion, attempts to alight, but finding while he is on the bottom step that the train is running too fast, changes his mind and decides to pay his fare to the next station, is not while thus on the car steps, a passenger. *De Vane v. Atlantic, etc., R. Co.*, 4 Ga. App. 136, 60 S. E. 1079. Compare *Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026.

On car steps with intention to pay fare—Erroneous instruction.—An instruction in an action against a railroad company to recover for personal injuries, which in effect declares that if plaintiff got onto the steps of the car which caused the injury, for the purpose of getting upon its platform as a passenger, with the intention of paying his fare when called upon, he became a passenger, without regard to the fact as to how, when or where he got upon the step of the car, and which wholly ignores the fact whether or not the defendant ever agreed to accept plaintiff as a passenger, or did any act indicating an intention to accept him as such, is erroneous. *Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64, 30 S. W. 331.

Crossing side track, without ticket, to take train on main track—Switch left open.—In *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254, where it appeared that while plaintiff, without having procured a ticket, was crossing the side track of a railroad to get upon a passenger train at its usual place of stopping on the main track, he was run over by a train which was thrown in upon the side track, through the negligence of the defendant railroad's employees in leaving a switch open, it was held that plaintiff was not a passenger; and that his right to cross the side track was only the right that persons have to cross a railroad upon a public street or highway.

versy, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the company must be deemed to have accepted him as a passenger.³³ The stopping of an electric car at a place where passengers are customarily received, and opening the door to admit them, is an invitation to all persons desiring to travel on such car to board it, and when one in good faith boards a car in such circumstances the relation of carrier and passenger is established, the carrier's legal duties attaching before as well as after the payment of fare.³⁴ So a person boarding a train without the knowledge or permission of the conductor, is a passenger, if allowed to remain as such by the conductor.³⁵ But a person can not become a passenger by forcing himself upon a car against the carrier's will; his remedy is for damages for wrongful exclusion.³⁶ So if the conductor of a train informs an intoxicated passenger not to get on the train, and he does so in violation of such direction, he is a trespasser, and not a passenger.³⁷ A person riding in a passenger elevator in a building is not a passenger, so as to entitle him to recover for injuries resulting from the falling of the elevator, where prior thereto he has been permanently prohibited from riding in the elevator in consequence of misconduct furnishing reasonable ground for such prohibition.³⁸ And in order to make effectual defendant's prohibition against plaintiff's riding in the former's passenger elevator, it is not necessary to repeat it every time.³⁹

Mere Failure to Order from Train.—The failure of those in charge of a train on which a person has wrongfully taken passage, to warn him to get off, can not be construed into a permission to him to become a passenger on the train.⁴⁰

A mere contract for future transportation can not of itself create the relation of carrier and passenger.⁴¹ The mere fact that one has a ticket, or that he has paid the price for transportation, or that he has made a contract of carriage, does not render him in all cases a passenger; he must have submitted himself to the carrier's protection and have imposed upon himself an

33. Question depends on circumstances.

—Hogner v. Boston Elevated R. Co., 84 N. E. 464, 198 Mass. 260, 15 L. R. A., N. S., 960, 28 R. R. R. 756, 51 Am. & Eng. R. Cas., N. S., 756.

34. Getting on street car at customary place.—Petersen v. Elgin, etc., Tract. Co., 87 N. E. 345, 238 Ill. 403, affirming judgment 142 Ill. App. 34.

Where a person with a transfer boarded a lighted car carrying other passengers, and agreed to pay his fare to the conductor, who was also informed of his transfer, he became a passenger; the fact that the car was carrying other passengers being a sufficient invitation. *Cyle v. Joline*, 120 N. Y. S. 761.

35. Allowing party to remain aboard.—Sherman v. Hannibal, etc., R. Co., 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423.

36. Forcing himself on car.—In the case of a street railway, the relation of carrier and passenger is seldom created by express contract, and whether it has begun is generally to be shown by the circumstances; but it must at least appear that the passenger has offered himself and that the offer has been accepted, and, while the carrier ought to consent where there is no reasonable objection, it does not necessarily follow that it has

consented or will consent in any particular case, for it may decline to accept an offered passenger without a good reason, and in such case one cannot become a passenger by forcing his way upon the car against the carrier's will, but his remedy is for damages for unwarrantable exclusion. *Hogner v. Boston Elevated R. Co.*, 84 N. E. 464, 198 Mass. 260, 15 L. R. A., N. S., 960, 28 R. R. R. 756, 51 Am. & Eng. R. Cas., N. S., 756.

37. Intoxicated person boarding train against conductor's order.—Louisville, etc., R. Co. v. McNally, 31 Ky. L. Rep. 1357, 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642, 105 S. W. 124.

38. Persons prohibited from riding in elevator.—Ferguson v. Truax, 132 Wis. 478, 112 N. W. 513, 14 L. R. A., N. S., 350, 13 Am. & Eng. Ann. Cas. 1092.

39. Prohibition need not be repeated.—Ferguson v. Truax, 132 Wis. 478, 112 N. W. 513, 14 L. R. A., N. S., 350, 13 Am. & Eng. Ann. Cas. 1092.

40. Mere failure to order person from wrong train.—Brown v. Scarboro, 97 Ala. 316, 12 So. 289, 58 Am. & Eng. R. Cas. 364.

41. Contract for future transportation.—Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

obligation to the carrier for performance of his own side of the contract of carriage. But so long as the party merely entertains the wish or intention, no obligation has arisen on either side.⁴²

Rule as to Fixed Stations.—The principle that there must be an acceptance by the carrier before the person who offers himself becomes a passenger, as applied to those who offer themselves for transportation by railroads, whose trains stop only at fixed stations, at which only the carrier holds itself out as ready to receive as passengers those who present themselves in the usual way, is not applicable to a street railway, unless it has made a rule that passengers will not be taken on except at designated places.⁴³

Receiving Car from Connecting Carrier.—A passenger who has been carried on the line of a railway in a passenger car which that company switches off upon the line of a connecting railway, sustains the relation of passenger to such connecting railway company during the time the car is stationary and he remains in it, if according to the usual course of business that company is accustomed to receive presently cars so delivered to it, couple them into its trains and carry them over its own line.⁴⁴

§§ 2126-2136. When Relation of Carrier and Passenger Commences
—§ 2126. In General.—It may be laid down as a general rule that the relation of carrier and passenger commences where a person with a good faith intention of taking passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities for transportation which the carrier offers.⁴⁵ This rule is equally applicable to all other carrier's, such as street railways, etc., as well as to steam railroads.⁴⁶ Thus where a hotel elevator for the accommodation of guests stops at a floor and the door is opened for the reception of passengers, the relation of carrier and passenger begins the moment the latter starts to enter the car and brings himself within the range

42. Possession of ticket insufficient.—*Southern R. Co. v. Roseheim & Sons*, 1 Ga. App. 766, 58 S. E. 81.

43. Rule as to fixed stations not applicable to street cars.—*Lockwood v. Boston Elevated R. Co.*, 200 Mass. 537, 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, 86 N. E. 934, 22 L. R. A., N. S., 488. See post, "After Signaling Street Car," § 2130.

44. Receiving car from connecting carrier.—*Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848. See post, "Prior to Payment of Fare," § 2168.

In *Schopman v. Boston, etc., R. Corp.* (Mass.), 9 Cush. 24, 55 Am. Dec. 41, it is held that a railroad receiving upon its track the cars of another company, placing them under the control of its agents and servants and drawing them with its engines, over its own road, to their destination, assumes towards the passengers coming upon its road in such cars the relation of common carrier of passengers.

45. Rule stated—Situation to avail himself of facilities, etc.—*Pere Marquette R. Co. v. Strange*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A., N. S., 1041; *Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026; *Holzenkamp v. Cincinnati Tract. Co.*, 14 O. D. N. P. 586; *Powell v. Philadelphia, etc., R. Co.*,

70 Atl. 268, 220 Pa. 638, 20 L. R. A., N. S., 1019, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536.

In order to be a passenger it is not necessary to have a ticket, or to be actually upon defendant's train; but if there is a bona fide intention by one injured, at the time of the accident, to board defendant's train, and if defendant had knowledge of that fact, or if the acts and conduct of the injured party and the other circumstances were such as to reasonably notify defendant that he intended to board the train, he is entitled to such care and protection from defendant as is required where the relation of passengers and carrier exists. *MacFeat v. Philadelphia, etc., R. Co.* (Del.), 6 Pen. (Del.), 513, 69 Atl. 744, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254.

46. Rule applicable to all carriers.—The liability of a street railway company, as a common carrier begins when a person in good faith places himself in a position to avail himself of the facilities offered by the railway for carrying passengers with the express or implied assent of the carrier. It is not essential that there should be an entry into the car or that the fare should be paid. *Cincinnati Tract. Co. v. Holzenkamp*, 3 N. P., N. S., 537, 16 O. D. N. P. 673, affirmed in 74 O. St. 379, 78 N. E. 529, affirming 2 N. P., N. S., 157.

of its possible activities.⁴⁷

§ 2127. Before Reaching Carrier's Premises.—The rule as applied to railroads is that the relation does not have its beginning until the prospective passenger has reached the station premises, or other place intended for the reception of passengers, even though he has a ticket for the next train.⁴⁸ So long as a person merely intends to be carried, but has not reached any place provided for passengers or used for their accommodation, he is not a passenger.⁴⁹ Thus, it is held that a person walking towards a railroad station with the intention of buying a ticket and taking a train after he gets there, is not a passenger before he reaches the station, even if he might be one in the same place if he had begun his journey.⁵⁰ And where a person in order to reach the station to take a train, crosses a vacant lot, crawls under a wire fence, crosses a ditch, and climbs an embankment, he is no more than a trespasser and can not recover if he is killed upon the track at the top of the embankment.⁵¹

Person Riding to Its Station in Railroad Company's Stage.—Where a railroad company runs a stage for the purpose of carrying passengers to and from its depot, a person who is riding in the stage to the station for the purpose of taking passage on a train is a passenger, though he has not bought a ticket nor made any declaration of his intention to do so.⁵²

§ 2128. While at Station in Waiting Room, etc.—The general rule seems to be that one is entitled to the care and protection due a passenger while he is upon the carrier's station grounds for the purpose of taking a train which should depart for his proposed destination within a reasonable time.⁵³ A person who has purchased a ticket, and is rightfully on the carrier's premises, provided for

47. Hotel elevator.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.), 134 S. W. 45.

48. Beginning of relation—Rule as applied to railroads.—*Chicago, etc., R. Co. v. Jennings*, 22 Am. & Eng. R. Cas., N. S., 127, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; *June v. Boston, etc., R. Co.*, 153 Mass. 79, 26 N. E. 238.

Holder of commutation ticket crossing tracks in street.—In *Chicago, etc., R. Co. v. Jennings*, 190 Ill. 478, 22 Am. & Eng. R. Cas., N. S., 127, 60 N. E. 818, 54 L. R. A. 827, it is held that a person with a commutation ticket, crossing the tracks of a railroad along a street to take a train, but who has not yet reached the station or platform provided for boarding trains, is not a passenger.

49. Before reaching place provided for passengers.—*Chicago, etc., R. Co. v. Jennings*, 190 Ill. 478, 22 Am. & Eng. R. Cas., N. S., 127, 60 N. E. 818, 54 L. R. A. 827.

50. Person walking toward station.—*June v. Boston, etc., R. Co.*, 153 Mass. 79, 26 N. E. 238.

51. Trespasser.—*Comly v. Pennsylvania R. Co.* (Pa.), 12 Atl. 496, 9 Sad. 369.

52. Person going to station in carrier's stage.—*Buffett v. Troy, etc., R. Co.*, 40 N. Y. 168; *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258.

53. While upon station grounds.—*Chicago, etc., R. Co. v. Walker*, 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596, 217 Ill. 605, 75 N. E. 520; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 2 So. 567, 4 Am. St. Rep. 231; *Philadelphia, etc., R. Co. v. Crawford*, 112 Md. 508, 38 R. R. R. 14, 61 Am. & Eng. R. Cas., N. S., 14, 77 Atl. 278; *Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536, 70 Atl. 268, 20 L. R. A., N. S., 1019; Judgment 105 N. W. 526, reversed on rehearing, *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346; *Riley v. Vallejo Ferry Co.*, 173 Fed. 331; *Metcalf v. Yazoo, etc., R. Co.*, 97 Miss. 455, 52 So. 355, 36 R. R. R. 743, 59 Am. & Eng. R. Cas., N. S., 743, 28 L. R. A., N. S., 311; *Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026; *Atchison, etc., R. Co. v. Holloway*, 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648, 71 Kan. 1, 80 Pac. 31; *Pa. Rhoads v. Cornwall, etc., R. Co.*, 48 Pa. Super. Ct. 310; *Pendleton v. Richmond, etc., R. Co.*, 104 Va. 813, 52 S. E. 574; *Holzenkamp v. Cincinnati Tract. Co.*, 14 O. D. N. P. 586; *Lugner v. Milwaukee Elect. R., etc., Co.*, 131 N. W. 342, 146 Wis. 175, 41 R. R. R. 186, 64 Am. & Eng. R. Cas., N. S., 186.

A passenger assumes such relation when, intending to take passage, he enters a place provided for the reception of passengers as a depot, waiting room, or the like, at a time when such place is open for the reception of persons intending to take passage on the train or cars of the company. *Mitchell v. Augusta, etc., R. Co.*, 69 S. E. 664, 87 S. C. 375, 31 L. R. A., N. S., 442, 39 R. R. R. 154, 62 Am. & Eng. R. Cas., N. S., 154.

use by passengers, awaiting the arrival of his train, is a passenger.⁵⁴ And a person is entitled to the protection and care due a passenger when he is on the carrier's premises with the intention to purchase a ticket and take passage on a train or other vehicle of the carrier which should depart within a reasonable time.⁵⁵ But neither the purchase of a ticket nor an entry into the car is essential to create the relation of carrier and passenger. So where a person is at the station with intention of purchasing a ticket, he is a passenger, and as such entitled to protection,⁵⁶ though the agent may refuse to sell him a ticket,⁵⁷ or directs him to pay his fare on the train.⁵⁸ And if a person intending to take passage on a train goes to the depot a few minutes before the arrival of the train to deposit in the waiting room his satchel, his resort to the depot is for a lawful purpose and in furtherance of his intention to become a passenger, and the relation of carrier and passenger is created, though he intends to leave the depot to see a person on business.⁵⁹ But a person who is injured while riding on a train several miles from the station can not be regarded as a passenger merely because he had gone to the station with the intention to become a passenger, but the carrier's duty to him must be determined from the relation he bore to it on the train at the time.⁶⁰ Nor is a person a passenger who enters a steam railroad station intending to take a certain train, and finding it gone, waits in the station for a street car. The railroad company is not under the duty as to him of keeping station premises safely lighted.⁶¹

Persons in Waiting Room.—Being within the waiting room of the carrier's depot, waiting to take its cars, is as effectual to make a person a passenger as

54. *Roberts v. Atlantic, etc., R. Co.*, 155 N. C. 79, 70 S. E. 1080; *Scorenson v. Illinois Cent. R. Co.*, 155 Ill. App. 606; *Houston, etc., R. Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868, reversing 67 S. W. 915.

55. **At station to purchase ticket.**—In *Hansley v. Jamesville, etc., R. Co.*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474, it was held that the contract of carriage begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with the purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket.

A party upon the platform of an elevated railroad station, with the knowledge of the company that he intends to take a train, is a passenger when approaching the train to board it. *Lapin v. Northwestern Elevated R. Co.*, 162 Ill. App. 296.

56. **Ticket not necessary.**—*Texas Mid. Railroad v. Griggs* (Tex. Civ. App.), 106 S. W. 411; *Texas, etc., R. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124, affirmed in 93 Tex. 674, no op.; *St. Louis, etc., R. Co. v. Franklin* (Tex. Civ. App.), 44 S. W. 701.

57. **Person in ticket office refused ticket.**—A person in a railroad ticket office, for the purpose of buying a ticket, is entitled to be protected as a passenger, though the agent refused to sell him a ticket. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

58. **Directed by ticket agent to pay fare on train.**—In *Ramm v. Minneapolis, etc., R. Co.*, 94 Iowa 296, 62 N. W. 751, it is held that when one enters a ticket

office and lays his money on the counter, and is told by the ticket agent to pay his fare on the train, his relation to the railroad company is that of a passenger.

59. **Effect of intention to leave waiting room.**—*Metcalf v. Yazoo, etc., R. Co.*, 97 Miss. 455, 36 R. R. R. 743, 59 Am. & Eng. R. Cas., N. S., 743, 52 So. 355, 28 L. R. A., N. S., 311.

60. **Injured while on train.**—But in *Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, it is said in the opinion: "Nor did he become a passenger on the train when he went to the station for that purpose. Where one goes to a railroad station at a reasonable time before the departure of a train, for the purpose of traveling thereon, he may be regarded as a passenger in so far as it may relate to an injury received through the negligence or carelessness of the company while in or about the station or attempting to board the train. *Allender v. Chicago, etc., R. Co.*, 37 Iowa 264, 8 Am. R. Rep. 115; *Grimes v. Pennsylvania Co.*, 36 Fed. 72; *Warren v. Fitchburg R. Co.* (Mass.), 8 Allen 227, 85 Am. Dec. 700; *Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 486. The plaintiff, however, was not injured at the station, but while riding on the train eight or ten miles distant therefrom; and the duty of the company to him must be determined by the relation he bore to it on the train, and not while he was at the station."

61. **Person waiting in station for street car after missing train.**—*Heinlien v. Boston, etc., R. Co.*, 147 Mass. 136, 16 N. E. 698, 33 Am. & Eng. R. Cas. 500, 9 Am. St. Rep. 676.

if he were within one of its cars.⁶² And where a railroad has opened its waiting room in a depot for the reception of passengers, and a person, intending to take passage on a train shortly to arrive, resorts to the depot for that purpose, the relation of carrier and passenger arises as a matter of law.⁶³ Where a passenger on going to the depot finds it locked, she is not a trespasser where she enters the room, when it is opened and lighted by one not an agent of the company.⁶⁴

Person Occupying Place by Agent's Directions.—Where persons are occupying empty cars as a waiting room by the agent's directions when they are compelled to abandon the regular room, they are passengers and as such entitled to protection.⁶⁵

62. Person in waiting room.—Gordon v. Grand St., etc., R. Co. (N. Y.), 40 Barb. 546; Strain v. Vicksburg, etc., R. Co., 123 La. 407, 49 So. 2; Philadelphia, etc., R. Co. v. Green, 71 Atl. 986, 110 Md. 32, 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414.

A person who has purchased a ticket for his transportation and is at the station awaiting arrival of the train is a passenger, and entitled to protection as such. Keifner v. Pittsburg, etc., R. Co., 72 Atl. 253, 223 Pa. 50, 32 R. R. R. 220, 55 Am. & Eng. R. Cas., N. S., 220.

Failure of gateman to notify sick man of arrival of train—ejected because of his condition—killed by train.—In Wells v. New York Cent., etc., R. Co., 25 App. Div. 365, 49 N. Y. S. 510, it appeared that a gateman at a railroad station, who was aware that a person waiting in the station to take a train, for which he had purchased a ticket, was ill and unable to take care of himself, forgot to comply with a request made by such person and failed to notify him of the arrival of his train, and thereafter directed a police officer to eject him from the station, stating that "he was not in a condition of mind to go on any train," and the police did eject him, and the sick man, while wondering about the tracks near the station, was run over by a train and killed. It was held that deceased had become a passenger to whom the carrier owed an active duty to care for his safety.

Returning to station after attempting to enter vestibuled train—Struck by another train.—An intending passenger walked from the platform of a railroad station across one track for the purpose of taking a train of a company, which used the station jointly with defendant, then standing upon the second track and about to start. He attempted to enter on the side next the station, as was customary as the train started, but the cars were vestibuled and the door on that side closed, and being unable to enter he turned to go back to the station to wait for another train, when he was struck and killed by a train of defendant on the intervening track. It was held that he was a passenger with all the rights of one on the station grounds.

Chicago, etc., R. Co. v. Stepp, 90 C. C. A. 431, 32 R. R. R. 207, 35 Am. & Eng. R. Cas., N. S., 207, 164 Fed. 785, 22 L. R. A., N. S., 350.

63. Waiting room opened for passengers.—Metcalf v. Yazoo, etc., R. Co., 97 Miss. 455, 36 R. R. R. 743, 59 Am. & Eng. R. Cas., N. S., 743, 52 So. 355, 28 L. R. A., N. S., 311.

After place for reception of passengers is open.—A passenger assumes such relation when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such place is open for the reception of persons intending to take passage on the train or cars of the carrier. Mitchell v. Augusta, etc., R. Co., 87 S. C. 375, 39 R. R. R. 154, 62 Am. & Eng. R. Cas., N. S., 154, 69 S. E. 664, 31 L. R. A., N. S., 442.

A person becomes a passenger when, intending to take passage, he enters the waiting room of a depot or place provided by the carrier for the reception of passengers at a time when such place is open for the reception of passengers intending to take passage on trains of the company and desiring to buy a ticket, or, if the ticket office is not open, undertakes to get on the train while the train is standing for the reception of passengers, intending to pay his fare on the train. Merrill v. Michigan Cent. R. Co., 158 Ill. App. 38.

64. Depot opened, etc., by other than carrier's agent.—Chicago, etc., R. Co. v. Walker, 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596, 217 Ill. 605, 75 N. E. 520.

65. Using empty car as waiting room by direction of ticket agent—Jumping from moving car.—While a lady passenger was waiting with two others in the waiting room of a depot, some persons came in to clean the room. The three ladies asked the ticket agent for leave to sit in his office while the room was being cleaned, which was refused, as his office was to be cleaned also. They then asked the ticket agent for leave to sit on the station platform, but this request was also refused, as against the rules of the company. The agent then told them they might go into some empty cars standing

What Constitutes Railway Station.—A railway station is any place owned or under the control of a railway company, and designated by it as a regular point at which it receives and discharges passengers; and the duty of a railway company owning amusement grounds on which a station building and platform are located, and where passengers are invited by the company to assemble for the purpose of boarding its cars, is that of a common carrier, charged with the highest care for the safety of its passengers; and persons assembling in the building, on the grounds, or on the platform, at the point fixed by the company for receiving passengers, are at the company's station, and are passengers within the meaning of the law.⁶⁶ And where a railroad company habitually receives and sets down passengers at a platform at a flag station, prospective passengers waiting there for a train then due are not trespassers, regardless of whether the railroad company intends it as a waiting place.⁶⁷

Must Be at Station or Stopping Place at Proper Time.—Where one intends becoming a passenger on a car, he must be at the proper station when the car arrives; otherwise, he is not entitled to the rights of a passenger.⁶⁸ And a person intending to become a passenger must be at the place provided for passengers at a reasonable time prior to the arrival of the train.⁶⁹ The fact

beside the platform, which they did. They had not been there long when, without notice, the cars were suddenly and without signal moved out of the station. The occupants hurriedly passed to the end of the car and jumped from it, and the plaintiff was injured. There was no employee of the railroad on the cars, and the cars were still abreast the station platform when plaintiff jumped. It was held that plaintiff was a passenger while in the car. *Shannon v. Boston, etc., R. Co.*, 78 Me. 52, 2 Atl. 678, 23 Am. & Eng. R. Cas. 511.

66. What constitutes railway station.—*Dixon v. Great Falls, etc., R. Co.*, 38 App. D. C. 591, 598.

67. Prospective passengers at flag station.—*Louisville, etc., R. Co. v. Glasgow (Ala.)*, 60 So. 103.

68. Hundred and twenty-five yards from flag station—Refusal to respond to signals.—A flag station where plaintiff desired to take one of defendant's cars consisted merely of the word "Station" attached to a trolley pole. Cars did not stop there to receive or let off passengers unless signaled. The car plaintiff desired to take did not stop to receive or let off passengers, but to enter a switch to enable another car to pass. It remained on the switch a sufficient time to enable persons on the train to have alighted, or for those who were at the station when it arrived to have boarded it. When it stopped at the station, plaintiff was about 125 yards away, and though he ran to it and hallooed to the conductor to wait for him, he refused to do so and plaintiff was left. It was held that plaintiff not being at the station when the car arrived was not entitled to the rights of a passenger. *Mitchell v. Augusta, etc., R. Co.*, 87 S. C. 375, 39 R. R. R. 154, 62 Am. & Eng. R. Cas., N. S., 154, 69 S. E. 664, 31 L. R. A., N. S., 442.

69. Must be a reasonable time prior to train time.—*United States. — Grimes v.*

Pennsylvania Co., 36 Fed. 72; *Smith v. Seaboard, etc., Railway*, 10 Ga. App. 227, 73 S. E. 523.

Indiana.—*Pere Marquette R. Co. v. Strange*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A., N. S., 1041.

Iowa.—*Allender v. Chicago, etc., R. Co.*, 37 Iowa 264, 8 Am. R. Rep. 115; *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa 250, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346, 121 N. W. 676, 31 L. R. A., N. S., 338.

Kansas.—*Atchison, etc., R. Co. v. Holloway*, 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648, 71 Kan. 1, 80 Pac. 31.

Maryland.—*Philadelphia, etc., R. Co. v. Green*, 110 Md. 32, 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414, 71 Atl. 986.

Massachusetts.—*Warren v. Fitchburg R. Co. (Mass.)*, 8 Allen 227, 85 Am. Dec. 700.

Mississippi.—*Metcalfe v. Yazoo, etc., R. Co.*, 97 Mass 455, 36 R. R. R. 743, 59 Am. & Eng. R. Cas., N. S., 743, 52 So. 355, 28 L. R. A., N. S., 311.

Missouri.—*Albin v. Chicago, etc., R. Co.*, 103 Mo. App. 308, 77 S. W. 153.

Nebraska.—*Fremont, etc., R. Co. v. Hagblad*, 72 Neb. 773, 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226, 101 N. W. 1033, 106 N. W. 1041, 9 Am. & Eng. Ann. Cas. 1096, 4 L. R. A., N. S., 254.

New Jersey.—*Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 486.

New York.—*Gordon v. Grand St., etc., R. Co. (N. Y.)*, 40 Barb. 546.

Oregon.—*Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Pennsylvania.—*Keifner v. Pittsburgh, etc., R. Co.*, 223 Pa. 50, 32 R. R. R. 220, 55 Am. & Eng. R. Cas., N. S., 220, 72 Atl. 253.

South Carolina.—*Mitchell v. Augusta, etc., R. Co.*, 87 S. C. 375, 39 R. R. R. 154,

that a person is at a railroad station an unreasonably long time before the scheduled departure of the train he intends to take passage on may prevent him from being entitled to hold the railroad company responsible as a carrier of passengers for injuries sustained by him while waiting for such train.⁷⁰ And where a rule of a railroad commission provides when the waiting room shall be open for the different trains, one whose coming to the depot to take a train is not within the limitations of the rule, is not a passenger.⁷¹ What is a reasonable time depends upon the circumstances of the particular case. Thus, if a person who intends to take a train not due for an hour or so and who has purchased no ticket, obtains permission from the station agent to do some writing in the office of the station, and while there he and the agent become involved in an altercation over a private matter, in which the agent commits an assault on plaintiff, the railroad company is not liable, the relation of passenger and carrier not existing.⁷² But where a woman is traveling alone with her baby, and is transferred to a station of defendant's railroad, over which she has a valid ticket, purchased from a connecting line, and which includes her transfer from one road to the other, if the station is kept open at all times, both day and night, for the use of passengers, and plaintiff remains there to await her train, which will not arrive for ten hours, with the assent of defendant's agent, she is a passenger of defendant while so waiting for the train.⁷³

§ 2129. Approaching Train to Board.—A person is entitled to the care and protection due a passenger while approaching a train by the proper route, with the intention of taking passage thereon, if he has a ticket conferring upon him the right to transportation upon such train.⁷⁴ Thus, it is held that a per-

62 Am. & Eng. R. Cas., N. S., 154, 69 S. E. 664, 31 L. R. A., N. S., 442.

Texas.—Gulf, etc., R. Co. v. McGown, 65 Tex. 640; Houston, etc., R. Co. v. Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868; St. Louis, etc., R. Co. v. Franklin (Tex. Civ. App.), 44 S. W. 701; Texas, etc., R. Co. v. Jones (Tex. Civ. App.), 39 S. W. 124; Texas Mid. Railroad v. Griggs (Tex. Civ. App.), 106 S. W. 411.

In *Phillips v. Southern R. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, it is held that it is the coming to the station within a reasonable time, with the intention to take the next train, and not the purchase of a ticket, that creates the relation of passenger and carrier.

Failure to be on platform promptly—Struck by train while crossing track to platform.—One intending to become a passenger had not within a reasonable time prior to the arrival of the train which he had intended to take placed himself on the platform provided for the use of passengers. He attempted to cross the track with a view of reaching the platform, and was struck by a train. It was held that he was not a passenger. *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183, 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519, 94 Pac. 911.

70. At station too soon.—*United States.*—*Grimes v. Pennsylvania Co.*, 36 Fed. 72.

Iowa.—*Allender v. Chicago, etc., R. Co.*, 37 Iowa 264, 8 Am. R. Rep. 115; *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa

250, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346, 121 N. W. 676, 31 L. R. A., N. S., 338.

Massachusetts.—*Warren v. Fitchburg R. Co.* (Mass.), 8 Allen 227, 85 Am. Dec. 700.

Nebraska.—*Fremont, etc., R. Co. v. Hagblad*, 72 Neb. 773, 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226, 101 N. W. 1033, 106 N. W. 1041, 9 Am. & Eng. Ann. Cas. 1096, 4 L. R. A., N. S., 254.

New Jersey.—*Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 486.

North Carolina.—*Phillips v. Southern R. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163.

Oregon.—*Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

South Carolina.—*Holcombe v. Southern R. Co.*, 8 R. R. R. 482, 31 Am. & Eng. R. Cas., N. S., 482, 44 S. E. 68, 66 S. C. 6.

Vermont.—*Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337.

71. Railroad commission rule.—*Smith v. Seaboard, etc., Railway*, 10 Ga. App. 227, 73 S. E. 523.

72. Permission to write in station some time prior to train time.—*Andrews v. Yazoo, etc., R. Co.*, 86 Miss. 773, 16 L. R. A. 587, 39 Am. & Eng. R. Cas., N. S., 587, 38 So. 773.

73. Ten hours prior to train time—consent of station agent.—*St. Louis, etc., R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741.

74. Approaching train to board it.—*Arkansas.*—*St. Louis, etc., R. Co. v.*

son walking on the side track of a railroad from the depot to a train on the main track in order to take passage on such train is a passenger, and not a trespasser.⁷⁵ And where a person who has purchased a ticket, passes through a turnstile where the ticket is deposited, enters a platform exclusively for passengers and is about to enter the train, he is a passenger.⁷⁶ And a person having a mileage book good on a railroad and undertaking to board a train by passing along the platform of a freight warehouse, where he has been to check his trunks by the invitation of the railroad, is a passenger.⁷⁷

Forfeiture of Rights.—If a passenger needlessly linger about a depot or station and neglect to board a train, at the proper place and time, the carrier is, as to such passenger, only bound to ordinary diligence when he attempts to board the train at another point. It is the duty of a passenger to use caution in observing signals which might be given by the agents of the company, as to the arrival and departure of trains.⁷⁸ And a person forfeits his rights as a passenger while going from the depot to his train by a route which he knows, or should know, is not intended to be used for such purpose, instead of by the

Hutchinson, 101 Ark. 424, 142 S. W. 527.

Illinois.—Chicago, etc., R. Co. v. Chancellor, 60 Ill. App. 525; Illinois Cent. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290.

Indiana.—Pere Marquette R. Co. v. Strange, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A., N. S., 1041.

Maryland.—Baltimore, etc., R. Co. v. Mahone, 63 Md. 135.

Massachusetts.—Warren v. Fitchburg R. Co. (Mass.), 8 Allen 227, 85 Am. Dec. 700; Young v. New York, etc., R. Co., 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193.

New Jersey.—Exton v. Central R. Co., 62 N. J. L. 7, 42 Atl. 486.

New York.—Northrup v. Railway, etc., Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724; Redner v. Lehigh, etc., R. Co., 73 Hun 562, 26 N. Y. S. 1050, 56 N. Y. St. Rep. 230.

North Carolina.—Pincus v. Atlantic, etc., R. Co., 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856; Seawell v. Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610.

Tennessee.—Street Railroad v. Boddy, 105 Tenn. (7 Pickle) 666, 55 S. W. 646, 51 L. R. A. 885.

While walking upon connecting steamboat.—A person who is injured while walking from a connecting steamboat to a railroad by the customary route, is injured while traveling by public conveyance, within the meaning of a policy which insures against personal injuries when caused by any accident while traveling "by any public or private conveyance provided for the transportation of passengers." Northrup v. Railway, etc., Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724.

Killed while walking across tracks.—Train waiting for passengers.—A person was killed while walking across one of the railroad tracks at a station under circumstances which warranted a jury in finding that she was about to take pas-

sage upon a train waiting for the reception of passengers. It was held that such person was justifiably found by a passenger for whose safety the railroad was bound to exercise the highest degree of diligence. Chicago, etc., R. Co. v. Chancellor, 60 Ill. App. 525.

An intending passenger walked from the platform of a railroad station across one track for the purpose of taking a train of a company which used the station jointly with defendant, then standing upon the second track and about to start. He attempted to enter on the side next the station, as was customary, as the train started, but the cars were vestibuled and the doors on that side closed, and being unable to enter he turned to go back to the station to wait for another train, when he was struck and killed by a train of defendant on the intervening track which was running at a speed of forty or fifty miles an hour. Held, in an action to recover for his death, that he was a passenger with all the rights of one on the station grounds, and that the questions of defendant's negligence in the manner of running its train and of the contributory negligence of the deceased were properly submitted to the jury. Judgment 151 Fed. 908, affirmed. Chicago, etc., R. Co. v. Stepp, 164 Fed. 785, 90 C. C. A. 431, 32 R. R. R. 207, 35 Am. & Eng. R. Cas., N. S., 207, 22 L. R. A., N. S., 350.

75. Walking on side track.—Illinois Cent. R. Co. v. Proctor, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598.

76. Through turnstile where ticket is deposited.—Illinois Cent. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290.

77. On warehouse platform after checking trunk.—Pincus v. Atlantic, etc., R. Co., 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856.

78. Needlessly lingering about station.—Perry v. Central Railroad, 66 Ga. 746.

proper route, which is available at the time.⁷⁹ And where a person who has taken the wrong train, voluntarily leaves it to take another train pointed out to him by the conductor, and at a place away from the station, he forfeits his right as a passenger when he leaves the first train.⁸⁰

§ 2130. After Signaling Street Car.—The principle that there must be an acceptance by the carrier before the person who offers himself becomes a passenger, as applied to a railroad, is inapplicable to a street railway, unless it has made a rule that passengers will not be taken on except at designated places.⁸¹ The general rule is, that a contract of passage begins when the car is stopped at a usual stopping place, in response to a signal from an intending passenger.⁸² A person who signals a street car with the intention of taking passage upon it, becomes a passenger as soon as his signal is recognized and repounded to by those in control of the car.⁸³ Stopping for the purpose of enabling him to enter, implies a consent to accept such person as a passenger, and the carrier is liable for injuries to him while he is attempting to board the vehicle.⁸⁴ And if a street car comes to a full stop in response to plaintiff's sig-

79. Taking wrong route from depot to train.—*Boden v. Boston Elevated R. Co.*, 205 Mass. 504, 36 R. R. R. 740, 59 Am. & Eng. R. Cas., N. S., 740, 91 N. E. 879; *Comly v. Pennsylvania R. Co. (Pa.)*, 12 Atl. 496, 9 Sad. 369; *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183, 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519, 94 Pac. 911.

Selecting unfamiliar route, instead of platform.—Where a passenger, in order to take a train, knowingly disregards the provisions made for his convenience and safety, and instead of using the platform, chooses a route with which he is not familiar, and which he knows was not intended for his use, he becomes a trespasser, or at most a mere licensee. *Boden v. Boston Elevated R. Co.*, 205 Mass. 504, 36 R. R. R. 740, 59 Am. & Eng. R. Cas., N. S., 740, 91 N. E. 879.

80. Leaving wrong train, not a station to board train pointed out by conductor.—In *Finnegan v. Chicago, etc., R. Co.*, 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399, it appeared that plaintiff having entered the wrong train as a passenger, the conductor stopped the train, not at a station, in order that the passenger might get off and walk along the track to a train pointed out by the conductor, which would carry him to his destination. It was held that the contract of the passenger in availing himself of this opportunity being voluntary, he ceased to be a passenger after leaving the first train.

81. After signalling car—Principal applied to street car.—*Lockwood v. Boston Elevated R. Co.*, 86 N. E. 934, 200 Mass. 537, 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, 22 L. R. A., N. S., 488.

82. General rule.—*Dougherty v. Cincinnati Tract. Co.*, 17 O. D. N. P. 513, 514.

83. After signalling street car.—*California.*—*Nilson v. Oakland Tract. Co.*, 101 P. 413.

Massachusetts.—*Carter v. Boston, etc., St. R. Co.*, 205 Mass. 21, 35 R. R. R. 697,

58 Am. & Eng. R. Cas., N. S., 697, 91 N. E. 142; *Marshall v. Boston Elevated R. Co.*, 88 N. E. 1094, 203 Mass. 40.

Minnesota.—*Gaffney v. St. Paul R. Co.*, 81 Minn. 459, 84 N. W. 304; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 16 Am. & Eng. R. Cas. 310, 50 Am. Rep. 550.

Missouri.—*O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680.

Ohio.—*Carney v. Cincinnati St. R. Co.*, 8 O. Dec. 587.

Texas.—*Lewis v. Houston Electric Co.*, 88 S. W. 489, 39 Tex. Civ. App. 625, 112 S. W. 593.

Wisconsin.—*Karr v. Milwaukee Light, etc., Co.*, 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623, 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

England.—*Brien v. Bennett*, 8 C. & P. (Eng.), 724.

Interurban car.—One who in good faith signals in the recognized manner an interurban car, with a view to board it, which signal is responded to by the motorman by whistling or setting his brake, is a passenger. *Karr v. Milwaukee Light, etc., Co.*, 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623, 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

Existence of relation a question for jury.—Whether the conduct of a person and that of the railway company shows such person to have been a passenger is a question for the jury. *Altmeier v. Cincinnati, etc., R. Co.*, 4 N. P. 224, 5 O. Dec. 655, affirmed in 60 O. St. 10, 53 N. E. 300.

84. Implied acceptance—Stopping.—*Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 16 Am. & Eng. R. Cas., N. S., 310, 50 Am. Rep. 550; *Brien v. Bennett*, 8 C. & P. (Eng.), 724.

One becomes a street car passenger the instant he starts to board a car, and it then becomes the duty of the operators of the car not to start it until he has been given a reasonable opportunity to

nal, it is not necessary, to constitute the carrier's consent to plaintiff becoming a passenger, that the car door be entirely open to permit him to enter.⁸⁵ But a person who signals a street car at a place other than a customary stopping place has no right to assume that the car will stop at any particular point and until he is given to understand by some act of the motorman or conductor that he can safely attempt to board the car, or until the conditions are such that he can do so, the company is under no legal duty to him.⁸⁶ And a street railway owes no duty whatever to a person intending to become a passenger, until he has become a passenger by either getting on, or attempting to get on, the car after it has stopped for the purpose of permitting him to board it.⁸⁷ It is not necessary, however, that a person should have come in physical contact with a street railway car to constitute him a passenger and entitle him to the care due to that relation.⁸⁸ The rule is not inflexible that to entitle a person to protection due a passenger he must be actually within the vehicle or upon some portion of it. Otherwise he might in good faith and in the exercise of due care,

reach a place of comparative safety. *Conway v. Metropolitan St. R. Co.* (Mo. App.), 142 S. W. 1101.

Plaintiff desiring to become a passenger, signaled an open car, and, the motorman having inclined his head, started from the sidewalk and, on the car's being stopped, boarded it and was standing on the running board on his way to a seat at the time of his injury. The conductor, who saw him coming to get on the car and standing on the running board, did not order him not to get on, or make any objection, either verbally or by gesture, that he was unlawfully on the running board. Held, that the relation of passenger and carrier was established. *Lockwood v. Boston Elevated R. Co.*, 200 Mass. 537, 86 N. E. 934, 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, 22 L. R. A., N. S., 488.

One who intended to become a passenger walking alongside the car and stepping off the walk or platform and sustaining injury thereby, was to be considered as entitled to the same degree of care as though fare had been paid and she had thereby become a passenger. *Cincinnati Tract. Co. v. Holzenkamp*, 3 N. P., N. S., 537, 539, 16 O. D. N. P. 673, affirmed in 74 O. St. 379, 78 N. E. 529, affirming 2 N. P., N. S., 157.

85. Necessity for car door to be open.—*Carter v. Boston, etc., St. R. Co.*, 205 Mass. 21, 35 R. R. R. 697, 58 Am. & Eng. R. Cas., N. S., 697, 91 N. E. 142.

86. No right to assume car will stop—Must await act of consent.—*Garvey v. Rhode Island Co.*, 26 R. I. 80, 58 Atl. 456.

87. Not prior to attempt to go on board.—*Lexington R. Co. v. Herring*, 29 Ky. L. Rep. 794, 96 S. W. 558, 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635.

Not before car is reached—Defects in car.—And in *Duchemin v. Boston Elevated R. Co.*, 186 Mass. 353, 13 R. R. R. 679, 36 Am. & Eng. R. Cas., N. S., 679, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, it is held that a pedestrian on

the highway, who, for the purpose of boarding it, is approaching a street car stopped to receive him as a passenger, is not, before he actually reaches the car, entitled to the rights of a passenger, even so far as concerns defects in the car, in respect of the extraordinary degree of care due passengers from common carriers, and the railroad owes to any person on the highway.

88. Physical contact with car not essential.—*Haselton v. Portsmouth, etc., Railway*, 71 N. H. 589, 6 R. R. R. 705, 29 Am. & Eng. R. Cas., N. S., 705, 53 Atl. 1016; *Cincinnati Tract. Co. v. Holzenkamp*, 3 N. P., N. S., 537, 16 O. D. N. P. 673, affirmed in 74 O. St. 379, 78 N. E. 529, affirming 2 N. P., N. S., 157.

A complaint, aside from its express averment that plaintiff and her children were defendant's passengers, and that it was its duty to carry them on its car from G. to B., shows such relation by the allegations that defendant was a common carrier of passengers by means of an electric car running from G. to B.; that plaintiff, with her children with her, was at G., at the proper place used by defendant for receiving passengers on the car, for the purpose of boarding said car and being carried thereon as defendant's passengers from G. to B.; that the car stopped at said place for the purpose of receiving passengers, but that she did not board it by reason of the servant in charge of the car negligently failing to allow her a reasonable time or opportunity to do so. *Birmingham R., etc., Co. v. Wise*, 149 Ala. 492, 42 So. 821.

Car brought to slow movement.—It is not essential to the status of a passenger that the person be on the car, and if the car is stopped or brought to a slow movement in obedience to a signal of a bystander that such person wishes to take passage, this conduct is an invitation to him to board the car; and when he starts to do so he becomes a passenger. *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680.

place himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier, and the latter be bound to the exercise of ordinary care only.⁸⁹ It has been said: "In respect of injuries occasioned by the sudden and untimely starting of cars before passengers have gotten fairly aboard, physical contact is made a prominent feature in decisions of courts thereon; but this is so because this fact is the *sine qua non* of the injury itself. These cases, therefore, can not be accepted as authority for the proposition that physical contact is an exclusive prerequisite to recovery, in all cases; so that, even if, for the purpose of discussion, we accept physical contact as a general rule of decision, it must be with the understanding that it is subject to well recognized exceptions."⁹⁰

§ 2131. Before Entering Vehicle.—A person may be a passenger before he enters the carrier's vehicle.⁹¹ If there is a bona fide intention on the part of the person, injured at the time of the accident, to board defendant's train, and if defendant has knowledge of that fact or if the acts and conduct of the injured party and the other circumstances are such as to reasonably notify defendant that he intends to board the train, he is entitled to such care and protection from defendant as is required where the relation of passenger and carrier exists.⁹² Thus if a person has purchased his ticket and arrived at the point of departure he is a passenger, even though he has not entered the cars, and while waiting for the train to start he is, as to all the duties of the company which directly involve his safety, entitled to extraordinary diligence.⁹³

Approaching Transfer Car.—A person who has been given a transfer by the conductor of the car he has just left is a passenger while he is properly approaching the transfer car with intent to board it.⁹⁴

89. Rational of rule.—*Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 16 Am. & Eng. R. Cas. 310, 50 Am. Rep. 550; *Brien v. Bennett*, 8 C. B. & P. (Eng.), 724; *Allender v. Chicago, etc., R. Co.*, 37 Iowa 264, 8 Am. R. Rep. 115; *Gordon v. Grand St., etc., R. Co.* (N. Y.), 40 Barb. 546; *Commonwealth v. Boston, etc., R. Co.*, 1 Am. & Eng. R. Cas. 459, 129 Mass. 500, 37 Am. Rep. 382.

90. Exceptions to rule.—*Holzenkamp v. Cincinnati, Tract. Co.*, 14 O. D. N. P. 586.

91. Delaware.—*MacFeat v. Philadelphia, etc., R. Co. Del.*, 6 Pen. 513, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254, 69 Atl. 744.

Kentucky.—*Illinois Cent. R. Co. v. Proctor*, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531, 122 Ky. 92, 28 Ky. L. Rep. 598, 89 S. W. 714.

Minnesota.—*Gaffney v. St. Paul R. Co.*, 81 Minn. 459, 84 N. W. 304.

Missouri.—*Albin v. Chicago, etc., R. Co.*, 103 Mo. App. 308, 77 S. W. 153; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680.

North Carolina.—*Pincus v. Atlantic, etc., R. Co.*, 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112, 140 N. C. 450, 53 S. E. 297, 11 Am. St. Rep. 856.

Virginia.—*Norfolk, etc., R. Co. v. Gal-
liher*, 89 Va. 639, 16 S. E. 935.

92. Carrier notified by person of his intention.—*MacFeat v. Philadelphia, etc.,*

R. Co. (Del.), 6 Pen. 513, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254, 69 Atl. 744.

93. Person with ticket waiting to depart.—*Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253; *Central R., etc., Co. v. Perry*, 58 Ga. 461, 16 Am. R. Rep. 122; *Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1023.

94. One with street car transfer approaching transfer car.—*Colorado Springs, etc., R. Co. v. Petit*, 21 R. R. R. 132, 44 Am. & Eng. R. Cas., N. S., 132, 37 Colo. 326, 86 Pac. 121; *Chicago City R. Co. v. Carroll*, 11 R. R. R. 35, 34 Am. & Eng. R. Cas., N. S., 35, 206 Ill. 318, 68 N. E. 1087; *Walger v. Jersey City, etc., R. Co.*, 71 N. J. L. 356, 14 R. R. R. 226, 37 Am. & Eng. R. Cas., N. S., 226, 59 Atl. 14; *Keator v. Scranton Tract. Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758.

Five feet of transfer car—Struck by piece of trolley pole.—In *Keator v. Scranton Tract. Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758, it is held that where a person is given a transfer ticket from one electric car to another which is a block distant, to enable him to reach the destination for which he has paid fare and, while in the cartway approaching the second car, he is struck within five feet of the car by a piece of the trolley pole which broke while the conductor was turning it from one end of the car to the other, such person is a passenger.

Soliciting Services of Hackman.—A person who solicits the services of a licensed hackman is a passenger, within the meaning of a city ordinance declaring that it shall be unlawful for the driver of any omnibus, etc., to refuse to convey any passenger from any one point to any other point in the city.⁹⁵

§ 2132. Attempting to Board Train or Other Vehicle.—When a person is engaged in proper acts in an effort to board the conveyance of a carrier of passengers, the relation of carrier and passenger may be said to have commenced, and the carrier owes such person the same degree of care as when upon the conveyance of the carrier.⁹⁶ Passengers are not required to wait for express invitations before entering a car.⁹⁷ When a person is on the steps or platform of the car which is open for the reception of passengers, in the act of entering for the purpose of becoming a passenger, the relation of passenger and carrier exists.⁹⁸ And it is generally held that a person is a passenger while properly attempting to board a street car which has stopped at a place where it is customary to take on passengers.⁹⁹ If a person board a shuttle car

95. Effect of soliciting services of hackman.—*Atlantic City v. Brown*, 71 N. J. L. 81, 58 Atl. 110.

96. Attempting to board train with proper ticket.—*Birmingham, etc., R. Co. v. Norris*, 4 Ala. App. 363, 59 So. 66; *Central R., etc., Co. v. Perry*, 58 Ga. 461, 16 Am. R. Rep. 122.

Kansas.—*Atchison, etc., R. Co. v. Hol-loway*, 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648, 71 Kan. 1, 80 Pac. 31.

Massachusetts.—*Warren v. Fitchburg R. Co. (Mass.)*, 8 Allen 227, 85 Am. Dec. 700. *New Jersey.*—*Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 486.

New York.—*Wells v. New York Cent., etc., R. Co.*, 25 App. Div. 365, 49 N. Y. S. 510.

North Carolina.—*Pincus v. Atlantic, etc., R. Co.*, 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856.

South Carolina.—*Williford v. Southern Railway*, 85 S. C. 301, 35 R. R. R. 693, 58 Am. & Eng. R. Cas., N. S., 693, 67 S. E. 302.

Texas.—*Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.; *Green v. Houston Electric Co.*, 40 Tex. Civ. App. 260, 89 S. W. 442. See, also, *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, affirmed, no op.; *Texas Mid. Railroad v. Brown (Tex. Civ. App.)*, 58 S. W. 44; *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152, affirmed in 93 Tex. 643.

97. Necessity for express invitation.—*Texas Mid. Railroad v. Brown (Tex. Civ. App.)*, 58 S. W. 44.

98. Standing on steps or platform.—*Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026.

99. Attempting to board street car at proper point.—*Delaware.*—*Waller v. Wilmington City R. Co. (Del.)*, 5 Pen. 374, 21 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727, 61 Atl. 874.

Kentucky.—*Lexington R. Co. v. Her-ring*, 29 Ky. L. Rep. 794, 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635, 96 S. W. 558.

Illinois.—*Lake St., etc., R. Co. v. Bur-gess*, 200 Ill. 628, 7 R. R. R. 136, 30 Am. & Eng. R. Cas., N. S., 136, 66 N. E. 215.

Indiana.—*Citizens St. R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491.

Massachusetts.—*Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110; *Gordon v. West End St. R. Co.*, 175 Mass. 181, 55 N. E. 990; *McDonough v. Metropolitan R. Co.*, 21 Am. & Eng. R. Cas. 354, 137 Mass. 210.

Minnesota.—*Miller v. St. Paul City R. Co.*, 66 Minn. 192, 68 N. W. 862.

Missouri.—*Barth v. Kansas, etc., R. Co.*, 142 Mo. 535, 44 S. W. 778; *Benjamin v. Metropolitan St. R. Co. (Mo.)*, 151 S. W. 91.

New Hampshire.—*Haselton v. Ports-mouth, etc., Railway*, 71 N. H. 589, 6 R. R. R. 705, 29 Am. & Eng. R. Cas., N. S., 705, 53 Atl. 1016.

North Carolina.—*Snipes v. Norfolk, etc., R. Co.*, 144 N. C. 18, 23 R. R. R. 53, 46 Am. & Eng. R. Cas., N. S., 53, 56 S. E. 477.

Texas.—*Green v. Houston Electric Co.*, 89 S. W. 442, 40 Tex. Civ. App. 260.

Virginia.—*Norfolk, etc., Terminal Co. v. Morris*, 101 Va. 422, 44 S. E. 719.

Where plaintiff approached an electric car standing at a station, and the motor-man, being asked by plaintiff's companion which car would leave first, replied, "This one," and plaintiff walked round the front of the car toward the rear of the same and attempted to board it, the relation of carrier and passenger arose, though he had no ticket and the car was not going directly towards his destination. *Snipes v. Norfolk, etc., R. Co.*, 144 N. C. 18, 23 R. R. R. 53, 46 Am. & Eng. R. Cas., N. S., 53, 56 S. E. 477.

On steps or platform.—In *Gaffney v.*

on a city street, which connects with an elevated railroad, and is carried to a platform station erected between two elevated tracks, where she waits for an elevated train, on which she intends to continue her journey, and is injured by falling between two cars as she attempts to board the train, she is a passenger.¹ But one intending to board a street car who approached it from the rear, and was in a position where the conductor, in looking out for impending passengers, would not ordinarily have seen her, and who was not seen by the conductor, who did look out towards the rear before giving the signal to start, was not a passenger.²

Attempting to Board Street Car or Train at Improper Point.—A person is not a passenger when attempting to board a street car, without the knowledge and express or implied invitation or consent of those in charge of it, at a place which he knows, or is chargeable with knowledge, is not used or intended as a place for the reception of passengers.³ Nor is a person boarding a street car inside of a car barn a passenger before the car emerged from the barn.⁴ And a person who, without the knowledge of any of the trainmen or servants of a railroad corporation, endeavors to get upon a train which has stopped for the purpose of discharging passengers where it is not accustomed to stop for the purpose of receiving them, does not thereby become, nor acquire the rights of, a passenger, although he has a ticket.⁵

Attempting to Board Transfer Car with Transfer.—A person who has been given a transfer by the conductor of the street car he has just left is a passenger while attempting, in a proper manner, to board the transfer car.⁶

St. Paul R. Co., 81 Minn. 459, 84 N. W. 304, it is held that if a street car stops at a usual place for passengers, and a person in the exercise of due care gets upon the steps or platform of the car, for the purpose of taking passage, he is a passenger while waiting there for the car to start.

On step of rear platform of crowded car.—The complaint alleged that plaintiff was waiting at a point where defendant's street cars usually stopped for passengers, with the intention of taking passage; that a car stopped to take on passengers; that plaintiff stepped on the step of the rear platform, and endeavored to get on the car, which was crowded, when he was thrown to the ground and injured by the starting of the car. It was held that the complaint, *prima facie*, showed plaintiff to have been a passenger. *Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 8 R. R. R. 175, 31 Am. & Eng. R. Cas., N. S., 175, 67 N. E. 935.*

1. Attempt to board elevated train.—*Lake St., etc., R. Co. v. Burgess, 200 Ill. 628, 7 R. R. R. 136, 30 Am. & Eng. R. Cas., N. S., 136, 66 N. E. 215.*

2. Approaching car from rear.—*Foster v. Seattle Elect. Co., 35 Wash. 177, 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640, 76 Pac. 995.*

3. Attempting to board street car at improper point.—*Kroeger v. Seattle Elect. Co., 37 Wash. 544, 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689, 79 Pac. 1115; Geiger v. Pittsburgh R. Co., 83 Atl. 367, 234 Pa. 545.*

A street railroad, operating a line to a fort, erected a platform on a loop at the

terminus, at which cars customarily were so placed as to discharge passengers from the front door. An inbound car having run by the platform, plaintiff, a soldier at the fort, and chargeable with knowledge of the operation of the cars, attempted to board it from the side opposite the platform, and by the rear door, when he was thrown off and run over by the sudden backing of the car to its proper place at the platform. When plaintiff attempted to board the car, the conductor was at the front end, in the discharge of his duty of looking after passengers leaving and boarding it, and neither he nor the motorman was aware of plaintiff's attempt to board. Held, that plaintiff was a trespasser, and not a passenger, as to whom the carrier owed no duty until it had notice of his presence. *Robinson v. Helena, etc., R. Co., 99 Pac. 837, 38 Mont. 222.*

4. Boarding car inside car barn.—*Kroeger v. Seattle Elect. Co., 37 Wash. 544, 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689, 79 Pac. 1115.*

5. Train stopped to discharge passengers.—*Jones v. Boston, etc., R. Co., 163 Mass. 245, 39 N. E. 1019.*

6. Attempting to board transfer car, with transfer.—*Washington, etc., R. Co. v. Patterson, 9 App. D. C. 423; Kane v. Cicero, etc., R. Co., 100 Ill. App. 181; Clark v. Durham Tract. Co., 138 N. C. 77, 24 R. R. R. 165, 47 Am. & Eng. R. Cas., N. S., 165, 50 S. E. 518, 107 Am. St. Rep. 526.*

Foot on running board and hand on stanchion.—An allegation that the injury complained of was received while plaintiff was a passenger on one of defendant's

Attempting to Board Moving Train or Street Car.—A mere attempt to board a moving train or street car does not constitute one a passenger, although he has a ticket entitling him to passage on such train or car,⁷ as the relation is one of contract,⁸ unless an invitation to do so has been extended him by the carrier through its authorized agent.⁹ The relation may be found to have been created by plaintiff having signaled an approaching car, and by the car having immediately slowed down until it practically stopped at its usual stopping place, where he attempted to board it.¹⁰ The mere attempt to board a moving street car by a person who has not indicated his intention to do so in time to enable the persons in charge of the car to stop it at a proper place, does not create the relation of passenger and carrier.¹¹ Nor does the mere act of attempting to board a street car after it has started constitute the relation of carrier and passenger, especially so where he was not seen by either the motorman or conductor.¹² And where the persons in charge of a street car neglect to pay attention to the signals of one wishing to board the car, the act of such intending passenger in attempting to get on the car while it is in motion will not of itself constitute him a passenger.¹³ Where a person attempts to board a moving train, the fact that the door is locked so he can not effect an entrance does

cars is supported by proof that plaintiff, having obtained a ticket of transfer from another car which entitled her to ride on defendant's car, approached a car standing to receive passengers and had placed her foot on the running board and had taken hold of a stanchion for the purpose of raising herself to a seat when the car suddenly started and she was thrown to the ground and injured. Washington, etc., R. Co. v. Patterson, 9 App. D. C. 423.

7. Attempting to board moving train or street car.—*Illinois.*—Illinois Cent. R. Co. v. O'Keefe (Ill.), 9 Am. & Eng. R. Cas., N. S., 611.

Kentucky.—Illinois Cent. R. Co. v. Cotter, 31 Ky. L. Rep. 679, 27 R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141, 103 S. W. 279.

Maryland.—Baltimore Tract. Co. v. State, 78 Md. 409, 28 Atl. 397.

Massachusetts.—Jones v. Boston, etc., R. Co., 163 Mass. 245, 39 N. E. 1019; Payne v. Springfield St. R. Co., 203 Mass. 425, 33 R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186, 89 N. E. 536.

Missouri.—Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712, 2 Am. & Eng. R. Cas., N. S., 9.

New Jersey.—Schmidt v. North Jersey St. R. Co., 66 N. J. L. 424, 49 Atl. 438.

South Carolina.—Creech v. Charleston, etc., R. Co., 66 S. C. 528, 45 S. E. 36.

Rapidly moving train—Ticket.—One who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it. Illinois Cent. R. Co. v. Cotter, 31 Ky. L. Rep. 679, 27 R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141, 103 S. W. 279.

Six miles an hour.—In Baltimore Tract. Co. v. State, 78 Md. 409, 28 Atl. 397, it is held that one attempting to board a street car moving six miles an hour, can not be regarded as a passenger, and is entitled only to the reasonable care due a person not a passenger.

8. The relation of passenger and carrier is created by contract, and does not necessarily arise from the mere fact that a person runs toward a moving car to get on board. Chicago Union Tract. Co. v. O'Brien, 219 Ill. 203, 76 N. E. 341, 19 R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95.

9. In absence of invitation.—The attempt of one to board a slowly moving street car after it had left the usual stopping place, and was starting to run over a viaduct used exclusively for street car traffic, did not create the relation of passenger and carrier in the absence of any invitation extended to him by the company to board the car and the company owed him no other duty than that of using ordinary care to avoid injuring him after it discovered or should have known his peril. Mathews v. Metropolitan St. R. Co., 137 S. W. 1003, 156 Mo. App. 715.

10. Relation previously created.—Palfrey v. United R. Co. (Mo. App.), 142 S. W. 773.

11. Intention not indicated in time.—Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712, 2 Am. & Eng. R. Cas., N. S., 9.

12. Taking hold after street car started.—In Payne v. Springfield St., R. Co., 203 Mass. 425, 33 R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186, 89 N. E. 536, it is held that a charge that where a person goes toward a street car after it has stopped at a regular stopping place and takes hold of it in the process of entering it, he is a passenger, is deficient, in not stating that if the person undertook to take hold of the car after it had started, and without having been seen either by the motorman or conductor, he was not a passenger.

13. Signal neglected.—Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712, 2 Am. & Eng. R. Cas., N. S., 9.

not affect his status so as to create the relation of carrier and passenger.¹⁴ But a person who has a ticket, and succeeds in safely boarding a moving train, is a passenger.¹⁵ Thus, it is held that a person who has safely boarded a moving cable street car, by its open front platform, is as a passenger entitled to protection from assault by the gripman.¹⁶

Waiver of Rule Forbidding Passengers to Get on or Off Moving Cars.

—The rule that passengers will not be allowed to get on or off moving cars may be waived, and if a passenger is invited to get on a moving car he is a passenger, and the question whether he was invited to do so or not is for the jury.¹⁷ And where a person boards a train moving at the rate of four miles an hour, at a flag station, on the invitation of the conductor, he is a passenger.¹⁸

§ 2133. Boarding Train at Improper Place.—A person does not, as a general rule, acquire the status of a passenger by boarding a train, without the carrier's knowledge, at a place where it has not stopped for the reception or discharge of passengers.¹⁹ But if a railroad company permits passengers to take trains at a place which is not a depot, a person taking a train at such place is not a trespasser; and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger.²⁰ It has been held that a person with a ticket, and with the intention to ride as a passenger, who boards the train upon which his ticket entitles him to ride, even at an unusual time and place, is entitled to the rights of a passenger to the extent of not being

14. Car door locked—Collision—Thrown from platform.

—After the train has commenced moving from the station and the door for admitting passengers from such station had been locked, the deceased, the holder of a free pass over the road, boarded the moving train, and, being unable to effect an entrance because of the locked door, remained upon the platform of the car until knocked off by the shock of a collision, which took place before the conductor had time to admit him into the car. It was held that he was not an accepted passenger. *Illinois Cent. R. Co. v. O'Keefe* (Ill.), 9 Am. & Eng. R. Cas., N. S., 611.

15. Boarding moving train in safety.

—*Sharrer v. Paxson*, 171 Pa. 26, 33 Atl. 120.

Not until safely in car.—One who gets upon a train after it has started does not become a "passenger," within Mass. Pub. Sts., c. 111, § 212, until he reaches a place of safety inside of a car intended for passengers to ride in. *Merrill v. Eastern R. Co.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705.

16. Front platform of cable car.

—*Hart v. Metropolitan St. R. Co.*, 69 N. Y. S. 906, 34 Misc. Rep. 521.

17. Waiver of rule.

—*North Chicago, St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672, 52 Am. & Eng. R. Cas. 522.

18. Invitation of conductor.

—*Murphy v. St. Louis, etc., R. Co.*, 43 Mo. 342.

19. Boarding train at point it has not stopped to receive passengers.

—*United States*.—*Farley v. Cincinnati, etc., R. Co.*, 47 C. C. A. 156, 21 Am. & Eng. R. Cas., N. S., 404, 108 Fed. 14.

Massachusetts.—*Jones v. Boston, etc., R. Co.*, 163 Mass. 245, 39 N. E. 1019; *Yancey v. Boston Elevated R. Co.*, 205 Mass. 162,

35 R. R. 705, 58 Am. & Eng. R. Cas., N. S., 705, 91 N. E. 202, 26 L. R. A., N. S., 1217.

Mississippi.—*Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 So. 60.

New Jersey.—*Barlow v. Jersey City, etc., R. Co.*, 67 N. J. L. 364, 51 Atl. 463.

New York.—*Jones v. New York Cent., etc., R. Co.*, 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490.

Washington.—*Foster v. Seattle Elect. Co.*, 35 Wash. 177, 13 R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640, 76 Pac. 995.

20. Effect of custom.

—*Dewire v. Boston, etc., R. Co.*, 148 Mass. 343, 19 N. E. 523, 37 Am. & Eng. R. Cas. 57, 2 L. R. A. 166.

Boarding passenger car of mixed train at point other than station—Custom—Single instance.

—In *Jones v. New York Cent., etc., R. Co.*, 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490, it is held that a custom of boarding the passenger car of a mixed train when standing at a point other than the station platform, which will warrant the inference of an invitation to the public to board it at that point is not established by testimony that in a single instance it had been boarded there, without special invitation, even if the act was witnessed by the conductor, that in one other instance the station baggageman had invited a passenger to board the car there, and that in a few instances, but apparently without direction, authority or consent, persons had boarded the car there, although the train always came to the passenger station after being made up when there were any passengers to be taken.

mistreated by the carrier's employees.²¹ But a person who by signals causes a passenger train to stop at night at a point not a stopping place, and, while endeavoring to enter, though with reasonable care, is injured by the sudden starting of the train, can not recover for the injury, if his purpose to take passage was unknown to the conductor and other trainmen. Under such circumstances, when injured, he had not acquired the rights of a passenger. And the fact that he succeeded in entering a car, and that the conductor, finding him there, collected fare from him as from other passengers, could not give color to such past occurrences which had resulted in his injury.²²

§ 2134. On Train or Car before Its Departure.—A person is entitled to all the rights of a passenger while on the train within a reasonable time before it should start, if he is there with the bona fide intention to travel upon it under an express or implied transportation contract with the carrier.²³ When a passenger enters a car by the invitation of an employee of the railroad company, or in obedience to an announcement that the cars are ready to receive passengers, the relation of passenger and carrier is created.²⁴ Where a coach is placed near a station for persons to go on board, to await the train, which was to leave several hours later, persons taking passage on such train became passengers on entering such car under the direction of the carrier's agent.²⁵ But a person is not entitled to the care and protection due a passenger while he is on a train an unreasonably long time before it should start, if he is, or should be, aware of such fact, and he is on the train too soon through no cause for which the carrier is responsible.²⁶

§ 2135. Before Taking Seat in Vehicle.—Where a person is properly upon the vehicle of the carrier, the fact that he has not yet taken his seat does not prevent him from being a passenger, with all of the rights of one.²⁷ The relation of carrier and passenger may exist while the person is entering the

21. Ticket holder boarding train at unusual time and place.—*Martin v. Southern R. Co.*, 51 S. C. 150, 28 S. E. 303.

22. Subsequent collection of fare.—Effect on prior injury.—*Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 So. 60.

23. On train before its departure.—*Hannibal, etc., R. Co. v. Martin*, 11 Ill. App. 386; *Gaffney v. St. Paul R. Co.*, 81 Minn. 459, 84 N. W. 304.

24. *Hannibal, etc., R. Co. v. Martin*, 11 Ill. App. 386.

Invitation to board.—Injured while moving to water tank, in wrong direction.—Where it appears that plaintiff, having a pass over defendant's railroad to Troy, hearing the call "all off for Troy," got on the train, which moved in the opposite direction to a water tank for water for the engine, and was injured before the train returned to the station, the relation of plaintiff to the railroad, whether as passenger or trespasser, would depend on his reasonable belief that the train was about to depart for Troy, justified by some conduct on the part of defendant's officers or servants having control of the movements of the train. *Brown v. Scarboro*, 58 Am. & Eng. R. Cas. 364, 97 Ala. 316, 12 So. 289.

25. Direction of agent.—*Missouri, etc., R. Co. v. Byrd*, 89 S. W. 991, 40 Tex. Civ. App. 315.

26. On train too soon.—*Brown v. Scar-*

boro, 58 Am. & Eng. R. Cas. 364, 97 Ala. 316, 12 So. 289.

Passenger entering coach before proper time.—Where one intending to become a passenger, and while the work of preparing the train on which he intends to take passage is going on, necessitating dangerous switchings and couplings of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to or invitation by any officer or agent of the carrier with authority, enters one of the coaches, and in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switches or couplings, the carrier is not liable to him in damages for his injuries thus sustained. *Raines v. Chesapeake, etc., R. Co.*, 68 W. Va. 694, 70 S. E. 711, 33 L. R. A., N. S., 583.

27. Prior to taking seat.—*Citizens' St. R. Co. v. Jolly*, 161 Ind. 80, 8 R. R. 175, 31 Am. & Eng. R. Cas., N. S., 175, 67 N. E. 935; *Lockwood v. Boston Elevated R. Co.*, 200 Mass. 537, 31 R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, 86 N. E. 934, 22 L. R. A., N. S., 488; *Gaffney v. St. Paul R. Co.*, 81 Minn. 459, 84 N. W. 304; *Messenger v. Valley, etc., R. Co.*, 21 N. Dak. 82, 39 R. R. 127, 62 Am. & Eng. R. Cas., N. S. 127, 128 N. W. 1023, 32 L. R. A., N. S., 881.

car or other vehicle of the carrier, and before he is seated therein. The fact that no ticket has been purchased does not necessarily prevent such relation arising. An implied acceptance may arise without the purchase of a ticket or other acceptance in express terms.²⁸

On Running Board of Street Car.—A person may be a passenger while riding on the running board of a street car, while he is there without objection from any one in charge of the car.²⁹

§ 2136. Mail Clerks.—Under the well-settled rule that a person must be expressly or impliedly received as a passenger before the carrier comes under obligation to exercise towards him that high degree of care and caution for his safety which is due from the carrier to the passenger,³⁰ this obligation does not rest on a carrier with respect to a mail clerk who, without the knowledge of the carrier, boards a car knowing that the car is not ready to receive him, and that it is not expected or intended that he should enter it at that time or place.³¹ The difficulty to a railroad company in exercising a high degree of care towards persons on cars in motion in its switch yards, and the increased liability from obligation to do so, are so manifest that a usage or custom relied on to create the relation of carrier and passenger, and impose on the railroad company this high duty, ought, under such conditions, upon the plainest principles of justice, to be established by evidence which shows, or strongly tends to show, a well-defined, definite and continuous practice, from which knowledge on the part of the company may be fairly inferred.³² A mail clerk in the employ of the United States government is a passenger of the defendant carrier as well while in transit as during the ensuing period, when he, pur-

28. While entering car.—*Messenger v. Valley, etc., R. Co.*, 21 N. Dak. 82, 39 R. R. 127, 62 Am. & Eng. R. Cas., N. S., 127, 128 N. W. 1023, 32 L. R. A., N. S., 881. See ante, "Attempting to Board Train or Other Vehicle," § 2132.

29. On running board of street car.—*Washington, etc., R. Co. v. Patterson*, 9 App. D. C. 423; *Lockwood v. Boston Elevated R. Co.*, 200 Mass. 537, 31 R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, 86 N. E. 934, 22 L. R. A., N. S., 488.

A person riding upon the running board of an electric street car, and continuing aboard after having signaled the car to stop, is still a passenger, towards whom the carrier must exercise reasonable care to protect him from injury. *Olund v. Worcester Consol. St. R. Co.*, 92 N. E. 720, 206 Mass. 544.

30. Mail clerk—When liability begins.—See "Mail Clerks," § 2136.

31. Farley v. Cincinnati, etc., R. Co., 47 C. C. A. 156, 108 Fed. 14, 21 Am. & Eng. R. Cas., N. S., 404.

Mail clerk boarding mail car, not yet switched into yards to be equipped for run—Collision while switching.—It was the custom of a railroad company to have a mail car, which went out with a train at 8:45 p. m., supplied with gas and ice, and equipped for the run, and standing near the express station, at about six o'clock, where it was boarded by the mail clerk, who was to have charge of it for the run. On one occasion the train with which the car came in was late, and did

not arrive until about 6:30, and the clerk boarded the car immediately on its arrival at the station, before it had been cut out from the train or equipped for the succeeding run. While it was being switched into the yards, for the purpose of being so equipped, a coupling broke and it collided with other cars, as a result of which the clerk was thrown down and injured. It was held in an action to charge the railroad company, with liability for the injury on the ground of negligence, there being no evidence that defendant, through any officer or agent, had actual knowledge of plaintiff's presence in the car, that he could only recover by proof of a custom of the clerks to board the car at places other than the usual one at the express station, which was known to defendant, or was so general that defendant was chargeable with notice of it, so that it must have impliedly agreed to receive plaintiff as a passenger at the time and place where he entered the car; and that evidence that plaintiff and another clerk had, on three occasions during the preceding four years, boarded the car at other places, "wherever it could be found," was not sufficient to establish such custom, it not being shown that defendant had any knowledge of such facts. *Farley v. Cincinnati, etc., R. Co.*, 47 C. C. A. 156, 21 Am. & Eng. R. Cas., N. S., 404, 108 Fed. 14.

32. Farley v. Cincinnati, etc., R. Co., 47 C. C. A. 156, 108 Fed. 14, 21 Am. & Eng. R. Cas., N. S., 404.

suant to a long-continued custom, remained in the yards of the defendant at work in his car.³³

§§ 2137-2157. Termination of Relation—§ 2137. In General.—The general rule is, that the relation of carrier and passenger does not terminate until the passenger has alighted from a railway train and left the place where passengers are discharged; or, after reaching his destination, has had reasonable time to get off the car and leave the premises of the carrier.³⁴ But the relation may be determined by the voluntary act of the passenger or by the carrier under circumstances which would justify such a course.³⁵ Hence, it may be said that, from the time a passenger places himself under the charge of the carrier, by going to the station a reasonable time before the time fixed for the departure of the train upon which he intends to take passage and by indicating to the carrier in some manner his intention to become a passenger, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.³⁶ Thus a person who, having been to a station to take a train, leaves the station, and then returns thereto to send a telegram announcing that he will not make the contemplated journey, is not a passenger.³⁷

33. Occupying car after journey—Custom.—*Wabash R. Co. v. Jellison*, 124 Ill. App. 652.

34. General rule.—*McDade v. Norfolk*, etc., R. Co., 67 W. Va. 582, 68 S. E. 378, 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; *Layne v. Chesapeake*, etc., R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143; *Chicago*, etc., R. Co. v. *Thurlow*, 178 Fed. 894, 102 C. C. A. 128, 37 R. R. R. 546, 60 Am. & Eng. R. Cas., N. S., 546, 30 L. R. A., N. S., 571; *Alabama*, etc., K. Co. v. *Cox*, 173 Ala. 629, 55 So. 909; *Hill v. St. Louis*, etc., R. Co., 109 S. W. 523, 85 Ark. 529, 28 R. R. R. 753, 51 Am. & Eng. R. Cas., N. S., 753; *Savannah Elect. Co. v. McCants*, 130 Ga. 741, 61 S. E. 713; *Tuten v. Atlantic*, etc., R. Co., 4 Ga. App. 353, 61 S. E. 511. See, also, *Williamson v. Grand Trunk Western R. Co.*, 159 Ill. App. 443; *Louisville R. Co. v. Mitchell*, 138 Ky. 190, 127 S. W. 770; *Powell v. Philadelphia*, etc., R. Co., 70 Atl. 268, 220 Pa. 638, 20 L. R. A., N. S., 1019, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536; *Rhoads v. Cornwall*, etc., R. Co., 48 Pa. Super. Ct. 310; *Clunn v. Williamsport*, etc., R. Co., 39 Pa. Super. Ct. 591; *Pittsburg*, etc., R. Co. v. *Martin*, 2 N. P. 353, 3 O. Dec. 493; *St. Louis*, etc., R. Co. v. *Foster* (Tex. Civ. App.), 112 S. W. 797; *El Paso Elect. R. Co. v. Boer* (Tex. Civ. App.), 108 S. W. 199; *Fanning v. St. Louis*, etc., R. Co., 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Missouri*, etc., R. Co. v. *Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *El Paso*, etc., R. Co. v. *Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Ft. Worth*, etc., R. Co. v. *Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335; *Missouri*, etc., R. Co. v. *Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.

One paying fare and permitted to ride in a freight car with the stallion he was

transporting is a passenger in the same situation as a caretaker, and authorized to remain in the car until it reached the place of unloading. *Indianapolis Southern R. Co. v. Tucker* (Ind. App.), 98 N. E. 431.

Must be carried to destination.—*Ft. Worth*, etc., R. Co. v. *Hardin*, 90 S. W. 679, 41 Tex. Civ. App. 19.

35. Act of passenger or carrier.—*Brunswick*, etc., R. Co. v. *Moore*, 101 Ga. 684, 28 S. E. 1000, 12 Am. & Eng. R. Cas., N. S., 84; *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Central R. Co. v. Whitehead*, 74 Ga. 441; *St. Louis*, etc., R. Co. v. *Foster* (Tex. Civ. App.), 112 S. W. 797.

It is not the law, without qualification, that, when one becomes a passenger by the purchase of a ticket, he remains a passenger till he reaches his destination; but, having left the station premises after his purchase, he ceases to have the full rights of a passenger during his absence and until he has again presented himself for transportation at the proper time and place, according to the reasonable rules of the carrier. *Du Bose v. Atlantic*, etc., R. Co., 62 S. E. 255, 81 S. C. 271.

36. Continuation and termination of relation.—*Fremont*, etc., R. Co. v. *Hagblad*, 72 Neb. 773, 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226, 101 N. W. 1033, 106 N. W. 1041, 9 Am. & Eng. Ann. Cas. 1096, 4 L. R. A., N. S., 254.

A person entitled to transportation on a train between two points is entitled to the care and protection due a passenger from the starting point to the proper and usual stopping place at his final destination. *Hardin v. Ft. Worth*, etc., R. Co., 33 Tex. Civ. App. 448, 77 S. W. 431.

37. Returning to station to send telegram.—*Galehouse v. Minneapolis*, etc., R. Co. (N. Dak.), 135 N. W. 189.

§ 2138. Leaving Premises Previous to Transportation.—The relation of carrier and passenger ceases where a passenger, while awaiting the arrival of a connecting train, voluntarily leaves the premises of the carrier and is only resumed when he again enters the carrier's premises for the purpose of resuming his journey. In the interval, the duty owed to him by the carrier is merely such as it owes to the general public.³⁸ But where a carrier invites its passenger to use a street crossing its tracks at or near the station, he does not, by going on the street in order to approach his train, forfeit his rights.³⁹

§§ 2139-2143. Leaving Train or Car Before Reaching Destination
—§ 2139. With Intention to Return.—The general rule seems to be that a passenger alighting at an intermediate station remains a passenger so long as his object in getting off the train is not inconsistent with the character of passenger; he, as a passenger, has the privilege of alighting for other purposes than those connected with his journey,⁴⁰ without giving notice of his desire and intention to the carrier's agents.⁴¹ In some cases, however, it has been

38. Leaving premises previous to transportation.—*King v. Central, etc., R. Co.*, 107 Ga. 754, 33 S. E. 839.

Returning to station to look after baggage.—Returning to quarrel with agent.—*Georgia R., etc., Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565.

39. Using street by invitation.—The train of plaintiff was to take passage stopped with the rear car on a street crossing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. Held, that deceased was a passenger, and did not lose that relation by entering upon the street to reach his train which was at the implied invitation of defendant. *Atlantic City R. Co. v. Clegg*, 183 Fed. 216, 105 C. C. A. 478.

40. Leaving train at immediate station.—*Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, 12 Am. & Eng. R. Cas., N. S., 207; *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700; *Zeccardi v. Yonkers R. Co.*, 83 N. E. 31, 190 N. Y. 389, 17 L. R. A., N. S., 770, 28 R. R. R. 771, 51 Am. & Eng. R. Cas., N. S., 771.

A passenger on a freight train does not lose his character as a passenger by leaving the train to talk with an acquaintance during the time cars are being switched at a station. *Arkansas Cent. R. Co. v. Bennett*, 82 Ark. 393, 102 S. W. 198.

Car stopped where it could not be unloaded — Care-taker leaving car until next morning.—Under the contract of shipment, a person was riding in the car to look after and care for the property shipped. The car was temporarily stopped at a place where it could not be unloaded, and, with the understanding that it would be placed at a more convenient place the next morning, he left the car during the night, and returned to it in the morning. It was held that he had not, as a matter of law, ceased

to be a passenger. *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

Train stopped for dinner.—Again leaving train, after dining.—Defective platform.—In *St. Louis, etc., R. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, it is held that where a train stops at a station for dinner and a passenger goes from the coach to the eating house, and after luncheon returns to the coach in safety, and thereafter leaves the coach and goes out upon the platform maintained by the company for the use of passengers, and is injured by reason of the defective platform, the court can not declare as matter of law that his relation as passenger had ceased.

Special train side-tracked for twenty minutes.—Killed by other train after getting drink of water.—In *Wandell v. Corbin*, 49 Hun 608, 1 N. Y. S. 795, 17 N. Y. St. Rep. 718, there was evidence tending to show that plaintiff, a member of a regiment, boarded a special train bound for a certain point; that the train stopped at a certain place, and there remained about twenty minutes to permit a train to pass; that no caution was given, nor was there an announcement of the object of the stop; that plaintiff, sick from excessive heat, and needing water, looked out and saw a long platform, which looked like a passenger platform, and a house on which was the sign "Rockaway Junction;" and that he left his waiting train, crossed a track, and as he crossed it, looked and saw no train coming. He entered the building to get a drink of water, and while drinking heard a bell ring, rushed out of the building to board his train, and was struck and injured by another train. It was held that the evidence did not justify the court in holding, as a matter of law, that plaintiff had abandoned his relation as passenger.

41. Notice not necessary.—"It would seem clear that the right to alight at a regular intermediate station would not depend upon notice having been given to

held that a passenger who leaves the train temporarily, and without objection or notice, while it is stopping at an intermediate station, surrenders for the time his place and rights as a passenger.⁴² In pursuance of the general rule as set out it has been held that a passenger on a railroad train does not lose his status as such by leaving the train at a regular stopping place, from motives of business, exercise, recreation, or curiosity, although he has not yet arrived at the terminus of his journey, if his intention is to re-enter the train before it starts, for the purpose of being carried to his destination.⁴³ So a passenger

the conductor that the passenger desired to alight, but that it is an absolute right enjoyed by a passenger." *Galveston, etc., R. Co. v. Mathes* (Tex. Civ. App.), 73 S. W. 411, quoting *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App.), 51 S. W. 275.

42. Rule in Maine and Minnesota.—*State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258; *Dekay v. Chicago, etc., R. Co.*, 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687.

Not required to furnish means of egress and ingress—Act not illegal.—In *Dekay v. Chicago, etc., R. Co.*, 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687, it is held that where a passenger enters a train and pays his fare to a particular place, his contract does not obligate the carrier to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station, he, for the time being, surrenders his place as a passenger, and takes upon himself the responsibility for his own movements, but if he leaves without objection on the part of the company, he does no illegal act, and has a right to re-enter a car of the train and resume his journey.

Leaving side-tracked train—Responsibility assumed by passenger.—When a passenger enters a railway train, and pays the regular fare to be transported from one particular station to another, his contract does not obligate the corporation to furnish him with safe ingress and egress to and from any intermediate station; and when such train turns out upon a side-track, at an intermediate station, and there awaits the crossing of another train out of time, and the passenger, not destined to that station, without objection made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. *State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258.

43. United States.—*Alabama, etc., R. Co. v. Coggins*, 32 C. C. A. 1, 12 Am. & Eng. R. Cas., N. S., 109, 88 Fed. 455; *Hrebrik v. Carr*, 29 Fed. 298.

Alabama.—*Central, etc., R. Co. v. Storrs*, 169 Ala. 361, 39 R. R. R. 159, 62 Am. & Eng. R. Cas., N. S., 159, 53 So. 746.

Iowa.—*Gannon v. Chicago, etc., R. Co.*, 141 Iowa 37, 31 R. R. R. 27, 54 Am. & Eng. R. Cas., N. S., 27, 117 N. W. 966, 23 L. R. A., N. S., 1061.

Michigan.—*Serviss v. Ann Arbor R. Co.* (Mich.), 135 N. W. 343.

Minnesota.—*Lemery v. Great Northern R. Co.*, 21 Am. & Eng. R. Cas., N. S., 257, 85 N. W. 908, 83 Minn. 47.

Missouri.—*Cherry v. Kansas City, etc., R. Co.*, 52 Mo. App. 499; *Austin v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 385.

Nebraska.—*Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666.

New York.—*Zeccardi v. Yonkers R. Co.*, 190 N. Y. 389, 28 R. R. R. 771, 51 Am. & Eng. R. Cas., N. S., 771, 83 N. E. 31, 17 L. R. A., N. S., 770.

Texas.—*Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, 12 Am. & Eng. R. Cas., N. S., 207, affirmed in 93 Tex. 715, no op.; *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 93 Tex. 710, no op.; *Texas Mid. Railroad v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431; *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700, affirmed, no op.; *Mercher v. Texas Mid. R. Co.* (Tex. Civ. App.), 85 S. W. 468, affirmed in 101 Tex. 648, no op.; *Galveston, etc., R. Co. v. Mathes* (Tex. Civ. App.), 73 S. W. 411. See, also, *Sanchez v. San Antonio, etc., R. Co.* (Tex. Civ. App.), 27 S. W. 922, affirmed in 88 Tex. 117.

A passenger having made known to the conductor his desire to alight to get a lunch during the time the train stopped, and the conductor having informed him that he would have time to do so and consented to his alighting for that purpose, the passenger, on alighting, continued to sustain that relation. *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

West Virginia.—*Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103, 36 R. R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537.

A passenger on a railroad train does not lose his status as such by leaving the train at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666.

In *Parsons v. New York, etc., R. Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450, it is held that

on a crowded street car who alights to go where the conductor is standing, to procure a transfer, does not lose his status as a passenger.⁴⁴ Where a passenger train has stopped at a station, passengers, during the stops, may walk out of the car in which they are seated onto the station platform, or over the car platform into another car, without losing their rights as passengers.⁴⁵ And it is held that the fact that he alights to engage in an altercation with a servant of the carrier, does not affect his status.⁴⁶ The relation of carrier and passenger has not ceased to exist, although the actual transit had been interrupted for the time being by a wreck on the track and the passenger has voluntarily left a temporary station to which he has been transferred to await another train, for the purpose of obtaining a nearer view of the wreck.⁴⁷ But where a passenger leaves his train and boards another train at a meeting point, to converse with another person, he is not a passenger on the latter train, although his conductor consents to his boarding the other train.⁴⁸

Same Rule Inapplicable to Through Train Service.—There must, in the very nature of things, be a distinction between a through train carrying through passengers, and a local train stopping at all stations to receive and discharge passengers. As to the latter there is no question but that passengers may, for any legitimate purpose, alight from the train at any intermediate station at which the train stops to receive and discharge passengers, without relinquishing or abandoning their relation to the company as passengers. But as to a through train, carrying only through passengers, the passenger who leaves the train without the knowledge, consent, or invitation of the company, at an intermediate station at which the train stops only for some purpose in connection with its management and operation, as for the purpose of taking water or coal, and not to receive or discharge passengers, must be deemed to have abandoned his relation as a passenger, and to take upon himself for the time being all risks incident to his movements.⁴⁹ In the case of a local train, the company is bound

it seems that a passenger on a railroad train does not lose his character as such by alighting at a regular station from motives of business or curiosity, although he has not yet arrived at the terminus of his journey.

Passenger cleaning headlight at fireman's request.—Where a passenger on a railroad train at the request of the fireman undertakes to clean the engine headlight he does not lose the character of a passenger. *Brown v. Scarboro*, 97 Ala. 316, 12 So. 289, 58 Am. & Eng. R. Cas. 364.

To deliver message on platform.—*Mis-souri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, 12 Am. & Eng. R. Cas., N. S., 207, affirmed in 93 Tex. 715, no op.; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990, affirmed in 85 Tex. 431, no op.; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

44. Alighting from street car.—*Miller v. Brooklyn Heights R. Co.*, 108 N. Y. S. 960, 124 App. Div. 537.

45. Walking around platform—On cars.—*Central, etc., R. Co. v. Storrs*, 169 Ala. 361, 39 R. R. 159, 62 Am. & Eng. R. Cas., N. S., 159, 53 So. 746.

46. To engage in altercation.—A passenger does not cease to be such by reason of his alighting from a railway train at a station, other than his point of des-

tination, for exercise or from motives of curiosity or to engage in an altercation with a servant of the carrier, if he does not leave the premises of the carrier, nor the train with the intention not to return to it and resume his journey. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 36 R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537, 67 S. E. 1103.

47. Train wrecked—Leaving temporary station.—*Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243, 70 N. W. 486.

48. Boarding another train to converse with another person.—*Bullock v. Houston, etc., R. Co. (Tex. Civ. App.)*, 55 S. W. 184.

49. Rule inapplicable to through train.—*Lemery v. Great Northern R. Co.*, 83 Minn. 47, 85 N. W. 908, 21 Am. & Eng. R. Cas., N. S., 257.

A through passenger on a through train, one that does not stop at intermediate stations to receive or discharge passengers, who leaves such train without the knowledge, consent, or invitation of the company at an intermediate station at which the train stops for some purpose incident to its operation and management only, abandons for the time being his relation as a passenger, and assumes all risks incident to his movements. *Lemery v. Great Northern R. Co.*, 21 Am. & Eng. R. Cas., N. S., 257, 85 N. W. 908, 83 Minn. 47.

to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the approaches to the train in a safe condition for their egress and ingress. But as to a through train, there being no passengers to discharge and none to receive, a stopping of the train, for some purpose connected with its operation, creates no necessity for the exercise of vigilance in the matter of the attention to approaches to the train, and the company should not be held guilty of negligence in failing to do so.⁵⁰ When the train in which a passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than one used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train at such point must usually assume all the ordinary risks incident to his action.⁵¹ Of course, if a passenger leaves a through train with the consent and permission of the company or its agents, it would be the duty of the company to exercise the same degree of care as is required with respect to passengers on local trains.⁵²

Steamboat Landings—Safe Egress and Ingress.—A passenger for hire has the right to go ashore at any point where the boat may land, before arriving at his destination, without forfeiting his rights as a passenger to safe egress and ingress.⁵³

Alighting from Street Car to Enable Others to Alight.—A street car passenger, riding on the front vestibule, does not, by stepping off the car to enable some ladies to alight, cease to be a passenger.⁵⁴

50. Stopping merely incidental to operation.—*Lemery v. Great Northern R. Co.*, 83 Minn. 47, 85 N. W. 908, 21 Am. & Eng. R. Cas., N. S., 257.

51. *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666.

52. Leaving through train with consent or permission.—*Lemery v. Great Northern R. Co.*, 83 Minn. 47, 85 N. W. 908, 21 Am. & Eng. R. Cas., N. S., 257.

Train side-tracked—Struck by other train while returning from pump.—In *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666, it appeared that a through train between certain points ran onto a side track at an intermediate station to allow the passage of another through train; that a through passenger left his car, crossed the main track to the depot, and went to a pump for a drink of water; that he filled his cup from the pump, but, before drinking, heard the whistle of the incoming train and starting on a rapid run to regain his car, attempted to pass in front of the train and was struck by the engine and killed. It was held that he was not a "passenger being transported over the road," within the meaning of § 3, ch. 72 of the Compiled Statutes of Nebraska.

53. Steamboat landings—Safe egress and ingress.—*Dice v. Willamette Transp., etc., Co.*, 8 Ore. 60, 34 Am. Rep. 575.

Going ashore for tobacco.—A passenger on board a vessel, before her departure from the wharf, has the right to go ashore, even to buy tobacco, and it is the vessel's duty to provide a safe means of

passage from the steamer to the pier. *Hrebrik v. Carr*, 29 Fed. 298.

Leaving steamboat to get breakfast—Safe exit.—In *Dodge v. Boston, etc., Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541, it appeared that a common carrier, whose boats usually started from one end of its route late in the afternoon and reached the first stopping place early the next morning, meals being furnished to such as paid extra or had tickets including them, sold a ticket to a passenger for a passage without meals to a point beyond that place; that egress to the wharf at this place, where the average stop was about an hour, was had from the forward part of the boat's main deck through a slip adjustable to the state of the tide. The owner of the wharf, who leased a part of it, together with certain rights of way to the carrier, maintained upon it a restaurant, at which passengers bound for points beyond were in the practice of obtaining breakfast, with the knowledge of the carrier and without objection on its part. It was held that such passenger could properly go ashore to get his breakfast at the restaurant, and was entitled to all the rights of a passenger in leaving the boat, and in passing over the slip if that were a proper place for the exit of passengers.

54. Alighting from car to enable ladies to alight.—*Tompkins v. Boston Elevated R. Co.*, 201 Mass. 114, 32 R. R. R. 487, 55 Am. & Eng. R. Cas., N. S., 487, 87 N. E. 488, 20 L. R. A., N. S., 1063.

Alighting to allow other passengers to alight—Dispute about transfer—Assault by conductor.—Plaintiff paid his fare

§ 2140. Without Intention to Return.—Passengers Not Entitled to Stop Over.—Where a passenger, not entitled to a stop-over privilege, alights at an intermediate station, with no intention to board the train before it leaves the station to finish its trip, for the purpose of resuming his journey, he ceases to be a passenger, unless he changes his mind and boards it for such purpose.⁵⁵ A passenger who, before reaching the station to which his ticket entitles him to ride, leaves the train at a place not designated for the discharge of passengers, for the sole purpose of continuing his homeward journey on foot, thereby terminates his relation to the company as a passenger.⁵⁶

Leaving Street Car Because of Refusal to Carry Farther for Fare Paid.—Although passengers on an electric railway are entitled to be carried to their destination for a five-cent fare, if the company refuses to carry them beyond a certain point, where they voluntarily leave the car in which they are riding, they cease to be passengers, and can become such on another car only by the payment of another fare.⁵⁷

Stop-Over Privilege Granted by Conductor.—But it has been held that a passenger has the right to rely and act upon the statement of the conductor of his train that he may alight at an intermediate station, with no intention to resume his journey on such train, but upon a later one, without terminating his status as a passenger, though his ticket does not confer upon him the stop-over privilege.⁵⁸

Granting Stop-Over Rights.—See post, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

from T. to S., which also entitled him to a transfer to B., which the conductor promised to give him at a certain point, but at the point named plaintiff did not see the conductor, and at S., where it was necessary for him to change cars, he asked for the transfer, and the conductor requested him to get out of the way of the other passengers, and he got off the car, whereupon a dispute arose over the transfer, and plaintiff was assaulted by the conductor. It was held that the relation of a carrier and passenger had not terminated. *Blomsness v. Puget Sound Elect. Railway*, 47 Wash. 620, 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640, 92 Pac. 414, 17 L. R. A., N. S., 763.

55. Iowa.—*Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, 17 Am. R. Rep. 461, 29 Am. Rep. 458.

Kentucky.—*Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, 26 Am. & Eng. R. Cas. 258, 7 Ky. L. Rep. 498.

Maryland.—*Johnson v. Philadelphia, etc., R. Co.*, 63 Md. 106, 18 Am. & Eng. R. Cas. 304; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, 6 Am. Rep. 345.

Massachusetts.—*Buckley v. Old Colony R. Co.*, 161 Mass. 26, 36 N. E. 583.

New Jersey.—*Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671.

New York.—*Terry v. Flushing, etc., R. Co.* (N. Y.), 13 Hun 359.

Ohio.—*Hatten v. Railroad Co.*, 39 O. St. 375, 13 Am. & Eng. R. Cas. 53.

Pennsylvania.—*Dietrich v. Pennsylvania R. Co.*, 71 Pa. 432, 3 Am. R. Rep. 435, 10

Am. St. Rep. 711; *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. 231, 6 Am. R. Rep. 476.

West Virginia.—*Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103, 59 Am. & Eng. R. Cas., N. S., 537, 36 R. R. R. 537.

If a passenger leaves the train to "stop over" before he has arrived at the point to which his ticket entitled him to ride, and the ticket does not confer upon him a right to "stop over," he thereby terminates his contract with the company to carry him to his destination. *Drew v. Central Pac. R. Co.*, 51 Cal. 425, 12 Am. R. Rep. 222.

In *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, 17 Am. R. Rep. 461, 29 Am. Rep. 458, it is held that the ordinary contract for the transportation of a passenger on a railroad train is an entirety, and if, without the consent of the carrier, he alights before reaching his destination, he can not again impose the obligation of the contract by insisting that he shall be carried on another train the remainder of the journey.

56. Leaving train before reaching destination for purpose of walking home.—*Buckley v. Old Colony R. Co.*, 161 Mass. 26, 36 N. E. 583.

57. Refusal to carry farther for fare paid.—*Leclaire v. Tacoma R., etc., Co.*, 62 Wash. 157, 40 R. R. R. 81, 63 Am. & Eng. R. Cas., N. S., 81, 113 Pac. 268.

58. Stop-over granted by conductor.—*New York, etc., R. Co. v. Winter*, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356; *Tarbell v. Northern Cent. R. Co.* (N. Y.), 24 Hun 51.

§ 2141. For Purpose of Transfer.—See post, "Transferring Prior to Destination," § 2146.

§ 2142. To Avoid Imminent Danger.—A person does not lose his status as a passenger by leaving the train or street car to avoid being injured in a collision, or in case of any other emergency, if his motive is such as might so influence a reasonably prudent man under the same circumstances.⁵⁹

§ 2143. To Assist with Vehicle.—The relation is not terminated by the conduct of the passenger in leaving the vehicle at the request of the person in charge, to assist in getting it back upon the track, or started, or for a similar purpose.⁶⁰ Thus a passenger on a freight train who, at the request of the conductor, alights from the caboose to assist in the saving of property endangered by a wreck of a part of the train does not thereby cease to be a passenger, and the carrier owes him the duty to protect him from injury while alighting and of informing him of the dangers of his act, and where the conductor invites the passenger to leave the caboose while in a dangerous position known to him and unknown to the passenger, and the passenger is injured in consequence, the carrier is liable.⁶¹ And where such person has resumed his proper place as a passenger he is entitled to the care due such relation, even though it be assumed that he took upon himself the risk of the act he undertook to perform.⁶²

§§ 2144-2145. Violation of Rules—Assuming Dangerous Position—

§ 2144. In General.—If, after express notice to a passenger of his violation of a carrier's reasonable rule, he does not forthwith conform thereto, then his

59. Leaving train or car to avoid imminent danger.—*Gradert v. Chicago, etc., R. Co.*, 109 Iowa 547, 80 N. W. 559, 20 Am. & Eng. R. Cas., N. S., 118; *People's Passenger R. Co. v. Green*, 6 Am. & Eng. R. Cas. 168, 56 Md. 84.

Collision threatened.—Where one goes to a depot to take passage on the way car of a freight train, and, going to the place where passengers for that train are ordinarily received, enters the car, having a ticket, he becomes a passenger, and does not cease to be one where he leaves the car merely to avoid the collision of a train running into the rear of the car, and after getting out is injured by the collision. *Gradert v. Chicago, etc., R. Co.*, 109 Iowa 547, 20 Am. & Eng. R. Cas., N. S., 118, 80 N. W. 559.

60. Alighting to assist in starting vehicle.—*McIntire R. Co. v. Bolton*, 43 O. St. 224, 1 N. E. 333, 54 Am. Rep. 803.

Leaving standing car to assist in shoving it upon main track.—The members of a military organization were carried to B. the station of their destination, in a separate car, which was, after they had left it, run upon a side track, to the west of and beyond the station grounds, so that the west end of the car rested upon a bridge. Before ten o'clock in the evening the car was lighted and the doors unlocked, although no person representing the company was left in charge of it. The car could be seen from the hotel where the members of the organization were staying. At about the time at which the freight train to which this car was to be attached was due at B., most of such

members, including plaintiff, had passed from the platform and along the tracks, and had taken their seats in the car. After such freight train had arrived and stopped, its conductor opened the door and said: "Boys come out and give us a shove; shove this car on the main track so I can hitch on." The plaintiff, with others, arose, went to the door, and seeing the freight train moving on his right hand side, and fearing to alight on that side, stepped off the steps on the other side and fell through or over the side of the bridge. It was held that plaintiff became a passenger as soon as he came to the depot building to be carried back home on such car; and that he did not terminate the relation of carrier and passenger by so attempting to assist the conductor at his request. *Bellman v. New York, etc., R. Co.*, 5 N. Y. St. Rep. 153, 42 Hun 130, affirmed in 122 N. Y. 671, 34 N. Y. St. Rep. 1015.

61. Danger unknown to passenger.—*Austin v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 385.

62. Conductor of private freight cars injured after cutting loose cars following them, at request of railroad's conductor.—Plaintiff, the conductor of private freight cars, not in the employ of the railroad company, at the request of the railroad's conductor of the train, cut loose the cars following his own, fell off the train and was injured. It was held that plaintiff, after cutting loose the cars, having resumed his proper place as a passenger, became entitled to the care due such relation. *Cumberland Valley R. Co. v. Myers*, 55 Pa. 288.

rights as a passenger cease, and he becomes a trespasser, and may be ejected; but until notice the relation of carrier and passenger continues.⁶³ But where a passenger went to the lower step of the coach in which he was riding before the car stopped, in violation of a rule, but there was no evidence that notice had been given to him on former occasions that he would not be regarded as a passenger if he violated the rule, or that he knew that such was the penalty of violation, or that he avoided the carrier's servants, so that his conduct would be unobserved, and no notice could be given him, or that he was in a place where passengers might not go under proper conditions, his violation of the rule did not involve malicious conduct, moral turpitude, gross and willful disregard of the rights of others, or a plain surrender of his rights as a passenger, and therefore did not terminate the contract of carriage and transform him into a bare licensee or trespasser.⁶⁴

§ 2145. Leaving Moving Train or Car.—As a general rule it may be said that a passenger forfeits his right to the care due a passenger by leaving a train or street car while it is moving.⁶⁵ But where a passenger started to get off a train as soon as it stopped at his destination, but before he could alight the train started up again, and he stepped from the car platform while the train was in motion, and was injured, it was held that he was still a passenger at the time he stepped from the platform.⁶⁶

Contributory Negligence.—See post, "Contributory Negligence," chapter 24.

§ 2146. Transferring Prior to Destination.—A passenger on a street car, who has not reached his destination, and who must change from one car to another, and is permitted to remain in the first car while waiting the arrival of the connecting car, is still a passenger.⁶⁷ The relation of a carrier and passenger continues until the end of the journey, unless sooner terminated by the passenger's voluntary act, and exists between a railway company and persons holding through tickets while waiting at a junction point in making a necessary change of cars.⁶⁸ A person still retains his status as a passenger of the street car or railroad train he has just left for the purpose of transferring to another car or train, in compliance with a requirement of the carrier, while on his way to the transfer car or train.⁶⁹ Thus, it is held that through passengers with small

63. Violation of rules.—*Renaud v. New York, etc., R. Co.*, 97 N. E. 98, 210 Mass. 553, 38 L. R. A., N. S., 689.

64. Violation held not a forfeiture.—*Renaud v. New York, etc., R. Co.*, 97 N. E. 98, 210 Mass. 553, 38 L. R. A., N. S., 689.

65. Leaving train or car.—*Commonwealth v. Boston, etc., R. Co.*, 1 Am. & Eng. R. Cas. 459, 129 Mass. 500, 37 Am. Rep. 382.

Struck by engine on parallel track after alighting from car moving beyond his station.—A passenger left the train after the conductor had called out the name of the station to which he was entitled to be carried, and the car in which he was had passed the station and had almost stopped; and, while crossing to the station, was killed by a locomotive on a parallel track. On an indictment against the railroad, under Mass. St. of 1874, c. 372, § 103, it was held that the person killed ceased to be a passenger when he left the train while it was moving. *Commonwealth v. Boston, etc., R. Co.*, 1 Am. & Eng. R. Cas. 459, 129 Mass. 500, 37 Am. Rep. 382.

66. Train started after passenger attempts to alight.—*Pittsburg, etc., R. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39. See post, "Time and Opportunity to Leave Vehicle at Destination," §§ 2147-2148.

67. Transferring prior to destination.—*Remaining on car*.—*Valdosta St. R. Co. v. Fenn*, 11 Ga. App. 586, 75 S. E. 984.

68. Waiting to change trains.—*St. Louis, etc., R. Co. v. Foster* (Tex. Civ. App.), 112 S. W. 797.

Colorado.—*Denver, etc., R. Co. v. Derry*, 108 Pac. 172, 47 Colo. 584, 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 27 L. R. A., N. S., 761.

69. For purpose of transfer.—*Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; *St. Louis, etc., R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741; *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, 12 Am. & Eng. R. Cas., N. S., 93; *Koran v. Metropolitan St. R. Co.*, 118 Pac. 875, 85 Kan. 707; *Wilson v. Detroit United Railway*, 167 Mich. 107, 132 N. W.

children, stopping at a junction station four hours for necessary change of cars, have the right to occupy the waiting room until the arrival of their train, and for expelling them therefrom, the company is just as liable as if they had been ejected from the train.⁷⁰ And where a passenger in making transfer, takes the wrong train by misdirection of defendant's employee, the relation is not terminated.⁷¹

§§ 2147-2148. Time and Opportunity to Leave Vehicle at Destination—§ 2147. In General.—It is generally said that the duty of a railroad company as a carrier of passengers is not performed until it delivers its passengers at the station to which he has paid his fare;⁷² hence, the relation of carrier and passenger does not terminate until the passenger has had a reasonable time and opportunity to leave the vehicle at his destination.⁷³

§ 2148. Failure to Alight within Reasonable Time.—As a general rule a person ceases to be a passenger after failing to alight from the train within a reasonable time after it has stopped at his destination and he has been afforded a sufficient and safe opportunity to alight.⁷⁴ Where a passenger has

762; *Bullock v. Houston, etc., R. Co.* (Tex. Civ. App.), 55 S. W. 184.

A passenger on a street car, being informed by the conductor, on its reaching a trestle and a washout being discovered, that it would go no further, and that no car would cross that night, but that she might walk across, and take a car at the other end, was a passenger while so walking across; and this, whether the washout was caused by another agency than the carrier. *Bugge v. Seattle Elect. Co.*, 103 Pac. 824, 54 Wash. 483.

Decedent, on arriving at a junction, alighted from the car on which he had arrived, and crossed a track between himself and the station to take a train to reach his destination. Mileage coupons had been detached from his book paying his fare to the junction. As he stepped onto the track, he was killed by the engine of the train on which he had arrived backing down the track. Held, that decedent was a passenger. *Millett v. New York, etc., R. Co.*, 98 N. E. 574, 211 Mass. 486.

70. Through passengers.—*St. Louis, etc., R. Co. v. Foster* (Tex. Civ. App.), 112 S. W. 797.

71. Taking wrong train—Misdirection.—Plaintiff took passage on defendant's train for a destination which necessitated a change of cars at P., and when she arrived there, requested defendant's porter to direct her to the train she should take. By reason of the porter's misdirection she boarded defendant's train in a different direction, and was ejected by the conductor after the train had gone two miles from the station, when he discovered the mistake. Held, that plaintiff was a passenger on defendant's road, and continued to be such while she was on the platform at the junction. *Bullock v. Atlantic, etc., R. Co.*, 152 N. C. 66, 67 S. E. 60.

72. Duty to deliver safely at destination.—*Birmingham R., etc., Co. v. Sea-*

born, 168 Ala. 658, 38 R. R. R. 4, 61 Am. & Eng. R. Cas., N. S., 4, 53 So. 241.

73. Time and opportunity to leave vehicle.—*St. Louis, etc., R. Co. v. Harper*, 69 Ark. 186, 61 S. W. 911, 21 Am. & Eng. R. Cas., N. S., 77, 53 L. R. A. 220; *Denver, etc., R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 27 L. R. A., N. S., 761; *Chicago Terminal R. Co. v. Schmelling*, 99 Ill. App. 577; *Pittsburg, etc., R. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39; *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; *Southern R. Co. v. Wright*, 64 S. E. 703, 6 Ga. App. 172; *Houston, etc., R. Co. v. Easton*, 44 Tex. Civ. App. 95, 97 S. W. 833, affirmed in 102 Tex. 585, no op.; *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247; *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *El Paso Elect. R. Co. v. Boer* (Tex. Civ. App.), 108 S. W. 199; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698.

74. Kansas.—*Chicago, etc., R. Co. v. Frazer* (Kan.), 2 Am. & Eng. R. Cas., N. S., 206.

Pennsylvania.—*Schley v. Susquehanna, etc., R. Co.*, 227 Pa. 494, 37 R. R. R. 112, 60 Am. & Eng. R. Cas., N. S., 112, 76 Atl. 207, 19 Am. & Eng. Ann. Cas. 1019.

Texas.—*Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090; *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *St. Louis, etc., R. Co. v. Bryant* (Tex. Civ. App.), 92 S. W. 813; *Kaase*

been carried to his destination, and has been afforded almost half an hour to leave the train, the carrier no longer owes him any duty as a passenger, nor is it under any obligation to him as such.⁷⁵ But the severance of the relation of carrier and passenger is not necessarily dependent upon the fact that the passenger upon reaching his destination actually left the car; nor does the mere fact that the passenger had sufficient time and opportunity to leave the conveyance and failed to do so operate in every instance as a severance of the relation.⁷⁶ So where a passenger is sleeping when the train arrives at his destination, and those in charge of the train, knowing it to be the passenger's destination, fail to awaken him and acquaint him with the fact, his failure to leave the train immediately does not terminate the relation of passenger.⁷⁷ And where plaintiff's decedent, while riding on a pass, remained on the train, after he reached his destination, in an intoxicated and irresponsible condition, whether his remaining on the train was the result of the carrier's negligence or of his condition, he was entitled to be treated as a passenger.⁷⁸ But if the train is stopped at the station a reasonably sufficient time for a passenger to alight therefrom, and he delays getting off for any reason, if such reason is unknown to defendant, his relation as a passenger of defendant railroad ceases at the expiration of such reasonable time, and it is liable only for failure to exercise ordinary care against inflicting injury on such person;⁷⁹ or if a passenger, having reasonable time and opportunity to safely leave the train at his destination, remains in the car for the purpose of assaulting an employee of the carrier, he must be considered to have abandoned the protection of his transportation contract.⁸⁰

§§ 2149-2153. After Alighting at Destination—§§ 2149-2150.

In General—§ 2149. Rules as Railroads.—A passenger continues to retain his status and rights as such after he has alighted from its train at his destination and is proceeding to the carrier's depot or other stopping place.⁸¹ A person does not cease to be a passenger when he leaves the train, and is entitled to protection from the weather in defendant's depot for a reasonable length of time to prepare to resume his journey. So if a person on reaching his destination finds, when he attempts to reach the depot for shelter, the way blocked by a freight train, and is compelled to wait from two to ten minutes exposed to the weather, until the freight train moved off, he is still a passenger and entitled to recover.⁸² Where a passenger alights from a train, crosses the

v. Gulf, etc., R. Co., 92 S. W. 444, 41 Tex. Civ. App. 370.

West Virginia.—*Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 39 R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143, 69 S. E. 700, 31 L. R. A., N. S., 414.

Wisconsin.—*Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344.

75. Half an hour.—*Chicago, etc., R. Co. v. Frazer (Kan.)*, 2 Am. & Eng. R. Cas., N. S., 206.

Twenty-five minutes.—In *Schley v. Susquehanna, etc., R. Co.*, 227 Pa. 494, 37 R. R. 112, 60 Am. & Eng. R. Cas., N. S., 112, 76 Atl. 207, 19 Am. & Eng. Ann. Cas. 1019, it is held that where a passenger had remained in a railway car twenty-five minutes after it had reached its station, which was at a terminus of a railroad, he was no longer a passenger.

76. Mere existence of time and opportunity.—*Chicago, etc., R. Co. v. Barrett*, 16 Ill. App. 1.

77. Negligence of carrier—Passenger asleep.—*Bass v. Cleveland, etc., R. Co.*,

142 Mich. 177, 18 R. R. 600, 41 Am. & Eng. R. Cas., N. S., 600, 105 N. W. 151, 2 L. R. A., N. S., 875.

78. Negligence of carrier—Passenger intoxicated.—*Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 36 R. R. 438, 59 Am. & Eng. R. Cas., N. S., 438, 67 S. E. 593.

79. St. Louis, etc., R. Co. v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089.

80. Remaining in car to assault employee.—*Chicago, etc., R. Co. v. Barrett*, 16 Ill. App. 1.

81. After alighting at destination.—*Louisville, etc., R. Co. v. Keller*, 104 Ky. 768, 20 Ky. L. Rep. 957, 47 S. W. 1072, 12 Am. & Eng. R. Cas., N. S., 89; *Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 30 R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536, 70 Atl. 268, 20 L. R. A., N. S., 1019.

**82. Use of premise to prepare for pre-
sumption of journey.**—*Louisville, etc., R. Co. v. Keller*, 104 Ky. 768, 20 Ky. L. Rep. 957, 47 S. W. 1072, 12 Am. & Eng. R. Cas., N. S., 89.

track to a station on the other side to meet a friend waiting for her, and in so doing crosses a highway, she did not cease to be a passenger because she had passed over such highway.⁸³

Re-Entering Train at Station.—Where a person after alighting from defendant's train at his destination, discovered that he had left his bank book and papers on the seat, and on being assured by the brakeman, who was assisting passengers to alight, that he would have time to go back for the papers before the train started, went back, secured his papers and hurried to alight, he was still a passenger as he was attempting to do so.⁸⁴ But when a person, who had just alighted from a train upon which he had been a passenger, again boarded it after it had moved away from the station of his destination, for the exclusive purpose of getting from the conductor money due him after the deduction of his fare, the relation of passenger and carrier did not exist between him and the railroad company, when he jumped off, under the conductor's advice, after the return of his money, at a point beyond the station, not suitable nor intended for the purpose.⁸⁵ And it is held that a passenger who has alighted from a train, if he returns to it for the purpose of using it as a mode of crossing to the other side of the track, thereby becomes a trespasser.⁸⁶

Crossing Track between Train and Depot after Alighting.—A person is still a passenger when crossing a railroad track, after he has alighted from his train at his destination, and is leaving the carrier's premises by a proper route, or one which he has a right to believe is such.⁸⁷ A person after alighting from a train ceases to be a passenger when he undertakes to pass to the other side of the train to see the engineer on private business.⁸⁸

Leaving Train by Wrong Route.—A person can not, as a passenger, hold the carrier liable for injuries sustained by him while, without necessity, leaving the train at his destination by a route which he knows, or should know, is not intended to be used for such purpose.⁸⁹ A railroad company has the right to determine the routes by which passengers shall enter upon and leave its trains; and where a safe and suitable egress in one direction is provided, and a passenger, instead of taking it, climbs over a locked gate and gets upon the track in an opposite direction, he severs his relation with the carrier as a passenger.⁹⁰ But if by reason of the carrier's neglect to take precautions which it should have taken, the person leaves the car on the wrong side, in consequence of which he loses his life, the carrier is liable to him as a passenger.⁹¹

83. **Passing over highway.**—*Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536, 70 Atl. 268, 20 L. R. A., N. S., 1019.

84. **Re-entering train at station.**—*Hill v. St. Louis, etc., R. Co.*, 85 Ark. 529, 28 R. R. R. 753, 51 Am. & Eng. R. Cas., N. S., 753, 109 S. W. 523.

85. **Boarding moving train to get change from conductor.**—*Pittsburgh, etc., R. Co. v. Krouse*, 30 O. St. 222, 15 Am. R. Rep. 298.

86. **Returning to use train as means of crossing track.**—*Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566.

87. **Crossing between track.**—*Chesapeake, etc., R. Co. v. King*, 44 C. C. A. 432, 99 Fed. 251, 49 L. R. A. 102.

88. **Passing other side of train on private business.**—*Hendrick v. Chicago, etc., R. Co.*, 136 Mo. 548, 38 S. W. 297.

89. **Leaving train by wrong route.**—*Chicago, etc., R. Co. v. Harrison*, 100 Ill. App. 211.

90. **Right to determine route.**—*Chicago, etc., R. Co. v. Harrison*, 100 Ill. App. 211.

91. **Trains obliged by law to stop—Caused to leave train on wrong side by negligence.**—Trains were obliged by law to stop within five hundred feet of the point where its tracks crossed those of another company. At this stopping place, defendant company maintained upon the eastern side of its tracks a building and platform adapted for the use of passengers, and used by them to enter its trains, and also by the workmen at its shop in the vicinity. No trains of the corporation were advertised to stop at this point, no tickets were sold, and no fares were taken for passengers to or from this point, and the name of such stopping place was never called in the trains. A passenger on one of defendant's trains left it at this place upon the westerly side of the tracks,

§ 2150. Rules as to Street Cars.—It may be generally stated that where a street railway passenger has safely alighted upon a public highway at a place reasonably safe and proper for that purpose, the relation of passenger and carrier ceases, and with it the duty.⁹² A person who steps from a street car to the street is not upon the premises of the railway company, but upon a public place where he has only the same rights of every occupier, and over which place the carrier has no control; and his rights are those of a traveler upon the highway, and not of a passenger. This has been upheld in a case where a person was killed immediately after leaving the car by being struck by another car.⁹³ The question then arises as to when the passenger has alighted; and, generally speaking, the better rule seems to be that, in the transportation of passengers on

where no provision was made for passengers, and where it was dangerous for passengers to alight, and was killed by a passing train on a parallel track. It was held that he was still a passenger if, by reason of the defendant's neglect of precautions which it should have taken, the plaintiff's intestate left the train upon the wrong side, and thereby lost his life. *McKimble v. Boston, etc., R. Co.*, 141 Mass. 463, 5 N. E. 804.

92. Immediately after alighting from street car.—*Connecticut.*—*Powers v. Connecticut Co.*, 82 Conn. 665, 34 R. R. 434, 51 Am. & Eng. R. Cas., N. S., 434, 74 Atl. 931, 26 L. R. A., N. S., 405.

Georgia.—*Columbus R. Co. v. Asbell*, 133 Ga. 573, 38 R. R. 22, 61 Am. & Eng. R. Cas., N. S., 22, 66 S. E. 902.

Illinois.—*West Chicago St. R. Co. v. Walsh*, 78 Ill. App. 595.

Indiana.—*Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311, 67 N. E. 1044.

Kentucky.—*Louisville R. Co. v. Meglemery*, 23 Ky. L. Rep. 1587, 78 S. W. 217.

Massachusetts.—*Conroy v. Boston Elevated R. Co.*, 19 R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384, 74 N. E. 672, 188 Mass. 411; *Creamer v. West End St. R. Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456.

New Hampshire.—*Haselton v. Portsmouth, etc., Railway*, 71 N. H. 589, 6 R. R. 705, 29 Am. & Eng. R. Cas., N. S., 705, 53 Atl. 1016.

New York.—*Platt v. Grand St., etc., R. Co.* (N. Y.), 2 Hun 124; *Robertson v. West Jersey, etc., Co.*, 79 N. J. L. 186, 74 Atl. 300; *Street Railroad v. Boddy*, 105 Tenn. (21 Pickle) 666, 55 S. W. 646, 51 L. R. A. 885; *Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

In *West Chicago St. R. Co. v. Walsh*, 78 Ill. App. 595, it is held that when a passenger alights from a street car, it having stopped at a safe place for such purpose, the relation of the company to such passenger as a common carrier, and its duties incident to such relation, cease.

Starting to cross street behind end of car—Fall over rail.—Where a passenger on a street car alighted and started to cross the street behind the end of the car, when she was injured by falling over one of the rails above the surface of the ground, she had ceased to be a pas-

senger before she was injured. *Conroy v. Boston Elevated R. Co.*, 19 R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384, 74 N. E. 672, 188 Mass. 411.

93. Rights only those of occupier of street.—*Creamer v. West End St. R. Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456.

Traveler on street.—In *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311, 67 N. E. 1044, it is held that one who alights from a street car on which he has been a passenger at once becomes a traveler on the street.

Safe passage across street.—In *Powers v. Connecticut Co.*, 82 Conn. 665, 34 R. R. 434, 51 Am. & Eng. R. Cas., N. S., 434, 74 Atl. 931, 26 L. R. A., N. S., 405, it is held that a passenger on a street car ceases to be such when at the end of his trip, he steps from the car upon the street, and the carrier is not responsible as such for his safe passage across the street.

Alighting at street intersection and proceeding toward sidewalk—Degree of care.—In *Street Railroad v. Boddy*, 105 Tenn. (21 Pickle) 666, 55 S. W. 646, 51 L. R. A. 885, it is held that a street railway company is not held to that high degree of care which it owes to a passenger on its cars, in favor of one who has alighted from his car at his destination, a public place, an intersection of streets, over which the company has no special control and is proceeding to the sidewalk. The company does, however, owe to such person, at such public place and while near its track, a very high degree of care.

Struck by car horse being driven to other end of car.—In *Platt v. Grand St., etc., R. Co.* (N. Y.), 2 Hun 124, it appeared that a car belonging to defendant, in which plaintiff was a passenger, having arrived at the end of its route, stopped, and plaintiff, having stepped from the end of the car to which the horses were attached, proceeded toward the sidewalk. When she left the car, the horse were still attached to it. When she was about six or eight feet from the car she was struck on the right shoulder by one of the car horses, while they were being driven to the other end of the car. It was held that plaintiff had ceased to be a passenger at the time of the accident.

street cars, the relation of carrier and passenger does not terminate until the passenger has alighted and has placed both feet squarely on the ground,⁹⁴ and has had a reasonable opportunity to leave the carrier's roadway, after the car reaches the place to which he is entitled to be carried;⁹⁵ and hence the carrier is not discharged from liability where he is assaulted by its servant as soon as his feet touched the ground.⁹⁶ And it has been held that a passenger upon alighting from a street car does not cease to be a passenger, but is entitled to protection as such against the negligent management of cars by the same company on a parallel track.⁹⁷ But where distinct companies operate cars on parallel tracks the rule is different.⁹⁸

Where Carrier Maintains Platform.—A passenger on an interurban car, who alights at a platform where cars regularly stop to permit passengers to alight, is, while on steps leading from the platform to the street, a passenger entitled to a reasonably safe passage to the street.⁹⁹ And the relation exists when a street car passenger, who has alighted on a platform maintained in a street for use by passengers, is injured by stepping off of the platform because of the company's failure to light it.¹

Carrier Responsible for Obstructions in Street.—The relation of passenger and carrier is not terminated upon a passenger alighting from a street car, where the carrier's charter makes it liable for injuries sustained by reason of any obstruction placed by it in the street.²

§ 2151. **On Carrier's Premises after Alighting.**—In General.—After a passenger has alighted from his train at his destination he may, as a passenger, hold the carrier responsible for any injuries sustained by him while remaining at the depot a reasonable time before departing for his home or other ultimate destination.³ But after the lapse of a reasonable time such re-

94. When has passenger alighted.—*Denver City Tramway Co. v. Hills*, 50 Colo. 328, 41 R. R. R. 505, 64 Am. & Eng. R. Cas., N. S., 505, 116 Pac. 125, 36 L. R. A., N. S., 213.

One foot on foot-board—Assisting child to alight.—Where there was testimony that when the car on which plaintiff was riding stopped he put one foot on the ground and with the other on the foot-board attempted to lift his little girl off the car, when it started suddenly, injuring him, the question as to whether he was a passenger was for the jury. *Chicago Union Tract. Co. v. Rosenthal*, 217 Ill. 458, 21 R. R. R. 747, 44 Am. & Eng. R. Cas., N. S., 747, 75 N. E. 578.

95. Opportunity to leave alighting place.—*Melton v. Birmingham R., etc., Co.*, 153 Ala. 95, 28 R. R. R. 768, 51 Am. & Eng. R. Cas., N. S., 768, 45 So. 151, 16 L. R. A., N. S., 467.

Out of danger from forward movement of car.—After a passenger has alighted from a street car, so as to be free from injury from its forward movement, the company owes him no further duty, except to use ordinary care to avoid injuring him. *Louisville R. Co. v. Meglemery*, 23 Ky. L. Rep. 1587, 78 S. W. 217.

96. Assault by conductor as soon as off car.—*Johnson v. Washington Water Power Co.*, 62 Wash. 619, 40 R. R. R. 586, 63 Am. & Eng. R. Cas., N. S., 586, 114 Pac. 453.

97. Negligent management of cars of parallel track.—*South Covington, etc.,*

Co. v. Beatty, 20 Ky. L. Rep. 1845, 50 S. W. 239.

98. Distinct companies.—Where defendant and another street railway company operated cars over two parallel tracks in common, and plaintiff, a passenger on a car of the other company, was injured by alighting on one of the tracks in front of one of defendant's cars, the companies being distinct, defendant was not liable as a common carrier, plaintiff being a traveler upon the street as far as defendant was concerned, and hence it was immaterial whether the other company was negligent in leaving open the gate on its platform next the parallel track, as the negligence of that company could not be imputed to defendant. *Foreman v. Norfolk, etc., Co.*, 56 S. E. 805, 106 Va. 770.

99. Platform.—*Carter v. Rockford, etc., R. Co.*, 147 Wis. 86, 132 N. W. 598.

1. Failure to light platform.—*Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

2. Carrier responsible for obstruction.—*White v. Lewiston, etc., Railway*, 107 Me. 412, 39 R. R. R. 364, 62 Am. & Eng. R. Cas., N. S., 364, 78 Atl. 473.

3. Time and opportunity to leave carrier's premises.—*United States*.—*Chicago, etc., R. Co. v. Thurlow*, 102 C. C. A. 128, 37 R. R. R. 546, 60 Am. & Eng. R. Cas., N. S., 546, 178 Fed. 894, 30 L. R. A., N. S., 571; *Chicago, etc., R. Co. v. Wood*, 44 C. C. A. 118, 104 Fed. 663; *Chesapeake, etc.,*

lation ceases.⁴ And the fact that a female passenger who has alighted at a station has formed an intention to remain at the station all night, will not prevent her recovery for an injury received immediately after alighting.⁵

Reasonable or Necessary Delay.—A passenger who is ready to leave the premises of a carrier may be reasonably or necessarily delayed and continue to be a passenger and as such entitled to protection.⁶ During the time

R. Co. v. King, 44 C. C. A. 432, 99 Fed. 251, 49 L. R. A. 102.

Arkansas.—*Hill v. St. Louis, etc., R. Co.*, 85 Ark. 529, 28 R. R. R. 753, 51 Am. & Eng. R. Cas., N. S., 753, 109 S. W. 523. *Connecticut*.—*Gardner v. New Haven, etc., Co.*, 18 Am. & Eng. R. Cas. 170, 51 Conn. 143, 50 Am. Rep. 12.

Georgia.—*Brunswick, etc., R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000, 12 Am. & Eng. R. Cas., N. S., 84.

Illinois.—*Chicago, etc., R. Co. v. Tracey*, 109 Ill. App. 563; *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293, 12 Am. & Eng. R. Cas., N. S., 93, 51 N. E. 901; *Chicago, etc., R. Co. v. Schmelling*, 197 Ill. 619, 5 R. R. R. 298, 28 Am. & Eng. R. Cas., N. S., 298, 64 N. E. 714; *Chicago Union Tract. Co. v. O'Brien*, 219 Ill. 203, 76 N. E. 341, 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713.

Indiana.—*Jeffersonville, etc., R. Co. v. Parmalee*, 51 Ind. 42.

Massachusetts.—*Dodge v. Boston, etc., Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; *McKimble v. Boston, etc., Railroad*, 139 Mass. 542, 2 N. E. 97; *Webster v. Fitchburg R. Co.*, 58 Am. & Eng. R. Cas. 1, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521.

Michigan.—*Burnham v. Wabash, etc., R. Co.*, 91 Mich. 523, 52 N. W. 14.

Missouri.—*Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436.

Nebraska.—*Fremont, etc., R. Co. v. Hagblad*, 72 Neb. 773, 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226, 9 Am. & Eng. Ann. Cas. 1096, 4 L. R. A., N. S., 254, 101 N. W. 1033, 106 N. W. 1041.

Ohio.—*P. C. & St. L. R. Co. v. Martin*, 3 O. Dec. 493, 2 N. P. 353.

Pennsylvania.—*Bricker v. Philadelphia, etc., R. Co.*, 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585; *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. Cas. 234, 96 Pa. 256, 2 Ky. L. Rep. 183; *Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536, 70 Atl. 268, 20 L. R. A., N. S., 1019; *Hall v. Bessemer, etc., R. Co.*, 36 Pa. Super. Ct. 556.

South Carolina.—*Taylor v. Atlantic, etc., R. Co.*, 78 S. C. 552, 28 R. R. R. 774, 51 Am. & Eng. R. Cas., N. S., 774, 59 S. E. 641.

Texas.—*Houston, etc., R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. 981; *Texas, etc., R. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895; *Houston, etc., R.*

Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; *St. Louis, etc., R. Co. v. Wallace*, 74 S. W. 581, 32 Tex. Civ. App. 312; *Ormond v. Hayes*, 60 Tex. 180.

Washington.—*Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

West Virginia.—*Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143, 69 S. E. 700, 31 L. R. A., N. S., 414; *McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554, 68 S. E. 378.

Waiting for friend reasonable time.—

Where a passenger after alighting from a train enters the station to wait for a friend, she is entitled to use the station for a reasonable time. *Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536, 70 Atl. 268, 20 L. R. A., N. S., 1019.

Aiding in removal of baggage.—In *Ormond v. Hayes*, 60 Tex. 180, it is held that the relation of carrier and passenger does not necessarily cease where the passenger has alighted from the car and is aiding the carrier's employees in removing his baggage from the car.

4. After reasonable time.—When a passenger has reached his destination, and a reasonable time in which to leave the station has elapsed his rights as a passenger cease. *Louisville, etc., R. Co. v. Bays* (Ky. App.), 40 R. R. R. 86, 63 Am. & Eng. R. Cas., N. S., 86, 134 S. W. 450; *Illinois Cent. R. Co. v. McMillion*, 129 Ill. App. 27, 37.

5. Fall from unlighted platform.—Intention to remain in station until morning.—In *Chicago, etc., R. Co. v. Wood*, 44 C. C. A. 118, 104 Fed. 663, it is held that a woman alighting at a station in the early morning, while it was dark, and injured immediately afterwards by falling from the platform, owing to the darkness, is not debarred from recovering for the injury because she had formed the intention of remaining at the station until daylight.

6. Brother shot by railroad's policeman.—Passenger returning to station.—In

Layne v. Chesapeake, etc., R. Co., 68 W. Va. 213, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143, 69 S. E. 700, 31 L. R. A., N. S., 414, it is held that if a passenger has alighted at his point of destination, and is proceeding by the usual way to leave the railroad premises, but, before he has left them, is halted by the discharge of a gun and a report that his brother, a fellow passenger, has been shot

in which a railroad company may reasonably detain a passenger's baggage, the relation of carrier and passenger still exists between the parties.⁷ If a passenger is necessarily hindered or delayed in leaving the carrier's premises, the question whether he fails to depart within a reasonable time is one of fact for the jury.⁸ In such cases the good faith of the passenger, and the purpose of his return to the place of trouble, are questions of fact for jury determination from all the evidence in the case.⁹

Must Leave by Proper Route.—Where a carrier has made proper arrangements for the exit by passengers from its station grounds, a passenger must use the ways provided, and where he knowingly fails to do so, and without invitation makes his exit in some other way, he ceases to be a passenger, and becomes at most a mere licensee; and it makes no difference that he goes where others, with the knowledge of the carrier, have gone before him, unless there is some invitation on the part of the carrier, and knowledge of such use does not of itself amount to such invitation.¹⁰ And it is generally held that a person is no longer entitled to the rights of a passenger after he leaves the station house, and goes upon some other part of the carrier's premises which he knows, or should know, in the exercise of reasonable care, is not intended for the use of passengers.¹¹ Hence, it is held that a person who has left the train and the station platform, and is on the railroad track proceeding to some other place, has ceased to be a passenger.¹²

by a special police officer of the railway company, and in good faith and without the intention of engaging in the difficulty returns to relieve his brother, he should be regarded as reasonably and necessarily delayed, and as continuing to be a passenger, entitled as such to the protection of the railroad company and its agents; and if assaulted by such police officer or agent of the railroad company, the latter is liable to him in damages for his injuries.

7. While baggage is detained.—*Georgia R., etc., Co. v. Philips*, 93 Ga. 801, 20 S. E. 646.

8. Necessary delay—Question of fact.—*McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 68 S. E. 378, 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143.

9. Good faith, etc.—*Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143.

10. Must leave by proper route.—*Legge v. New York, etc., R. Co.*, 83 N. E. 367, 197 Mass. 88, 23 L. R. A., N. S., 633.

A carrier had provided a safe walk for exit from its station grounds to a highway. A passenger was on it, but left it and undertook to reach the highway by crossing the railroad tracks, where he was struck by a train. There was no path after he left the walk. There was nothing to indicate that the place he walked on was intended for passengers. Held, that he ceased to be a passenger, and was not entitled to protection as such. *Legge v. New York, etc., R. Co.*, 197 Mass. 88, 83 N. E. 367, 23 L. R. A., N. S., 633.

11. Upon part of station premises not intended for use of passengers.—*Illinois.*—*Kane v. Cicero, etc., R. Co.*, 100 Ill. App. 181.

Maryland.—*Abell v. Western Maryland R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433.

New York.—*Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, 7 Am. R. Rep. 25, 9 Am. R. Rep. 486.

South Carolina.—*Holcombe v. Southern R. Co.*, 8 R. R. R. 482, 31 Am. & Eng. R. Cas., N. S., 482, 44 S. E. 68, 66 S. C. 6.

Leaving passage way from train to street to enter depot—Fell down stairway.—A passenger alighted from the train at a depot at night, and for purposes of his own passed along an open space on the right of way used by the public by permission in passing from one street to another. He left the right of way, and went into an open door in the depot building twelve feet away, and fell down a stairway and was injured. It was held that he was not a passenger, but a mere licensee, and the railroad did not owe him the duty to keep the depot doors closed, but only of keeping the way free from dangers. *Quantz v. Southern R. Co.*, 137 N. C. 136, 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259, 49 S. E. 79.

12. On track after leaving station.—*St. Louis, etc., R. Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715. In this case the passenger was killed by the train she had just gotten off of.

Killed while crossing track farthest from station and home.—A passenger on a railroad train alighted in the night at the town where he resided. The station, the town, and his home were all on the west side of the track, and the doors of the cars, which were vestibuled, were opened

Return to Sleep in Train—Drover's Pass.—Where a drover, riding on a train transporting cattle, has reached his destination and left the train, returns to the train to sleep in a car, without authority to do so under his contract, he is not a passenger.¹³

§§ 2152-2153. After Leaving Carrier's Premises—§ 2152. In General.—As a general rule, the relation of carrier and passenger terminates after a passenger has alighted from the train at his destination and has left the carrier's premises.¹⁴ Thus, it has been held that a traveler on a train ceases to be a passenger when, after alighting on the railroad platform, he passes off the railroad property to the public highway on which he intends to cross the railroad tracks.¹⁵ And a person who has left the station platform of a railroad and proceeded along the sidewalk of a public street, is no longer in the carrier's charge as a passenger.¹⁶ But an approach to a depot on premises belonging to the carrier constitutes a part of such premises, and the relation of carrier and

on that side. After his train had departed he was killed by another train on a track to the eastward. It was held that he had ceased to be a passenger prior to his death, and the company at that time owed him no duty as such. *Payne v. Illinois Cent. R. Co.*, 83 C. C. A. 589, 26 R. R. R. 635, 49 Am. & Eng. R. Cas., N. S., 635, 155 Fed. 73.

Crossing track in highway farthest from station to go to some other place.—In *Allerton v. Boston, etc., R. Co.*, 146 Mass. 241, 15 N. E. 621, it is held that if a passenger on a train alights at his destination, and, after the train has passed on, starts away from the station over an adjacent grade highway crossing to go to some other place, he ceases to be a passenger.

13. Arrival at destination at night—Returning to car to sleep—Collision.—At a certain point, plaintiff delivered to defendant a car in which was his horse, and other property, to be transported over its line to S., under a contract by which he agreed to load, etc., and otherwise attend to his stock, at his own expense and risk, while at the carrier's stockyards or on its cars; and he assumed the duty of securely placing the stock in the cars, and keeping the same locked and fastened. The car arrived at S. in the night, and plaintiff left the car for a few minutes, and, on its being placed on a side track, returned to it, and laid down. Soon after he was injured by an engine running against the car. It was held that he was not a passenger at the time of the accident. *Orcutt v. Northern Pac. R. Co.*, 45 Minn. 368, 47 N. W. 1068.

Horses in stockyard at destination—Shipper returning to car to sleep—Notice.—Plaintiff's husband shipped in an emigrant car over defendant's road household goods and other goods and horses. The contract provided that he should be transported on the same train for the purpose of caring for the stock and should ride in the caboose. The car reached its destination in the evening and was placed on

a passing track. He paid the freight and unloaded his horses into the stockyards, and cared for them for the night; after which he went into the car to sleep without the knowledge of the carrier's employees; and there was a hotel near by. It was held that he was not a passenger after his horses were unloaded. *Chicago, etc., R. Co. v. Thurlow*, 102 C. C. A. 128, 37 R. R. R. 546, 60 Am. & Eng. R. Cas., N. S., 546, 178 Fed. 894, 30 L. R. A., N. S., 571.

14. United States.—*Payne v. Illinois Cent. R. Co.*, 83 C. C. A. 589, 26 R. R. R. 635, 49 Am. & Eng. R. Cas., N. S., 635, 155 Fed. 73.

Arkansas.—*St. Louis, etc., R. Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715.

Illinois.—*Lake Street, etc., R. Co. v. Gormley*, 108 Ill. App. 59.

Massachusetts.—*Allerton v. Boston, etc., R. Co.*, 146 Mass. 241, 15 N. E. 621.

North Carolina.—*Quantz v. Southern R. Co.*, 137 N. C. 136, 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259, 49 S. E. 79; *Rozwadoskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872; *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143, 69 S. E. 700, 31 L. R. A., N. S., 414.

Where a passenger alighted from a train, and left the depot platform in safety, after checking his baggage in the depot and obtaining a check therefor, the relation of carrier and passenger terminated, and the carrier became a warehouseman, with the duty to allow the passenger access to the depot to remove his baggage, and to see that no obstructions were in or on the station or platform. *Reynolds v. St. Louis, etc., R. Co. (Mo. App.)*, 142 S. W. 1097.

15. Traveler on public highway leaving premises.—*Garrett v. Atlantic, etc., R. Co.*, 79 N. J. L. 127, 74 Atl. 273.

16. On sidewalk going home.—*Lake Street, etc., R. Co. v. Gormley*, 108 Ill. App. 59.

passenger continues until the passenger has passed beyond such approach.¹⁷

§ 2153. Mail Clerk.—Where a railway company is bound to deliver mail from a station to a post office, and the incoming railway mail clerk is bound to accompany the mail to the office, the relation of carrier and passenger existing between him and the company continues until the arrival of the mail at the post office, and the company is liable for assault and battery by, and insulting conduct of the porter employed by the railroad to carry the mail.¹⁸

§ 2154. Passenger Continuing Journey Beyond Destination.—Passenger Remaining on Vehicle.—Where a passenger's train has reached his destination, but he remains on it, with the intention of paying his fare to another station, the relation of carrier and passenger is not interrupted.¹⁹ He need not alight and re-enter, or expressly notify the conductor of this purpose to continue his journey.²⁰ Where a passenger continues his journey, with the conductor's consent, to search for his watch which has been stolen, if the conductor does not request the payment of a fare it must be regarded as waived, and can not affect his status as a passenger.²¹ But if such person remains on the train without a present ability to pay his fare and a bona fide intention of paying it he is a trespasser.²² Where a passenger fails to alight from the train

17. Approach to railway depot.—Gulf, etc., R. Co. v. Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278.

18. Mail clerk.—Texas, etc., R. Co. v. Cassidy (Tex. Civ. App.), 137 S. W. 389.

19. Intention to travel beyond destination.—Southern R. Co. v. Skinner, 133 Ga. 33, 34 R. R. R. 186, 57 Am. & Eng. R. Cas., N. S., 186, 65 S. E. 134; Pittsburg, etc., R. Co. v. Gray, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39; Forbes v. Chicago, etc., R. Co., 135 Iowa 679, 26 R. R. R. 714, 49 Am. & Eng. R. Cas., N. S., 714, 113 N. W. 477; Anderson v. Missouri Pac. R. Co., 196 Mo. 442, 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696, 93 S. W. 394.

Mere failure to leave train at destination.—The relation of carrier and passenger is not terminated by the mere failure of the passenger to leave the train when stopped at the station to which he had paid fare. Pittsburg, etc., R. Co. v. Gray, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39.

20. Need not alight from and re-enter train, nor notify conductor.—A passenger who has purchased a ticket to a certain point, but who, on reaching such point, decides to go further, need not, to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey. Anderson v. Missouri Pac. R. Co., 196 Mo. 442, 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696, 93 S. W. 394.

Knowledge of conductor.—Where a passenger was carried by a railroad company to the station to which he had a ticket, and he remained on the train for the purpose of going beyond such station to a place on the road at which such train stopped to allow passengers to disembark, to which place he had no ticket, it was

held that whether he sustained the relation of passenger after the train left such station did not depend upon the knowledge of the conductor that he was on the train after it left such station, or whether the conductor could have discovered his presence on the train by the exercise of extraordinary care; and that if such person remained on the train after it left the station to which he had a ticket, with bona fide intention and present ability to pay cash fare to the place to which he intended going, he sustained to the carrier the relation of passenger, while thus on the train, and the carrier owed him the duty due by it to a passenger. Southern R. Co. v. Skinner, 133 Ga. 33, 34 R. R. R. 186, 57 Am. & Eng. R. Cas., N. S., 186, 65 S. E. 134.

21. Loss of watch—Refusal to leave train—Conductor's consent—Assault by conductor.—Where a passenger on arriving at the place to which he had paid his fare on a railroad train missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover it, and the conductor consented that he might remain on the train until it had reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "That fellow," pointing at a brakeman, who immediately struck him in the face with a lantern, it was held that the facts showed a right of action against the railroad company for the injury so inflicted; and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. Chicago, etc., R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

22. Ability and intention to pay fare essential.—Southern R. Co. v. Skinner, 133 Ga. 33, 65 S. E. 134, 34 R. R. R. 186, 57 Am. & Eng. R. Cas., N. S., 186.

at the destination to which he purchased a ticket if the train, is one on which passengers are entitled to ride, it must be presumed that he intends to pay the proper fare; and, until this presumption is overcome by evidence that he intends to be carried without payment of fare, he is entitled to the protection of a passenger.²³ And the presumption is sufficient to cause the issue to be sent to a jury, without the aid of any positive or direct evidence of his intention.²⁴

Passenger Alighting at Station.—A passenger who buys a ticket at a station, and who before reaching it notified the conductor of his intention to go beyond it, does not cease to be a passenger, where he leaves the train at the station to comply with the rule of the carrier to buy a ticket before taking passage on a train with the request of the conductor that he purchase a ticket at the station.²⁵

§ 2155. Carriage beyond Destination.—A passenger retains such status while being carried, without any fault on his part, beyond his destination, and for a reasonable time thereafter.²⁶ Hence, if a street car passenger, who, through the fault of the conductor, has been carried beyond his destination, is permitted by the conductor to remain upon the car, without paying a second fare, until the car has again reached his destination upon the return trip, his status as a passenger continues during such trip.²⁷ But where the passenger has been carried beyond his destination through no wrong or negligence of the carrier, and is safely landed at some other station, he is no longer a passenger,²⁸ and the carrier is not liable for injuries he may sustain in attempting to return to the proper station unless they attempted to transport him back and he is negligently injured. And as no duty rests on the defendant to get him back to the station the act of the carrier's servants in advising or directing him as to his return are gratuitous acts for which the company is not liable.²⁹

23. Presumption as to intention.—*Forbes v. Chicago, etc., R. Co.*, 135 Iowa 679, 26 R. R. R. 714, 49 Am. & Eng. R. Cas., N. S., 714, 113 N. W. 477.

24. Residence beyond destination—Intention to continue journey—Positive or direct evidence.—Where, in an action against a railroad for wrongful death, it appeared that deceased, after reaching the point on defendant's line to which he had purchased a ticket, remained in the car; that the residence of himself and family was at a station further along the road; and that, at the time of the collision causing his death, defendant's train had started, it was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision, or that it was his purpose to continue his journey. *Anderson v. Missouri Pac. R. Co.*, 196 Mo. 442, 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696, 93 S. W. 394.

25. Passenger alighting at station.—*Harkless v. Chicago, etc., R. Co.* (Mo. App.), 132 S. W. 29.

26. Carriage beyond destination.—*Toledo Consol. St. R. Co. v. Fuller*, 9 O. C. D. 123, 17 O. C. C. 562.

Street car passenger.—In *Toledo Consol. St. R. Co. v. Fuller*, 9 O. C. D. 123, 17 O. C. C. 562, it is held that a street car passenger having been negligently carried beyond the destination for

which he took passage, remains lawfully a passenger and entitled to all the rights of one.

In an action against a railroad, held, that at the time the conductor made a suggestion that he should carry children who had gone beyond their destination to the end of the division, and then return them next day, on which the action for damages was based, he was acting within the apparent scope of his authority, so as to confer upon the children the rights of passengers. *Missouri, etc., R. Co. v. Pope* (Tex. Civ. App.), 149 S. W. 1185.

27. Return trip by conductor's permission.—*Rosenberg v. Third Ave. R. Co.*, 47 App. Div. 323, 61 N. Y. S. 1052.

28. No fault of carrier.—*Birmingham R., etc., Co. v. Seaborn*, 168 Ala. 658, 38 R. R. R. 4, 61 Am. & Eng. R. Cas., N. S., 4, 53 So. 241.

If a person, through his own negligence, is carried beyond his destination and alights at the next station he is no longer a passenger, and the company does not owe him the duty of keeping the depot where he alights warmed for an hour after the departure of the train. *St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090.

29. Carrier not liable for his return.—*Birmingham R., etc., Co. v. Seaborn*, 168 Ala. 658, 53 So. 241, 38 R. R. R. 4, 61 Am. & Eng. R. Cas., N. S., 4.

§ 2156. Ejection of Passenger.—See post, "Ejection of Passengers," chapter 25.

§ 2157. Regaining Status on Train or Car after Ejection.—After a person's ejection from a train or street car for refusal to pay fare, or for other sufficient reason, has rightfully begun, he can not, through any mere act of his own, regain his status as a passenger on such train or car.³⁰ And if he gets upon the car for any purpose, as where he goes back to assault an employee, he is a trespasser.³¹ The weight of authority is that a passenger who has first violated the contract of passage by a failure to pay fare at the proper time upon demand, can not, by tending the fare while he is being put off, or upon a reentry after ejection, acquire a right to transportation, but the strict rule, ought, perhaps, be confined to willful violations of the contract.³² And such offer on the part of others must come before the attempted ejection.³³

§§ 2158-2166. Relation as Affected by Character of Vehicle or Position Occupied—§§ 2158-2161. Vehicle Used for Transportation of Passengers—§ 2158. Presumption Arising from Character of Vehicle.—The presumption is that a person, not an employee of the carrier, riding in a public conveyance used for the common carriage of passengers, is legally a passenger.³⁴ And neither a carrier nor its employees can assume that a person on any car of a passenger train is a trespasser.³⁵ It seems to be

30. Attempt to regain status as passenger after ejection.—*Massachusetts.*—*O'Brien v. Boston, etc., R. Co.* (Mass.), 15 Gray 20, 77 Am. Dec. 347.

New Jersey.—*State v. Campbell*, 32 N. J. L. 309.

New York.—*Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Nelson v. Long Island R. Co.* (N. Y.), 7 Hun 140.

Tennessee.—*Louisville, etc., R. Co. v. Harris*, 77 Tenn. (9 Lea) 180.

31. Trespasser.—A passenger who has been put off the car for improper conduct and thereafter again boards the car, for the sole purpose of assaulting the motor-man, becomes a trespasser on boarding it the second time, and not a passenger. *Colbeck v. Sampsell*, 140 Ill. App. 566.

32. Tending fare while being ejected or upon reentry.—*Louisville, etc., R. Co. v. Harris*, 77 Tenn. (9 Lea) 180; *Loy v. Northern Pac. R. Co.* (Wash.), 122 Pac. 372.

Such a person can not, by climbing upon the train again before it starts, and tendering the fare, obtain a right to transportation. *O'Brien v. Boston, etc., R. Co.* (Mass.), 15 Gray 20, 77 Am. Dec. 347.

Production of proper ticket after ejection.—A passenger after being ejected from a train for attempting to ride on a spent ticket, has not the right to re-enter the cars upon producing, after his expulsion, a regular ticket, which, while upon the train, he had kept back, presenting the spent ticket as his sole passport. *State v. Campbell*, 32 N. J. L. 309.

33. *Loy v. Northern Pac. R. Co.* (Wash.), 122 Pac. 372; *Kirk v. Seattle Elect. Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S., 991; *Missouri, etc., R. Co. v. Smith*, 81 C. C. A. 598, 152 Fed. 608, 10 Am. & Eng. Ann. Cas. 939.

34. Vehicle used for transportation of passengers.—*United States.*—*Bryant v. Chicago, etc., R. Co.*, 4 C. C. A. 146, 53 Fed. 997.

Colorado.—*Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

Indiana.—*Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357.

Massachusetts.—*Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110.

Missouri.—*Anderson v. Missouri Pac. R. Co.*, 196 Mo. 442, 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696, 93 S. W. 394.

Pennsylvania.—*Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229.

South Carolina.—*Iseman v. South Carolina, etc., R. Co.*, 52 S. C. 566, 30 S. E. 488.

Texas.—*Missouri, etc., R. Co. v. Williams* (Tex. Civ. App.), 40 S. W. 350; *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

In a suit against a railroad company for personal injuries, the fact that the plaintiff had ridden on the platform of a baggage car to escape paying his fare, but afterwards went into the passenger coach and was injured before his fare was demanded, did not justify a charge upon the hypothesis that he was a trespasser on the train. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179.

West Virginia.—*Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 14 L. R. A. 798, 29 Am. St. Rep. 827.

35. Right to assume otherwise forbidden.—*Missouri, etc., R. Co. v. Williams* (Tex. Civ. App.), 40 S. W. 350.

well settled that there is a presumption that a person riding in a passenger coach is lawfully there, by invitation or permission of the carrier's employees, and that these employees have authority to bind the carrier by such invitation or permission.³⁶ So where a person at the time of a collision, in which he was killed, was in a car used by defendant railroad for the transportation of passengers, his residence being at a distant point where his family was, and the train having started to carry such passengers as were on it to other points of destination along its line, the presumption was that deceased was lawfully in the coach.³⁷ And where one is carried upon a passenger train for many hours, and the conductor of the train has given him a check, which is found upon his person after he has been killed by the carrier's negligence, it will be presumed in the absence of evidence to the contrary, that he was lawfully upon the train as a passenger.³⁸ And although a nontransferable pass, issued to another person, is found in the pocket of one killed by the negligence of a railroad company, there is no other evidence that the deceased had procured the pass fraudulently, or was attempting to travel on it, the burden is on defendant, to overcome the presumption that deceased was a bona fide passenger.³⁹

Boarding Steamboat at Usual Stopping Place.—When a steamboat lands at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who goes on board does so as a passenger, unless he notifies an officer of the boat to the contrary, so as to relieve the officers from the duty of giving to such as do not come aboard as passengers, proper time and facilities for getting ashore.⁴⁰

§ 2159. Boarding Wrong Train or Car.—A person does not, as a general rule, become a passenger by merely boarding a train which he knows; or has sufficient reason to know, he has not the right to ride upon, even though he has a ticket entitling him to travel to his destination upon some other train of the carrier, or has a bona fide intention to pay a cash fare upon demand.⁴¹

36. Passenger car full of railroad's employees drawn by switch engine to meeting at depot—Direction of yardmaster.—In *Bryant v. Chicago, etc., R. Co.*, 4 C. C. A. 146, 53 Fed. 997, it appeared that the engineer of a switch engine, while under pay for extra hour's labor, went, under the direction of the yardmaster, to the company's shops, a distance of about two miles, being entirely within the company's yards, and drew a passenger coach full of the company's employees to a depot, where they attended a meeting. After the meeting was over, about 10 o'clock at night, the employees again got into the car, the yardmaster acting as conductor, and started on the return trip. A collision shortly occurred, in which plaintiff's intestate received injuries causing his death. The intestate had come in from the shop on the coach, but there was no evidence that he or any of the others paid fare. It was held that in view of the presumption that one riding in a passenger coach is lawfully there, by invitation or permission of the carrier's employees, and that these employees have authority to bind the carrier by such invitation or permission, there was some evidence that the relation of passenger and carrier existed, and it was error to direct a verdict for defendant on the ground that there was no evidence of such relation.

37. Presumption as intention to ride as passenger.—*Anderson v. Missouri Pac. R. Co.*, 196 Mo. 442, 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696, 93 S. W. 394.

38. Riding many hours—Conductor's check.—*Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357.

39. Pass found in pocket of deceased.—*Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357.

40. Boarding steamboat at usual stopping place.—*Keokuk Packet Co. v. Henry*, 50 Ill. 264.

41. Boarding wrong train.—*United States*.—*Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700.

Alabama.—*McCauley v. Tennessee, etc., R. Co.*, 93 Ala. 357, 9 So. 611.

Arkansas.—*Kruse v. St. Louis, etc., R. Co.*, 97 Ark. 137, 39 R. R. R. 376, 62 Am. & Eng. R. Cas., N. S., 376, 133 S. W. 841.

Connecticut.—*Gardner v. New Haven, etc., Co.*, 51 Conn. 143, 18 Am. & Eng. R. Cas. 170, 50 Am. Rep. 12.

Georgia.—*Southwestern Railroad v. Singleton*, 66 Ga. 252.

Iowa.—*Fitzgibbon v. Chicago, etc., R. Co.*, 108 Iowa 614, 14 Am. & Eng. R. Cas., N. S., 270, 79 N. W. 477.

Tennessee.—*Louisville, etc., R. Co. v.*

And a person who boards the car of a company under the impression that the car of another company is being boarded, having at the time no purpose or intention of being carried as a passenger, does not become a passenger in law.⁴² But it seems to be well settled that a person who, by mistake, gets on a passenger train other than the one upon which he intended to take passage, is nevertheless a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company.⁴³

On Wrong Train without Fault.—So where a person has bought a ticket over a railroad, and by mistake takes passage on the wrong train, he is a passenger, so far as to entitle him to protection against the negligence of the company.⁴⁴ A passenger who has an open way to an open car going to a place to which he bought and holds a ticket, and enters the car without knowledge that his ticket is not good on that car, is not a trespasser.⁴⁵

§ 2160. Persons Boarding Special Train.—A person who boards a special train or a train run for the exclusive use of a certain class of persons, with knowledge of its character, and of the fact that he has no right to ride thereon, is not a passenger.⁴⁶ But a person who boards a special train or street car, not intended for his use, but that of an excursion party or other class of passengers to which he does not belong, becomes a passenger upon it, if he board

Hailey, 94 Tenn. (10 Pickle) 383, 29 S. W. 367, 27 L. R. A. 549.

Texas.—Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; San Antonio, etc., R. Co. v. Lynch (Tex. Civ. App.), 40 S. W. 631; Texas, etc., R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Texas, etc., R. Co. v. Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331.

Virginia.—Virginia, etc., R. Co. v. Roach, 83 Va. 375, 5 S. E. 175.

42. No intention to become passenger.—Metropolitan West Side Elevated Ry. Co. v. Sutherland, 139 Ill. App. 85.

43. United States.—Dysart v. Missouri, etc., R. Co., 58 C. C. A. 592, 122 Fed. 228, 8 R. R. R. 197, 31 Am. & Eng. R. Cas., N. S., 197.

Georgia.—Western, etc., R. Co. v. Turner, 28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842.

Indiana.—Baltimore, etc., R. Co. v. Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

Iowa.—Gradert v. Chicago, etc., R. Co., 109 Iowa 547, 80 N. W. 559, 20 Am. & Eng. R. Cas., N. S., 118.

Missouri.—Burke v. Missouri Pac. R. Co., 51 Mo. App. 491; McGee v. Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; Wagner v. Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156.

Pennsylvania.—Arnold v. Pennsylvania R. Co., 28 Am. & Eng. R. Cas. 189, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542; Ham v. Delaware, etc., Canal Co., 142 Pa. 617, 21 Atl. 1012; Lake Shore, etc., R. Co. v. Rosenzweig, 26 Am. & Eng. R. Cas. 489, 113 Pa. 519, 6 Atl. 545.

Texas.—International, etc., R. Co. v. Gilbert, 64 Tex. 536; Texas, etc., R. Co.

v. Black, 87 Tex. 160, 27 S. W. 118; St. Louis, etc., R. Co. v. White (Tex. Civ. App.), 34 S. W. 1042; Gary v. Gulf, etc., R. Co. v. Rather, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.; St. Louis, etc., R. Co. v. Pruitt (Tex. Civ. App.), 79 S. W. 598, affirmed in 98 Tex. 630, no op.

Utah.—Everett v. Oregon, etc., R. Co., 9 Utah 340, 34 Pac. 289.

West Virginia.—Boggess v. Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

Wisconsin.—Boehm v. Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

44. Mistake.—Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144.

On wrong train by mistake.—A person who, by mistake, gets on a different train from the one he intended taking passage on is a passenger on the train he boards. Columbus, etc., R. Co. v. Powell, 40 Ind. 37; International, etc., R. Co. v. Gilbert, 64 Tex. 536.

45. Lake Shore, etc., R. Co. v. Rosenzweig, 6 Atl. 545, 113 Pa. 519, 26 Am. & Eng. R. Cas. 489.

46. Special train.—Fitzgibbon v. Chicago, etc., R. Co., 108 Iowa 614, 14 Am. & Eng. R. Cas., N. S., 270, 79 N. W. 477.

Contractor's employee on train intended for use of railroad's employees.—A person in the service of a contractor engaged in getting out timbers for a railroad, who, with his fellow workmen, rides on a train which is intended only for the use of the railroad employees, knowing that no other persons are allowed to ride on it without the consent of the superintendent, paying no fare, but using the train as an accommodation, in going to and returning from his work, is not to be regarded as a passenger. McCauley v. Tennessee, etc., R. Co., 93 Ala. 357, 9 So. 611.

it in the reasonable belief that he has the right to ride upon it, and is expressly or impliedly accepted as a passenger by its conductor.⁴⁷

Person Accepted as Passenger on Special Train or Car.—And a person allowed to ride on a special train, who has no notice of any want of authority to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor to defraud the company of its fare, is a passenger.⁴⁸ So if a person boards a special excursion train in good faith, believing that the conductor knows that he is not a member of the excursion, but has a right to accept him as a passenger, and that the conductor so accepts him, the relation of carrier and passenger is established.⁴⁹ Or if a person enters a special street car chartered by a particular person, and tenders the amount of his passage, with the knowledge and consent of the conductor, who intends to transport him to his destination, the carrier thereupon waives the right to insist that he is not a passenger.⁵⁰

§ 2161. Boarding Train Not Stopping at Destination.—Where a person knows, or should know, that a train does not stop at his destination, he does not, as a general rule, become a passenger by boarding it,⁵¹ for he has no right on a train which, under the rules of the carrier, does not stop at the station, for which he purchased a ticket.⁵² And where a person who has purchased a railroad ticket for a certain station, without making any inquiries or ascertaining what trains stop at the station to which he desires to go, subsequently takes his seat in a train which does not stop at such station, and refuses to pay his fare, on demand of the conductor, to the next station at which the train is to stop, and also refuses to leave the train when requested to do so by the conductor after he has stopped it at a suitable place for that purpose, such person is a trespasser.⁵³

47. Alabama.—Lawrence *v.* Kaul Lumber Co., 171 Ala. 300, 41 R. R. R. 141, 64 Am. & Eng. R. Cas., N. S., 141, 55 So. 111.

Iowa.—Fitzgibbon *v.* Chicago, etc., R. Co., 119 Iowa 261, 6 R. R. R. 680, 29 Am. & Eng. R. Cas., N. S., 680, 93 N. W. 276; Gradert *v.* Chicago, etc., R. Co., 109 Iowa 547, 80 N. W. 559, 20 Am. & Eng. R. Cas., N. S., 118.

Maine.—Dunn *v.* Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

Missouri.—Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156.

New York.—Schurr *v.* Houston, 10 N. Y. St. Rep. 262.

South Carolina.—McCarter *v.* Greenville Tract. Co., 72 S. C. 134, 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5, 15 S. E. 545.

Utah.—Everett *v.* Oregon, etc., R. Co., 9 Utah 340, 34 Pac. 289.

48. Person allowed on special train—Fare immaterial if no fraud.—Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156.

Mixed train specially ordered out on Sunday—Authority of conductor—Absence of collusion.—In Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156, it is held that where a mixed train, run only during the week for the carriage of freight and passengers, was ordered out

on Sunday, made up in the usual way and operated by the same conductor and trainmen as during the week, and the conductor in charge permitted a person to take passage thereon, the latter, in the absence of any notice of the conductor's want of authority to do so, and without any collusion between him and the conductor to defraud the company of its fare, whether he paid fare or not, became a passenger of defendant.

49. Acceptance or special excursion—Good faith.—Fitzgibbon *v.* Chicago, etc., R. Co., 119 Iowa 261, 6 R. R. R. 680, 29 Am. & Eng. R. Cas., N. S., 680, 93 N. W. 276.

50. Fare accepted on chartered car.—McCarter *v.* Greenville Tract. Co., 72 S. C. 134, 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5, 51 S. E. 545.

51. Train not stopping at destination.—Texas, etc., R. Co. *v.* White, 4 Texas App. Civ. Cas., § 259, 17 S. W. 419; Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 34 Am. & Eng. R. Cas., 290, 17 Pac. 54, 5 Am. St. Rep. 780; Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611.

52. Has no right on such trains.—Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611.

53. Refusal to pay fare or alight.—Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290, 17 Pac. 54, 5 Am. St. Rep. 780.

Boarding Through No Fault of His Own.—Where a person goes to a station to take passage on a train to a certain other station, and finds the ticket office closed, if he gets upon a train without a ticket, and without the knowledge that the train does not stop at his station, he is entitled, by payment of the fare to the next regular stopping station, to remain upon the train as a passenger.⁵⁴

Person on Wrong Train Through His Own Negligence—Ticket Punched.—The mere purchase of a ticket to a certain station does not create a contract on the part of the railroad company to carry the passenger on a train which does not stop there; and it may be negligence in the passenger to get on such train, yet if he does so, the taking and punching of his ticket by the conductor, after examining it, so that he can not ride on another train, is sufficient acceptance of him as a passenger.⁵⁵

Boarding Train Sometimes Stopping at Destination.—A person entering a train knowing that it sometimes stopped at the station to which he was destined can not be regarded as a trespasser until he has been notified by the conductor that it would not stop, and failed to comply with the conductor's requirements to leave at a station before reaching his destination, or go to the one beyond.⁵⁶

Statute Construed.—A person who carelessly enters a train, which he should know does not stop at his destination but which he hopes will stop either there or near there, and who has a ticket to such destination which he offers to the conductor, is a passenger, within the meaning of a statute which provides that if any passenger shall refuse to pay his fare the conductor may put him out of the cars at any "usual stopping place" he shall select, and is entitled to damages where he is ejected for nonpayment of fare at a place other than a usual stopping place.⁵⁷

§§ 2162-2165. Vehicle Not Designed for Passengers—§ 2162. In General.—A person who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him.⁵⁸ So where a person enters a special train not run for the accommodation of passengers but to carry provisions and pay the employees of the carrier, knowing the character of the train, and without the consent of the carrier or its agents, he is not a passenger but a trespasser.⁵⁹

Rule Abrogated by Carrier.—Where the rule against carrying passengers on freight trains has been impliedly abrogated by the carrier, by nonobservance of which it is chargeable with notice, one on such train in the belief that he has a right to obtain transportation on it, and with the intention to pay fare

54. **Boarding train through no fault of his own.**—Baltimore, etc., R. Co. v. Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166.

55. **Boarding wrong train—Punching ticket.**—Schurr v. Houston, 10 N. Y. St. Rep. 262.

56. **Train stopping sometimes at destination.**—Baldwin v. Grand Trunk R. Co., 128 Mich. 417, 23 Am. & Eng. R. Cas., N. S., 117, 87 N. W. 380.

57. **Passenger within statute.**—St. Louis, etc., R. Co. v. Harper, 69 Ark. 186, 21 Am. & Eng. R. Cas., N. S., 77, 61 S. W. 911, 53 L. R. A. 220.

58. **Vehicle not designated for transportation of passengers.**—Purple v. Union Pac. R. Co., 51 C. C. A. 564, 3 R. R. R.

711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700; White v. Illinois Cent. R. Co., 99 Miss. 651, 55 So. 593, 41 R. R. R. 520, 64 Am. & Eng. R. Cas., N. S., 520.

Through freight train.—One entering a train, such as a through freight train, which he knows or has reason to believe is not to carry passengers, and upon which the rules of the company forbid passengers—to ride, is not legally a passenger. Kruse v. St. Louis, etc., R. Co., 97 Ark. 137, 39 R. R. R. 376, 62 Am. & Eng. R. Cas., N. S., 376, 133 S. W. 841; Morris v. Georgia R., etc., Co., 131 Ga. 475, 62 S. E. 579.

59. **Train for carrying provisions—Pay car.**—Southwestern Railroad v. Singleton, 66 Ga. 252.

upon demand, can hold the carrier responsible for injuries sustained by him while on such train, to the same extent as if it were a passenger on an ordinary passenger train.⁶⁰ And if it is the custom of a freight train to carry passengers, though forbidden by the carrier's rules to do so, of which rules there is no notice given save on the time table for the use of trainmen, and if one knowing of the custom, but not of the rules, enters the caboose of such train to be carried, and has no notice of such rules until after the train has started, he becomes a passenger, and can not be ejected if he offers to pay his fare.⁶¹ So where one is lawfully in the cab of a freight train of a railroad, treating for passage, as has frequently been done, and is still being done at the time by other persons on the same train, as to an injury inflicted upon him by the conductor he stands within the reason and spirit of the authorities in reference to like injuries done to passengers.⁶²

Boarding by Direction of Proper Agent.—Where a person is directed by the agents of the railroad company, whose duty it is to inform passengers which trains they should enter, to take passage on a freight train, he becomes a passenger, although, under the rules of the carrier, which are unknown to him, passengers are not permitted to ride on freight trains.⁶³

Boarding Freight by Mistake—Good Faith.—A person having a ticket for passage upon a railroad, who boards a freight train which does not carry

60. Abrogation of rule against carrying passengers on freight trains.—*Secord v. St. Paul, etc., R. Co.*, 5 McCrary 515, 18 Fed. 221; *Burke v. Missouri Pac. R. Co.*, 51 Mo. App. 491; *Jones v. Wabash, etc., R. Co.*, 17 Mo. App. 158; *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *International, etc., R. Co. v. Irvine*, 64 Tex. 529; *Everett v. Oregon, etc., R. Co.*, 9 Utah 340, 34 Pac. 289; *Lucas v. Milwaukee, etc., R. Co.*, 33 Wis. 41, 14 Am. Rep. 735.

Boarding freight train in good faith.—In *Boehm v. Duluth, etc., R. Co.*, 91 Wis. 592, 65 N. W. 506, it is held that when a railroad company ordinarily carries passengers upon its freight trains, if a passenger in good faith boards such a train, and is not informed to the contrary before the train leaves, he becomes a passenger, and is entitled to ride to the next station, if there was nothing in the situation or condition of the train by which he might infer that it did not carry passengers. See also, *Lucas v. Milwaukee, etc., R. Co.*, 33 Wis. 41, 14 Am. Rep. 735.

Cars only suitable for freight—Custom—Implied assent.—In *Texas, etc., R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118, it is held that a conductor of a freight train, made up of cars suitable alone for carrying freight, without authority from any company expressly or impliedly given, can not receive passengers upon such train and thereby bind the railroad as a carrier of passengers. But such assent may be inferred if the railroad permits its freight trains to carry passengers, or if its servants receive and carry passengers on such trains and such acts are known or should be known to the management of the railroad.

Mere knowledge of former assump-

tions of authority by brakemen.—But no inference would arise that a brakeman on a freight train had authority to agree to carry passengers merely because his employer knew that such acts were done. *Missouri, etc., R. Co. v. Huff*, 98 Tex. 110, 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, 81 S. W. 525.

Not chargeable with notice that train was not for passengers.—It appeared that defendant's ticket office was not opened for the sale of passenger tickets except at or about the times of the departure of regular passenger trains, though passengers were allowed to be carried on some of its freight trains, and it did not appear that the trains last mentioned came to the passenger platform, nor that there was any thing in the external appearance of the caboose in question to indicate that it was not adapted to carry passengers. It was held that plaintiff was not chargeable with notice that the train in question would not carry him as a passenger, from the fact that it was not brought to the platform, nor from the fact that its caboose was not convenient for passengers, nor from his knowledge that the ticket office was not open at or about the time of the departure of such train. *Lucas v. Milwaukee, etc., R. Co.*, 33 Wis. 41, 14 Am. Rep. 735.

61. Custom—Notice of rules.—*Burke v. Missouri Pac. R. Co.*, 51 Mo. App. 491.

62. In car of freight train treating for passage—Custom—Assault by conductor.—*Western, etc., R. Co. v. Turner*, 72 Ga. 292, 28 Am. & Eng. R. Cas. 455, 53 Am. Rep. 842.

63. Direction of proper agent.—*McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706, see *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser.⁶⁴

Mistaking Nature of Freight Train.—Where a railroad company allows passengers to ride on regular freight trains, but not on "extras," and a person in good faith boarded a train which is in fact an "extra," but to all appearances similar to a regular freight, and is allowed by the conductor to ride thereon, he is to be regarded as a passenger to whom the company is liable as a carrier for injuries received while on such train.⁶⁵

Under Statute.—Under a statute providing that local freight trains shall carry passengers, one who boards a freight train with the consent of the conductor and pays his fare to him has the right to presume that the train is a local one.⁶⁶

On Train by Special Permit.—One holding a permit to ride on a freight train while on his way to the yards of a company to board a caboose which does not carry passengers except by special permission is not a passenger being transported over the road within Cobbey's Ann. St. 1903, § 10,039, and the duty which the company owes to him is only that of ordinary care.⁶⁷

§ 2163. Acceptance or Invitation by Trainmen.—Under ordinary circumstances, one can not become a passenger on a train not intended for passengers, or used as such, through the unauthorized conduct of the conductor or other trainman.⁶⁸ In some cases it is held that one who boards a freight

64. Boarding freight by mistake.—Bogess v. Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

65. Passengers allowed on regular freights—"Extras" of similar appearance.—Simmons v. Oregon R. Co., 41 Ore. 151, 4 R. R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896, 69 Pac. 440.

Section foreman on extra freight train
—**Payment of fare—Good faith.**—In Everett v. Oregon, etc., R. Co., 3 Utah 340, 34 Pac. 289, it appeared that plaintiff, a section foreman of defendant railroad, got upon a train to go to a certain point, on account of sickness in his family, and, without knowing it boarded an extra freight train, because the passenger train had gone, and paid the conductor of the train one dollar, which was less than the regular fare, although plaintiff did not know it, and the conductor told him to get into a box car, claiming that the caboose was full, and afterwards the same man helped him out of such car into the caboose. Shortly after this he was badly injured because of freight cars being violently and negligently driven by a switch engine against the caboose. The train was one forbidden by the rules of the railroad to carry passengers, which fact plaintiff did not know, but thought it was a regular freight train which was in the habit of carrying passengers. It was held that plaintiff was on the train in good faith as a passenger.

66. Under statute—Local freight.—Arkansas, etc., R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550.

67. Special permit.—Chicago, etc., R. Co. v. Mann, 78 Neb. 541, 111 N. W. 379. The party, who makes an arrangement to be carried on a freight train, impliedly

agrees to accept and be satisfied with such accommodations as regards carriages and seats, and the places of entering and leaving the carriages, as may be found in the usual course of the business. The company, considered as owners of the road or as carriers, is not in either case bound to make landings or provisions for the reception or discharge of passengers where none are expected to be. The duties and obligations to parties are construed reasonably, with reference to the nature of their business. Chicago, etc., R. Co. v. Mann, 78 Neb. 541, 111 N. W. 379; Murch v. Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631; Oviatt v. Dakota Cent. R. Co., 43 Minn. 300, 45 N. W. 436; Chicago, etc., R. Co. v. Troyer, 70 Neb. 293, 103 N. W. 680.

68. Alabama.—Lawrence v. Kaul Lumber Co., 171 Ala. 300, 41 R. R. R. 141, 64 Am. & Eng. R. Cas., N. S., 141, 55 So. 111.
Indiana.—Chicago, etc., R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444.

Kansas.—St. Joseph, etc., R. Co. v. Wheeler, 26 Am. & Eng. R. Cas. 173, 35 Kan. 185, 10 Pac. 461.

Louisiana.—Candiff v. Louisville, etc., R. Co., 42 La. Ann. 477, 7 So. 601; Reary v. Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

Minnesota.—Janny v. Great Northern R. Co., 63 Minn. 380, 65 N. W. 450; McNamara v. Great Northern R. Co., 61 Minn. 296, 63 N. W. 726; Grimshaw v. Lake Shore, etc., R. Co., 98 N. E. 762, 205 N. Y. 371, 40 L. R. A., N. S., 563, affirming judgment 125 N. Y. S. 626, 140 App. Div. 687.

Oklahoma.—Atchison, etc., R. Co. v. Johnson, 3 Okla. 41, 41 Pac. 641.

Tennessee.—Louisville, etc., R. Co. v.

train is not entitled to the rights of a passenger, notwithstanding any conduct of the conductor towards him, unless the railroad company has by its conduct led the public to believe that passengers will be carried on such trains for hire or otherwise.⁶⁹ Where there are no rules forbidding the transportation of persons on other than cars generally devoted to passenger service, but passengers are sometimes taken upon such cars, a person who enters such cars as a passenger by invitation of the agents in charge of them, or with the intention of paying fare when demanded, is lawfully there, and is entitled to all the rights of a regular passenger,⁷⁰ and it may be generally stated that a person may be a passenger on a freight train, with all the ordinary rights of that relation, if he is upon it in good faith, and is accepted as a passenger by one whom he

Hailey, 94 Tenn. (10 Pickle) 383, 29 S. W. 367, 27 L. R. A. 549.

Texas.—Gulf, etc., R. Co. v. Campbell, 41 Am. & Eng. R. Cas. 100, 76 Tex. 174, 13 S. W. 19; St. Louis, etc., R. Co. v. White (Tex. Civ. App.), 34 S. W. 1042, following Texas, etc., R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Missouri, etc., R. Co. v. Huff, 98 Tex. 110, 81 S. W. 525, 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, reversing 78 S. W. 249; Texas, etc., R. Co. v. Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331; Grahn v. International, etc., R. Co., 100 Tex. 27, 93 S. W. 104, 5 L. R. A., N. S., 1025, 123 Am. St. Rep. 767; Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

Washington.—Fischer v. Columbia, etc., R. Co., 52 Wash. 462, 32 R. R. R. 175, 55 Am. & Eng. R. Cas., N. S., 175, 100 Pac. 1005.

Persons riding on trains not intended for passengers, contrary to the carriers rules, are not passengers, but trespassers, and even when riding by permission of the trainmen are bare licensees. White v. Illinois Cent. R. Co., 99 Miss. 651, 41 R. R. R. 520, 64 Am. & Eng. R. Cas., N. S., 520, 55 So. 593.

Invitation of conductor.—One riding on a railroad train, free of charge, by the "invitation and permission" of the conductor is not a passenger. Stalcup v. Louisville, etc., R. Co., 16 Ind. App. 584, 45 N. E. 802.

On freight train by invitation of conductor.—In Smith v. Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753, it is held that a person who goes aboard a freight train by the invitation and permission of the conductor can not be regarded as a passenger, where it does not appear that the company, either by its usage, rules or regulations, permit passengers to travel on freight trains.

Attempting to enter cab of locomotive of freight train by invitation of conductor.—A person who attempts to get into the cab of a locomotive attached to a train used exclusively for the transportation of freight, to ride for his own convenience, by invitation of the conductor of the train, does not acquire the rights of a passenger. Files v. Boston, etc., R.

Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411.

Persons riding on switch engines at invitation of engineer not a passenger.—Wilcox v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379.

69. Authority of conductor.—Arkansas, etc., R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Texas, etc., R. Co. v. Black, 87 Tex. 160, 27 S. W. 118.

The conductor on a freight train has no right to receive passengers, in the absence of actual authority or authority implied from custom, and, if he does so, his employer does not thereby become a common carrier of passengers. Bergan v. Central Vermont R. Co., 74 Atl. 937, 82 Conn. 574; Neice v. Chicago, etc., R. Co., 98 N. E. 989, 254 Ill. 595, 41 L. R. A., N. S., 162.

Vehicle not intended for passengers.—Conductor's authority.—It is not within the power of a conductor or other trainman to permit a person to become a passenger upon a vehicle not intended for the carriage of passengers. Chicago, etc., R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444.

On coal train by conductor's invitation.—Promise of employment as brakeman.—In Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 7 Am. R. Rep. 67, 15 Am. Rep. 513, it appeared that plaintiff was invited by the conductor of a coal train to ride upon the train with the promise to get him employment as a brakeman; that no passenger cars were attached to the train, but aside from the coal cars, simply a "caboose" for the accommodation of the railroad's employees, in which plaintiff was invited to and did ride; that, by a regulation of the railroad, passengers were forbidden to ride on coal trains, but of this plaintiff had no notice. It did not appear that passengers were either habitually or occasionally permitted to ride in the caboose. It was held that there was nothing indicating authority in the conductor to create between the parties the relation of passenger and carrier.

70. In absence of rule forbidding riding on freight.—Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

has the right to believe has sufficient authority.⁷¹ The rule in some states is that if one takes passage on a train or in a car not provided for passengers, without being advised that he is not permitted to ride on such train or car, he may recover for injuries sustained as a passenger while so riding.⁷² But the rule is different if he has no right so to believe, or is informed to the contrary.⁷³

71. Good faith of person riding on freight.—*Hazard v. Chicago, etc., R. Co.*, 1 Biss. 503, Fed. Cas. No. 6275; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Richmond v. Southern Pac. Co.*, 41 Ore. 54, 67 Pac. 947, 57 L. R. A. 616, 93 Am. St. Rep. 694; *Western, etc., R. Co. v. Turner*, 28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285; *Lucas v. Milwaukee, etc., R. Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Everett v. Oregon, etc., R. Co.*, 9 Utah 340, 34 Pac. 289; *Crawleigh v. Galveston, etc., R. Co.*, 67 S. W. 140, 28 Tex. Civ. App. 260.

On freight train by conductor's permission.—Where an agent of the railroad company, such as the conductor of a freight train, permits a person to ride on a freight train, which is forbidden by the rules of the company to carry passengers, if such person acted in good faith in taking passage on the freight train, he is entitled to all the rights of a passenger. *Everett v. Oregon, etc., R. Co.*, 9 Utah 340, 34 Pac. 289.

Private freight car attached to passenger train in violation of rules—Owner assuming all risks.—Where at the request of the owner of a freight car, the agents of a railroad company attached such car to a passenger train contrary to the "instructions and rules" of the company, he agreeing "to run all risks," it was held that he was entitled to the rights of a passenger, so far as injury to him from the negligence of the railroad's employees was concerned. *Lackawanna, etc., R. Co. v. Chenewith*, 52 Pa. 382, 91 Am. Dec. 168.

Freight train—Order issued by trainmaster without authority—Both conductor and passenger acting in good faith.—In *Dysart v. Missouri, etc., R. Co.*, 58 C. C. A. 592, 122 Fed. 228, 8 R. R. R. 197, 31 Am. & Eng. R. Cas., N. S., 197, it appeared that a trainmaster, who had no authority to permit passengers to ride on freight trains without the order of the superintendent, but whose duty it was to issue orders to that effect to conductors when directed to do so by the superintendent, and whose orders the conductors were required to obey without question, issued an order to a conductor without authority from the superintendent to carry a physician on his freight train, and the conductor did so. Neither the conductor nor the doctor knew, or had reasonable cause to believe, that the trainmaster had violated his duty and issued the order without authority

from the superintendent. It was held that the doctor was a passenger while riding on the train by virtue of such order.

72. The general rule.—*Washburn v. Nashville, etc., R. Co.* 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

Ignorance of conductor's lack of authority.—In *Alabama, etc., R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447, it is held that a person riding on a train without paying fare, by permission of the conductor, is not a trespasser though the train is not intended and operated for the carriage of passengers, and though the conductor has no authority to permit such person to so ride, unless he knew that the conductor exceeded his authority in granting the permission.

Saloon car of freight train—Acceptance of fare—Violation of rule.—One who enters the saloon car of a freight railway train, and when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, is entitled to the rights of a passenger. *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, 4 Am. Rep. 267.

73. Illinois Cent. R. Co. v. Meacham, 91 Tenn. (7 Pickle) 428, 19 S. W. 232; *Trotlinger v. East Tennessee, etc., R. Co.*, 79 Tenn. (11 Lea) 533, 13 Am. & Eng. R. Cas. 49; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245; *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, 41 Am. & Eng. R. Cas. 100; *McVeety v. St. Paul, etc., R. Co.*, 45 Minn. 268, 47 N. W. 809, 47 Am. & Eng. R. Cas. 471, 11 L. R. A. 174, 22 Am. St. Rep. 728; *San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App.), 40 S. W. 631; *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

On freight train by arrangement with conductor—Rule known to both.—Plaintiff was not a passenger on defendant's freight train, if he rode by arrangement with the conductor, contrary to a rule of the company known to both. *Greenfield v. Detroit, etc., R. Co.*, 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

Where a former employee of a railroad asking permission to ride on a freight train knowing that it was against the rules, and was refused and succeeded by collusion with the conductor in getting permission to ride on the freight train, he was a trespasser, and not a passenger. *Youmans*

A regulation disallowing passengers on a freight train is a reasonable one, and the conductor of a freight train, in the absence of assumed or proven authority, is not to be presumed as authorized to disregard it, and if instead of assuming such authority, the conductor tells a person desiring to take passage that he did not have the authority, and then is induced by such person to take him on the train in violation of such rule, and in disregard of his obligations to the company, such person does not thereby become a passenger.⁷⁴ If a person who has been refused passage upon a freight train by the conductor, is subsequently permitted to board the train by a man with a lantern employed on the train, his presence upon the train is not with the consent of the railroad.⁷⁵

Failure to Eject—Mere Acquiescence.—The fact that the conductor of a freight train after discovering a person in the caboose did not eject him, did not constitute the latter a passenger.⁷⁶ Nor does the mere fact that the conductor requests such a person to ride in or on another car constitute him a passenger.⁷⁷ An invitation by implication to ride on freight trains is not sustained by omission of the flagman and trainmen to drive away boys who attempted to steal a ride while the train is passing a street crossing.⁷⁸

Payment of Fare on Freight Train under Collusive Agreement.—Of course, a person can not become a passenger by boarding a freight train and paying a cash fare, under a collusive agreement between himself and a trainman.⁷⁹

v. Wabash R. Co., 127 S. W. 595, 143 Mo. App. 393.

Chargeable with knowledge.—And in *Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700, it is held that one about to board a train who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers is chargeable with knowledge of all the facts which a reasonably diligent inquiry would discover.

Boy on freight train by conductor's consent.—In *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331, it is held that if a rule of the railroad company, in good faith, forbade persons being carried on freight trains, and the conductor of a freight train had no authority to relax the rule, and a boy thirteen years old took passage upon the train with a knowledge of these facts, the consent of the conductor would not make him a passenger.

Freight train—Fare accepted—Ignorance of rule—Burden of proof.—And in *St. Louis, etc., R. Co. v. White* (Tex. Civ. App.), 34 S. W. 1042, it is held that the fact that the conductor of a freight train accepted fare from a person riding thereon does not render the railroad liable to him as a passenger, where it is not shown that the latter was ignorant of a rule of the company forbidding passengers to ride on freight trains, or that it was the custom for its freight trains to carry passengers. See also, *Texas, etc., R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

74. Effect of notice of conductor's authority.—*Louisville, etc., R. Co. v. Hailey*,

94 Tenn. (10 Pickle) 383, 29 S. W. 367, 27 L. R. A. 549.

75. Permission by trainmen after conductor's refusal.—*Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, 41 Am. & Eng. R. Cas. 100.

76. Failure to eject.—*Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

77. Request by conductor to leave coach and ride on car loaded with stone—Fare not demanded.—Defendant operated a railway to a stone quarry, and ran a train whenever necessary to carry stone. Plaintiff's intestate boarded a train standing at the quarry, and took a seat in a coach ahead of the engine, and after riding three-quarters of a mile the conductor requested him to ride on a car loaded with stone, because he desired to place the coach on a side track. The conductor did not demand any fare, and there was no evidence that the company was in the habit of carrying passengers on their trains. It was held that intestate was not a passenger. *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20, 22 Am. & Eng. R. Cas., N. S., 1, 60 N. E. 694.

78. Mere omission to drive boys away from train.—*Mehalek v. Minneapolis, etc., R. Co.*, 105 Minn. 128, 117 N. W. 250.

79. Payment of fare on freight under collusive agreement.—*Kruse v. St. Louis, etc., R. Co.*, 97 Ark. 137, 39 R. R. R. 376, 62 Am. & Eng. R. Cas., N. S., 376, 133 S. W. 841; *Mendenhall v. Atchison, etc., R. Co.*, 66 Kan. 438, 6 R. R. R. 685, 29 Am. & Eng. R. Cas., N. S., 685, 71 Pac. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380; *Brevig v. Chicago, etc., R. Co.*, 64 Minn. 168, 66 N. W. 401; *Atchison, etc., R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Rucker v. Missouri Pac. R. Co.*, 61 Tex.

Brakeman's Authority.—A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of carriage; and his permission to a person to ride on the train does not make such person a passenger.⁸⁰ Nor does a person by paying money to a brakeman on a freight train become a passenger, it not being within the scope of authority, apparent or real, of a brakeman to collect fare.⁸¹

Baggage Master's Authority.—It is not within the scope of the employment of a baggage master connected with a railroad train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a coach of such train; and permission given in such circumstances can not create the relation of carrier and passenger between the company and the person thus riding on the train.⁸²

Construction or Wreck Train.—As the conductor in charge of a construction train is the representative of the railroad company and the manager of the train, his action in receiving passengers upon such train and collecting fares from them ordinarily entitles them to the rights of passengers.⁸³ But one who, with full knowledge of the circumstances, contracts with its conductor to be carried as a passenger on a special train, made up and used for the purpose of going to and returning from a wreck on the company's line, to and from the wreck, and who pays fare for his passage in going, has no right to an action *ex delicto* against the company for its breach of the contract to furnish him return transportation, for the company is under no legal obligation to receive and transport passengers on such train.⁸⁴

Hand Car Used for Employees.—A person being transported on a hand car which is used by the railroad for the convenience of its employees, and on which the carrying of passengers is forbidden by the rules of the railroad, does not occupy toward the company the relation of passenger, though he may be ignorant of such rules, when such carrying is not done by an authorized agent of the company, but by those in charge of the hand car for the

499; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Texas, etc., R. Co. *v.* Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331.

Told by brakeman to keep concealed.

—One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops and keep out of sight, and who follows such instructions, is not a passenger. *Mendenhall v. Atchison, etc., R. Co.*, 66 Kan. 438, 6 R. R. R. 685, 29 Am. & Eng. R. Cas., N. S., 685, 71 Pac. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380.

80. Brakeman's authority.—*Candiff v. Louisville, etc., R. Co.*, 42 La. Ann. 477, 7 So. 601; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; *Galaviz v. International, etc., R. Co.*, 15 Tex. Civ. App. 61, 38 S. W. 234; *Missouri, etc., R. Co. v. Huff*, 98 Tex. 110, 81 S. W. 525, 13 R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, reversing 78 S. W. 249.

81. Paying money to brakeman.—*McNamara v. Great Northern R. Co.*, 61 Minn. 296, 63 N. W. 726.

On freight car by invitation of brakeman—Paying less than regular fare.—One who on the invitation of the brakemen of a freight train, who have no au-

thority to receive passengers or collect their fares, takes passage in an exclusively freight car, loaded with freight, paying to the brakemen less than the regular fare, is not a passenger, and the railroad owes him no duty as such. *Janny v. Great Northern R. Co.*, 63 Minn. 380, 65 N. W. 450.

82. Baggage master's authority.—*Reary v. Louisville, etc., R. Co.*, 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

83. Construction train.—*Chicago, etc., R. Co. v. Frazer (Kan.)*, 2 Am. & Eng. R. Cas., N. S., 206.

Boy permitted to ride on construction train in violation of instruction.—Where a boy asked and obtained permission to ride upon a construction train from the conductor, who had been instructed by the railroad company not to permit passengers to ride on his train; but this instruction had not been communicated to the boy, it was held that though the boy was not entitled to the care due a passenger for hire, the railroad was bound to the exercise of reasonable care and diligence toward him. So held in *St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185, 26 Am. & Eng. R. Cas. 173, 10 Pac. 461.

84. Wreck train—Return passage refused.—*Du Bose v. Louisville, etc., R. Co.*, 121 Ga. 308, 15 R. R. R. 727, 38 Am. & Eng. R. Cas., N. S., 727, 48 S. E. 913.

purpose of doing other work.⁸⁵ But the rule may be otherwise where the agent who controls the car has authority to direct its use for such a purpose.⁸⁶ While the tender years of a person may excuse him, if he had occupied the relation of a passenger, from the effect of his own contributory negligence, it can not create that relation. It has been so held where an infant was injured while riding on a hand car at the invitation of employees of the company, but in violation of the rules of the company.⁸⁷

§ 2164. Presumption as to Status.—Where a person is discovered riding in a vehicle of a carrier, which he should have known, before entering it, was not designated or intended for the carriage of passengers, the presumption is that he is not lawfully thereon as a passenger.⁸⁸ Hence, in the absence of any rule or practice permitting such trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser.⁸⁹ And

85. On hand car.—*Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982.

Hand car—Authority of section foreman.—A section foreman on a railroad is not an agent of the company for the purpose of carrying passengers on a hand car; and a person riding on such car at the invitation of such foreman is a trespasser. *Rathbone v. Oregon R. Co.*, 40 Ore. 225, 1 R. R. 511, 24 Am. & Eng. R. Cas., N. S., 511, 66 Pac. 909.

86. On hand car to attend to business of interest to railroad—Authority of trainmaster—Question for jury.—In *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795, a suit for damages for personal injuries sustained by plaintiff when, upon a hand car at the request of an employee of the railroad, and he was acting on a dispatch from the trainmaster on business of interest to the company, it appeared that the rules of the company forbade the use of hand cars in carrying passengers; that such rules did not extend the authority of the trainmaster over the hand cars, but the testimony tended to show that the trainmaster was the representative of the railroad on that part of the road in respect to all matters connected with the use of the road. It was held not to be error that the court submitted to the jury and the jury to find that the trainmaster had authority to direct the use of the hand car and to the use in question; and that plaintiff was lawfully upon the hand car as a passenger.

Invitation by sectionman.—Plaintiff, a boy seven years old, was invited by certain of the sectionmen to get on a hand car for a ride. The foreman ordered the men to help the boy on the car, and told him to "hold on tight." He held on until the car had gone three or four hundred feet when he got dizzy, fell off, and was injured. Held, that he was not a passenger, but was either a licensee or a trespasser. *Daugherty v. Chicago, etc., R. Co.*, 137 Iowa 257, 114 N. W. 902, 28

R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558, 14 L. R. A., N. S., 590.

87. Child riding on invitation.—*Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982.

Child on hand car in violation of rule.—A child of tender years can not recover from a railroad for injuries received by him while riding on a hand car, caused by the negligence of its employees who were propelling the car, if the company's rules forbade such employees to take anyone on the hand car except an employee, and there was no custom to prevent persons to ride on the hand car shown to have been known to or acquiesced in by the railroad's officers. *Houston, etc., R. Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190.

88. Presumption.—*United States—Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700; *Dysart v. Missouri, etc., R. Co.*, 58 C. C. A. 592, 122 Fed. 228, 8 R. R. R. 197, 31 Am. & Eng. R. Cas., N. S., 197; *Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314.

Colorado.—*Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

Georgia.—*Morris v. Georgia R., etc., Co.*, 131 Ga. 475, 62 S. E. 579.

Indiana.—*Smith v. Louisville, etc., R. Co.*, 124 Ind. 394, 24 N. E. 753.

New York.—*Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513, 7 Am. R. Rep. 67.

Texas.—*Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

On trains palpably not designed for passengers—Authority of employees.—In *Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314, it is held that the presumption of law is that persons riding upon trains which are palpably not designed for the transportation of persons, are not lawfully there.

89. Riding on freight trains—Absence of rule.—*Purple v. Union Pac. R. Co.*, 51

in an action to recover for the death of one riding on such a train, in violation of the company's rules forbidding the carrying of passengers on freight trains, the burden of showing that the attitude the company assumed toward deceased was that of a carrier of passengers was on plaintiff.⁹⁰ And the mere fact that a person was found in the caboose attached to a freight train is not sufficient of itself to warrant a court in assuming that the railroad had undertaken, as to him, the duties and obligations of a carrier of passengers.⁹¹ But where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employees in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown.⁹² And where a statute provides that local freight trains shall carry passengers, there is no presumption that a person riding on a freight train is not a passenger.⁹³

Presumption Rebuttable.—But the carrier through its proper officers having the right to make such rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them as dispensed with, when not practically enforced.⁹⁴ And such a presumption may be rebutted by showing that notwithstanding the existence of such rule, yet, with the knowledge of the railroad company and without objection on its part, persons are habitually permitted to take passage upon such trains.⁹⁵ But it is not overcome by proving any number of former trespasses, by riding upon the train.⁹⁶

§ 2165. Presumption as to Trainmen's Authority.—If persons are permitted to ride upon railroad trains which are obviously not designed for the transportation of persons, by the consent of the carrier's employees, the presumption is against the authority of such employees to bind the railroad by such consent,⁹⁷ and the burden of showing such fact rests upon the person seeking to establish the relation of carrier and passengers.⁹⁸ And it is held

C. C. A. 564, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700.

If, by the rules of the railroad company, passengers are expressly forbidden to be carried upon a particular train, the presumption is that any one claiming to be a passenger upon such a train is an intruder and without lawful right to be there. *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; *International, etc., R. Co. v. Hanna* (Tex. Civ. App.), 58 S. W. 548, see 94 Tex. 691, no op.

90. Burden of proof—Violation of rule.—*San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. 517.

On work train in violation of rule.—In *International, etc., R. Co. v. Hanna* (Tex. Civ. App.), 58 S. W. 548, it is held that a person, not an employee of the railroad, riding on a work train in violation of a rule forbidding passengers to be carried on work trains, is presumed to be a passenger. *Bergan v. Central Vermont R. Co.*, 74 Atl. 937, 82 Conn. 574.

Person riding on freight trains.—*Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

Persons riding on hand cars.—*Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982; *International, etc., R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635.

91. Mere fact of riding in caboose.—*Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

92. Drovers upon cattle trains.—*Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314.

93. Statute providing for riding on local freights.—*Kruse v. St. Louis, etc., R. Co.*, 97 Ark. 137, 133 S. W. 841, 39 R. R. R. 376, 62 Am. & Eng. R. Cas., N. S., 376.

94. Presumption rebuttable.—*Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

95. *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas., 152; *Houston, etc., R. Co. v. Moore*, 49 Tex. 64 Tex. 144, 21 Am. & Eng. R. Cas., 152; *Co. v. Morgan*, 98 S. W. 408, 44 Tex. Civ. App. 155.

Where passengers are forbidden to ride on a hand car they are presumed to be there unlawfully; this is rebuttable by showing a contrary custom. *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

96. Proof of former trespasses.—*International, etc., R. Co. v. Hanna* (Tex. Civ. App.), 58 S. W. 548.

97. Presumption as trainmen's authority.—*Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314.

98. Burden of proof.—A person claiming to be a passenger on a freight train by an arrangement with the conductor

that the presumption that one who is permitted by an employee of the railroad company to ride upon a construction train is not lawfully thereon may be overcome by special circumstances implying the authority of such employee to grant such privilege.⁹⁰ Although the rules of a carrier prohibit a brakeman on freight trains from inviting passengers to board the same or collect fares, yet, if he exercises such authority with the knowledge of the company's officers, or has openly and habitually exercised it for such a length of time that the officers, by the exercise of ordinary care, might have known it, knowledge will be imputed to the company, and it will be responsible for such brakeman's acts.¹

§ 2166. Relation as Affected by Position Occupied.—In general, it may be said that a person does not become a passenger on a railway train until he has come under the charge of the carrier by boarding, or attempting to board, at its invitation, a car thereof used or held out by it for the transportation of passengers. The relation of passenger and carrier is one of contract, and requires the assent of both parties. To become a passenger, one must put himself in charge of the carrier, with the bona fide intention of being carried, and the carrier must receive and accept him as such.² Of course there is hardly ever any formal act by the passenger in putting himself in the care of the carrier, or by the carrier in accepting him as a passenger, but these relations are commonly implied from the circumstances. The railway company holds itself out as ready to receive as passengers all who are willing to be governed by its rules and regulations, and who present themselves at the proper place, at a proper time, and in a proper manner. By providing certain cars attached to a train for the carrying of passengers, the company impliedly invited all persons desiring to be transported to enter such cars, and one who accepts such invitation in good faith becomes a passenger without any further act on the part of the company. The providing of such cars, however, manifests an intention on the part of the company not to accept a person as a passenger who in boarding the train voluntarily enters one of its cars or vehicle which

has the burden of showing the conductor's authority to make such an arrangement. *Bergan v. Central Vermont R. Co.*, 74 Atl. 937, 82 Conn. 574.

On coal car—Authority of brakeman.—Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on a coal car, it was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on such car, but the burden was on plaintiff to prove such facts. *Missouri, etc., R. Co. v. Huff*, 98 Tex. 110, 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, 81 S. W. 525.

99. Evidence to show authority.—*Rosenbaum v. St. Paul, etc., R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653.

Former railroad employee accepted on construction train—Good faith—Permit required—Conductor's apparent authority.—Plaintiff, who had formerly been a railroad employee, when passengers were carried on all trains, purchased a ticket, and was accepted by the conductor of a construction train as a passenger thereon, which was against defendant's orders, ex-

cept on official permit, of which plaintiff had no notice. Plaintiff knew nothing about the construction train, except he had ridden thereon before as a passenger, and that other passengers were on the train when he took it. Construction trains were not on defendant's passenger time tables, but two other freight trains were, and the train in question looked like an ordinary freight train, except that it carried only a single car. It was held that the conductor had such apparent authority to accept plaintiff as a passenger, and as such he could recover for injuries caused by defendant's negligence. *Spence v. Chicago, etc., R. Co.*, 117 Iowa 1, 3 R. R. R. 822, 26 Am. & Eng. R. Cas., N. S., 822, 90 N. W. 346.

1. Brakeman's authority—Custom.—*Missouri, etc., R. Co. v. Huff* (Tex. Civ. App.), 78 S. W. 249, judgment reversed in 81 S. W. 525, 98 Tex. 110.

2. Place of getting on car.—*Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153; citing *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, 58 Am. & Eng. R. Cas. 1; *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 149, 61 Am. St. Rep. 68.

is obviously not intended for the carriage of passengers, even though he may have been at the station for the purpose of traveling on the train, and has a ticket entitling him to ride." ³ And the rule is that a person does not become a passenger upon a train or street car by boarding it at a part of it not intended for the reception of passengers, without the express or implied invitation or consent of one having sufficient authority. ⁴ A person who gets on a blind

3. Car obviously not intended for passengers.—*Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

4. Boarding wrong part of car.—*Devine v. Chicago, etc., R. Co.*, 162 Ill. App. 243.

Indiana.—*Chicago, etc., R. Co. v. Field*, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444; *Udell v. Citizens' St. R. Co.*, 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

Massachusetts.—*Files v. Boston, etc., R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411.

North Carolina.—*McGraw v. Southern R. Co.*, 135 N. C. 264, 47 S. E. 758.

Oregon.—*Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, 75 Pac. 212.

Tennessee.—*Mobile, etc., R. Co. v. Bogle*, 101 Tenn. 40, 46 S. W. 760; *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25.

On steps leading to locked vestibule—Ignorance of rule.—In *Yancy v. Boston Elevated R. Co.*, 205 Mass. 162, 35 R. R. 705, 58 Am. & Eng. R. Cas., N. S., 705, 91 N. E. 202, 26 L. R. A., N. S., 1217, it is held that plaintiff was technically a trespasser, where, in ignorance of its rule, whereby entrance to the car could be had only by the rear right-hand door, and the other door to the rear vestibule was kept locked, she, for the purpose of becoming a passenger, got on the rear left-hand steps leading to such vestibule.

Plaintiff's presence on defendant's street car was not wrongful, in the sense of an intentional invasion of its possession and control, where, in ignorance of its rule whereby entrance to the car could be had only by the rear right-hand door, and the other door to the rear vestibule was kept locked, she, for the purpose of becoming a passenger, got on the rear left-hand steps leading to such vestibule. *Yancy v. Boston Elevated R. Co.*, 91 N. E. 202, 205 Mass. 162, 26 L. R. A., N. S., 1217, 35 R. R. R. 705, 58 Am. & Eng. R. Cas., N. S., 705.

Running board or steps of car.—One entering a car with the intention of paying fare when called upon, and occupying a place provided for carrying passengers, becomes a passenger by such act; but not where he takes position in a part of the car not provided for carrying passengers, as upon the steps or running

board of a street car which has unoccupied seats inside. *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350, followed in *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, distinguished. *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25, reversing 78 S. W. 1085.

Boy on step of front platform of electric car—Closed door—Collision with wagon.—In *Barlow v. Jersey City, etc., R. Co.*, 67 N. J. L. 364, 51 Atl. 463, it appeared that a lad nearly twelve years, without invitation, express or implied, got upon the step of the front platform of a moving electric street car, meaning to become a passenger on the car. Access to the platform was barred by a closed door; the place provided for ingress to the car being at the rear platform. He rapped on the door and the motorman looked toward him but did not open the door, or stop the car or lessen its speed. The car struck a wagon and the boy was thrown off and injured. It was held that plaintiff, in an action against the railway for his injuries, was properly nonsuited, because he was not a passenger, but a mere trespasser.

Boy standing on side of crowded street car—Bars to prevent ingress or egress on that side—Not seen by employees—Fall.—A boy eight and one-half years of age being unable to get into an open electric street car on account of its crowded condition, stood on the side of the car not intended for passengers, and on which strips were placed to prevent the ingress or egress of passengers, with his feet on the boxing of the axle, and held on to a seat with his hands. He rode in a stooped position three-fourths of a mile, when, being unable to retain his hold, he fell and was run over by the wheels of the car. None of the employees of the train saw the boy hanging on the car when it was in the act of starting nor while under way, but might have seen him if they had made an examination of that part of the car. Plaintiff did not pay his fare, but intended to do so when called upon. It was held that plaintiff was not a passenger upon defendant's car. *Udell v. Citizens' St. R. Co.*, 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

Boy sitting upon street car platform with feet on step—Presumption.—And in *Jackson v. St. Paul City R. Co.*, 74 Minn. 48, 76 N. W. 956, it appeared that a boy

baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger, for injuries received by being pulled off the train by the conductor.⁵ And a person who in a fancied emergency, mounts the engine to prevent his being left behind by the train, loses his right to that high degree of care that the law accords to passengers riding in the coaches, and can claim nothing more than the protection due a trespasser on the train.⁶ But it has been held that one who boarded a passenger train able and intending in good faith to pay his fare, was a passenger, though in his hurry, the train being already in motion, he got on the front platform of an express car, where the conductor could not reach him without stopping the train. And where a car which bears the sign, "Not in Service," is stopped at a crossing and the doors are open, plaintiff, if he enters the car in good faith, is a passenger on the car and continues to be such until he is given a reasonable opportunity to alight.⁷

Payment of Fare to Brakeman.—Where a person enters the front platform of an express car, and, after the train has started, pays to a brakeman the fare to his proposed destination, and remains on the platform of the express car until, when a short distance from his destination, he is discovered by the conductor and ejected from the train, he is not a passenger but a trespasser.⁸

Taking Position Assigned by Agent.—A conductor, of course, has charge of the train, and has authority to assign passengers to cars and seats. Ordinarily, if he directs a passenger to take a certain place on the train, the passenger may obey him without losing his status as a passenger, or being guilty of contributory negligence, as a matter of law, unless, perhaps, the place is so obviously unsafe and dangerous that no reasonably prudent person would consent to occupy it, even if directed to do so.⁹ But a conductor's mere knowledge that a person is riding at an unsuitable or exposed place on the train, or one he knows is not designed for carrying passengers, does not make the person a passenger, or charge the carrier with that high degree of care toward him

eight years and four months old got upon the rear platform of a street car, intending to ride thereon to his home, several blocks distant; and the motorman, who was also conductor, knew that the boy was on the car. It was held that merely getting upon the car and sitting down upon the platform with his feet on the step was not prima facie evidence that the boy was a passenger.

Riding on engine by invitation of engineer.—A person intending to take, as a passenger, a freight train, was told by the conductor that it would leave in about ten minutes. He went some distance from the train, and, returning in about five minutes, found the train ready to start. Fearing that he would be unable to reach the caboose, he accepted the engineer's invitation to board the engine, and while riding thereon was injured. It was held that he was a passenger. *Fischer v. Columbia, etc., R. Co.*, 52 Wash. 462, 32 R. R. R. 175, 55 Am. & Eng. R. Cas., N. S., 175, 100 Pac. 1005.

One permitted by the engineer to ride on the back of the engine held not a lawful passenger without reward, within Civ. Code Cal., § 2096, but merely a trespasser, so that the defendant's only liability was to exercise ordinary care to prevent injuring him after discovery of his peril.

Roberts v. Southern Pac. Co. (Mo. App.), 150 S. W. 717.

Municipal fireman riding on running board.—A municipal fireman permitted to ride free on the platforms of street cars, while riding on the running board of a car in violation of a known rule of the carrier, was not a passenger, but at most a mere licensee, to whom the company owed no duty except to refrain from intentionally injuring him. *Twiss v. Boston Elevated R. Co.*, 208 Mass. 108, 40 R. R. R. 556, 63 Am. & Eng. R. Cas., N. S., 556, 94 N. E. 253, 32 L. R. A., N. S., 728.

5. Blind baggage.—Possession of ticket. —*McGraw v. Southern R. Co.*, 135 N. C. 264, 47 S. E. 758.

6. Fancied emergency.—Mobile, etc., R. Co. *v. Bogle*, 101 Tenn. 40, 46 S. W. 760.

Boarding platform of express car train in motion.—Missouri, etc., R. Co. *v. Williams (Tex. Civ. App.)*, 40 S. W. 350.

7. Car "not in service."—*Ahern v. Minneapolis St. R. Co.*, 102 Minn. 435, 113 N. W. 1019.

8. Payment of fare to brakeman.—Chicago, etc., R. Co. *v. Field*, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444.

9. Radley v. Columbia, etc., R. Co., 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

which he owes to one whom it has accepted and agreed to transport as a passenger.¹⁰ Where one has, by entering a car provided by a railway company for that purpose, become in fact a passenger, he perhaps does not lose such status by assuming a dangerous position on the train, assigned him by the direction or consent of the employees in charge thereof, although under such circumstances he may even be guilty in some instances of such contributory negligence as would preclude a recovery.¹¹ Before the principle can apply, however, he must first become a passenger, and he does not assume that relationship by voluntarily boarding an engine, which is obviously not designed for the carriage of passengers.¹²

Occupying Position Through Necessity.—The fact that one is riding upon the platform of a street car, or steam railroad car, through necessity, does not prevent him from being entitled to all the care and protection ordinarily due a passenger.¹³ So a person who is permitted by the conductor to ride on the bumper of a street car because of its crowded condition is a passenger.¹⁴ And where a train of street cars is so crowded inside the cars as not to admit of others entering, but it continues to stop at each stopping place, and others are allowed to get on, a person who gets on and stands outside the vestibule is a passenger, though he has not been seen by the conductor, and though his fare has not been collected.¹⁵

Presumption as to Status.—As the relation of carrier and passenger is created only by contract, express or implied, the presumption is that one riding out of the place provided by a railroad company for passengers is not a passenger, or, if such, that he has assumed the increased risk from riding there.¹⁶

§§ 2167-2178. Relation as Affected by Possession of Ticket or Payment of Fare—§ 2167. In General—Proper Ticket.—Carriers of passengers are responsible for injuries to passengers, who are received as such by the agent of the carrier, whether they pay their fares or not,¹⁷ if no refusal

10. *Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

The mere silent acquiescence of the conductor in not objecting when he finds a person riding on a part of the train not designed for passengers does not make such person a passenger. *Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, 75 Pac. 212; *Virginia, etc., R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175.

11. *Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, citing *Brown v. Scarboro*, 97 Ala. 316, 12 So. 289, 58 Am. & Eng. R. Cas. 364; *Willmot v. Corrigan Consol. St. R. Co.*, 106 Mo. 535, 17 S. W. 490; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

12. *Radley v. Columbia, etc., R. Co.*, 44 Ore. 332, 75 Pac. 212, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, citing *McGucken v. Western, etc., R. Co.*, 77 Hun 69, 28 N. Y. S. 298; *Virginia, etc., R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Robertson v. New York, etc., R. Co. (N. Y.)*, 22 Barb. 91.

13. **On car platform through necessity.**—*Birmingham R., etc., Co. v. Bynum*, 139 Ala. 389, 13 R. R. R. 683, 36 Am. & Eng.

R. Cas., N. S., 683, 36 So. 736; *Choate v. Missouri Pac. R. Co.*, 67 Mo. App. 105.

14. **Riding on bumper.**—*Kirkpatrick v. Metropolitan St. R. Co.*, 143 S. W. 865, 161 Mo. App. 515.

15. **Crowded car—Fare not collected.**—*Birmingham R., etc., Co. v. Bynum*, 139 Ala. 389, 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683, 36 So. 736.

16. **Presumptions as to status.**—*Chicago, etc., R. Co. v. Thurlow*, 178 Fed. 894, 102 C. C. A. 128, 38 R. R. R. 546, 60 Am. & Eng. R. Cas., N. S., 546, 30 L. R. A., N. S., 571.

17. **Fare or ticket.**—*Hunt v. Southern R. Co.*, 40 Mass. 391; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111, 41 R. R. R. 141, 64 Am. & Eng. R. Cas., N. S., 141; *Wabash R. Co. v. Jellison*, 124 Ill. App. 652; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; *St. Louis, etc., R. Co. v. Fowler (Tex. Civ. App.)*, 93 S. W. 484.

Persons riding on shipper's pass, see post, § 2172.

Mere failure to pay fare does not deprive one riding on a street car of his

to pay has taken place, and there is no evidence impugning the bona fide of the intention of one who has boarded a car,¹⁸ as the exaction of fare by a railroad company is not essential in every case to make one riding on its cars a passenger,¹⁹ and it may be waived by the carrier.²⁰ And the acceptance of a ticket, fare or transfer is an acceptance of the person as a passenger.²¹ If a transfer is accepted by the conductor in lieu of a fare, he can recover for breach of the contract of carriage without proving that the transfer was good.²²

Failure to Request Fare.—When one gets upon a street car for the purpose of becoming a passenger expecting and willing to pay fare, he becomes a passenger for hire, although the conductor, owing to the crowded condition of the car, may fail to collect the fare from him.²³

Sufficiency of Payment or Tender.—A railroad is not justified in refusing to convey a passenger already admitted into its cars, where the journey has commenced, who, upon demand of his fare, tenders only legal tender notes in payment, as in such case the contract is already made and in process of performance, and the kind of money to be paid is no longer an open question.²⁴ And where a person on a train has no money to pay his fare, but other passengers offer to pay it, he thereby becomes a passenger.²⁵ An offer to pay fare to a trainman who is unauthorized to receive fares is not an offer to the company, and does not entitle the person to the rights of a passenger who has paid his fare.²⁶

Proper Ticket—Knowledge of Facts.—A person who enters a train having a ticket which he believes to be good and to entitle him to ride on the train, is not a trespasser, and is entitled to be treated as a passenger until he is notified

rights as a passenger, nor does it convert his relation to the owner into that of a mere licensee. *Gabbert v. Hackett*, 135 Wis. 86, 115 N. W. 345, 14 L. R. A., N. S., 1070.

Where one, although he has paid no fare, is on a car with the knowledge and permission of the person in charge thereof, he may be a passenger. *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315, 28 Am. & Eng. R. Cas. 157; *Sherman v. Hannibal, etc., R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423; *Buck v. People's St. R., etc., Co.*, 46 Mo. App. 555.

Upon whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. *Walther v. Southern Pac. Co.*, 159 Cal. 769, 116 Pac. 51, 41 R. R. R. 466, 64 Am. & Eng. R. Cas., N. S., 466, 37 L. R. A., N. S., 235.

18. Good faith of passenger determined.—*Petersen v. Elgin, etc., Tract. Co.*, 142 Ill. App. 34, judgment affirmed in 87 N. E. 345.

One who enters and takes passage in a street car with the consent of the company, and does not refuse to pay fare, is not a trespasser. *Gabbert v. Hackett*, 135 Wis. 86, 115 N. W. 345, 14 L. R. A., N. S., 1070.

19. Fare not essential.—*Gregory v. Georgia Granite R. Co.*, 132 Ga. 587, 64 S. E. 686.

20. Waiver of fare.—*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.

The voluntary waiver of all claim for compensation for carriage of a person does not take away the status of common carrier with respect to such person. *Walther v. Southern Pac. Co.*, 159 Cal. 769, 116 Pac. 51, 41 R. R. R. 466, 64 Am. & Eng. R. Cas., N. S., 466, 37 L. R. A., N. S., 235.

21. Effect of acceptance of fare.—If a person upon a traction car gives to a conductor a transfer slip and receives from him another, then the relation of passenger and carrier is established. *Hickey v. Chicago City R. Co.*, 148 Ill. App. 197.

Where the evidence in an action by a passenger for injuries establishes prima facie the payment of fare by the plaintiff, the relation of passenger and carrier is prima facie established. *Coburn v. Moline, etc., R. Co.*, 149 Ill. App. 132, judgment affirmed 90 N. E. 741.

22. Transfer in lieu of fare.—*Kohn v. Nassau Electric R. Co.*, 117 N. Y. S. 231.

23. Failure to request fare.—*Cogswell v. West St., etc., R. Co.*, 5 Wash. 46, 31 Pac. 411.

24. Payment or tender—Sufficiency thereof.—*Tarbell v. Central Pac. R. Co.*, 34 Cal. 616.

25. Other person offering to pay fare.—*Randell v. Chicago, etc., R. Co.*, 102 Mo. App. 342, 76 S. W. 493.

26. Offer to pay trainmen.—*Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457.

that his ticket is not good and he refuses to pay his fare.²⁷ And such person is a passenger from the time he tenders his fare, and is entitled to all of the indulgences which the law accords persons in that relation.²⁸ And a person boarding a train in good faith, believing that his ticket is good, is a passenger, and the carrier requiring him to disembark owes him a duty as such.²⁹ When a person purchases a railroad ticket, no irrebuttable presumption arises that he is informed as to the rule and regulation of the company prohibiting the use of such tickets on certain trains, when no such prohibition appears on its face. If, in such case, without knowledge of such regulation, he takes passage upon a prohibited train, he must be treated as a passenger who by mistake has got upon a train on which, by his contract, he is not entitled to travel.³⁰ If a person without knowledge that under the rules of the railroad his ticket is not good for passage, enters a railway train, he is not a trespasser, but must be treated as a passenger who by mistake has entered a train upon which by his contract he is not entitled to ride.³¹

Ticket Paid for after Being Used.—A person who gets a ticket on his promise to pay therefor on his return, there not being time to pay before the starting of the train, and who thereafter makes such payment, is to be treated as a purchaser of the ticket in an action for his ejection from the train.³²

Ticket Purchased from Connecting Railroad.—The contract created between a railroad and a purchaser of one of its tickets, is the same, whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any authorized agent of the company.³³

Ticket Purchased of Scalper—What Law Governs.—Where one purchases a railroad ticket from a dealer outside the limits of the state who is not an authorized agent of the company, he may maintain an action in such state against the company for a refusal to carry him on such ticket, notwithstanding a statute of the state making it unlawful for an unauthorized person to sell railroad tickets within the state.³⁴

§ 2168. Prior to Payment of Fare.—Although a person on a train or street car has not purchased a ticket or paid his fare, if he is rightfully on the car or train he is entitled to all the rights of a passenger until he is in default with respect to the payment of his fare, after it has been demanded; it not being

27. Bona fide attempt to ride on invalid ticket.—*Gulf, etc., R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640.

28. Effect of tender of fare.—*Short v. St. Louis, etc., R. Co. (Mo. App.)*, 130 S. W. 488.

29. Central, etc., R. Co. v. Bagley, 173 Ala. 611, 55 So. 894.

30. Tickets acceptable only on certain trains.—*Lake Shore, etc., R. Co. v. Rosenzweig*, 26 Am. & Eng. R. Cas. 489, 113 Pa. 519, 6 Atl. 545.

31. No knowledge of rules—Valid ticket.—*Arnold v. Pennsylvania R. Co.*, 28 Am. & Eng. R. Cas. 189, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542. See also, *Ham v. Delaware, etc., Canal Co.*, 142 Pa. 617, 21 Atl. 1012.

Expired coupon of round trip ticket—Offer to pay difference between fare and redeemable value.—But in *Arnold v. Pennsylvania R. Co.*, 28 Am. & Eng. R. Cas. 189, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542, it appeared that plaintiff boarded a train on defendant's road to make a return trip upon the return

coupon of a round trip ticket, good for a limited time only, and that time had expired when called upon for his ticket by the conductor, he offered the coupon, which was refused, and he then offered to pay the difference between its redeemable value and full fare, which was also refused, and the plaintiff expelled from the train. It was held that if he supposed that he was entitled to passage on such terms, he was not to be regarded as a trespasser, but merely as a passenger who has made a mistake; and that the question as to which capacity he occupied should have been submitted to the jury.

32. Ticket paid for after being used.—*Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

33. Ticket purchased from connecting railroad.—*Schopman v. Boston, etc., R. Corp. (Mass.)*, 9 Cush. 24, 55 Am. Dec. 41.

34. Ticket purchased of scalper—What law governs.—*Sleeper v. Pennsylvania R. Co.*, 100 Pa. 259, 9 Am. & Eng. R. Cas. 291, 45 Am. Rep. 380.

essential that the fare should be paid in advance or tendered to establish the relation of carrier and passenger. It is sufficient if one comes within the control and protection of the carrier in a proper way, with the intent to pay his fare upon demand.³⁵ Ordinarily, where a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded, unless his conduct should be such as to show that he was trying to evade a demand being made on him, by secreting himself or

35. Prior to payment of fare.—*United States*.—*Chicago, etc., R. Co. v. Lee*, 34 C. C. A. 365, 92 Fed. 318; *Second v. St. Paul, etc., R. Co.*, 5 McCrary 515, 18 Fed. 221.

Delaware.—*MacFeat v. Philadelphia, etc., R. Co.* (Del.), 6 Pen. 513, 30 R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254, 69 Atl. 744.

Georgia.—*Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848; *Western, etc., R. Co. v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; *Turner v. Western, etc., Railroad*, 69 Ga. 827.

Illinois.—*Cleveland, etc., R. Co. v. Scott*, 111 Ill. App. 234; *Illinois Cent. R. Co. v. O'Keefe*, 63 Ill. App. 102; *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958.

Massachusetts.—*Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110; *Hunt v. Southern R. Co.*, 40 Mass. 391; *Inness v. Boston, etc., R. Co.*, 168 Mass. 433, 47 N. E. 193, 9 Am. & Eng. R. Cas., N. S., 819.

Missouri.—*Albin v. Chicago, etc., R. Co.*, 103 Mo. App. 308, 77 S. W. 153; *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156.

New York.—*Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306.

North Carolina.—*Phillips v. Southern R. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163; *Snipes v. Norfolk, etc., R. Co.*, 144 N. C. 18, 23 R. R. 83, 46 Am. & Eng. R. Cas., N. S., 53, 56 S. E. 477.

North Dakota.—*Messenger v. Valley, etc., R. Co.*, 21 N. Dak. 82, 39 R. R. 127, 62 Am. & Eng. R. Cas., N. S., 127, 128 N. W. 1023, 32 L. R. A., N. S., 881.

Oregon.—*Simmons v. Oregon R. Co.*, 4 R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896, 69 Pac. 440, 41 Ore. 151.

Tennessee.—*Nashville, etc., R. Co. v. Messino*, 33 Tenn. (1 Sneed) 220; *Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

Texas.—*Missouri, etc., R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096.

Virginia.—*Norfolk, etc., R. Co. v. Galihier*, 89 Va. 639, 16 S. E. 935; *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

Washington.—*Cogswell v. West St., etc., R. Co.*, 5 Wash. 46, 31 Pac. 411.

Wisconsin.—*Lugner v. Milwaukee Elect. R., etc., Co.*, 131 N. W. 342, 146 Wis. 175, 41 R. R. 186, 64 Am. & Eng. R. Cas., N. S., 186.

In *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336, it is said in the opinion: "It is, however, urged that the plaintiff had paid nothing for his passage. This can make no difference, as the company had the right to demand the fare at the time he came upon the road, and upon failing to pay might have put him from the cars. Or they might have afterwards collected it, or, if the company was indebted to him * * * they could have deducted it from that indebtedness. But even if they were carrying him gratuitously it could make no difference in this case whether the plaintiff in error had paid for his passage, or whether he was there by permission to be carried without compensation, as it does not appear that he was there unlawfully."

Night watchman and gatekeeper on passenger car—Conductor's knowledge—Violation of rule—Status until refusal to pay fare.—A railroad employee having nothing to do with the operations of trains, but performing services at a station as night watchman and gatekeeper, who is permitted by the company to travel to and from his place of service on its trains, without payment of fare, is a passenger while thus on its trains, and is not deprived of his character as passenger, while so riding on his employer's train, by the fact that he was riding without pass or payment of fare, in violation of a well-known and reasonable rule of the company, it appearing that he was riding openly in a passenger car, with the knowledge of the conductor. And until such employee resists or refuses to comply with the reasonable demand of the company's servants in charge of the train to pay fare or leave the train, he remains a passenger. *Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

A person who enters a train with the honest purpose of securing a right to ride thereon is a passenger as a matter of law. *Cross v. Kansas City, etc., R. Co.*, 56 Mo. App. 664.

In order that the relation of carrier and passenger may exist, it is not necessary that the passenger should have purchased a ticket or have paid his fare, but it is sufficient if he is on the train with the intention of paying his fare. *Gardner v. Waycross, etc., R. Co.*, 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

otherwise; but, if he fails to pay after demand and opportunity to pay, the presumption ceases.³⁷ It follows that a passenger is one who enters the vehicle of a carrier with the intention of paying in money the usual fare or who is supplied with a ticket or pass entitling him to ride to a certain point,³⁸ since it can not be presumed at law that a demand of the carrier for payment of fare would not be complied with.³⁹ A person who goes to a flag station on a railroad at which there is no ticket office, for the purpose of boarding a train, is, upon properly signifying an intention to get upon a passenger train which has stopped, entitled to the rights of a passenger.⁴⁰ And although a railroad company requires fare for all children over five years old, the fact that a father purchases no ticket for his child six years old, will not bar recovery for injury causing his death; and whether or not he knew that a ticket was required is immaterial.⁴¹ Where there is evidence that the person was willing to pay his fare when requested, the question as to his relation is for the jury.⁴² And it has been held that proof of payment of fare was not essential to establish the relation of passenger and carrier between the plaintiff and the defendant street railway company, where the plaintiff entered the car in the usual way, conducted herself as a passenger, and was conveyed as such from where she boarded the car to where she was injured in attempting to alight.⁴³ But where one boards a railroad train without any intention to pay fare for his transportation, he does not become a passenger.⁴⁴ And where it can not be found as matter of law that plaintiff intended in good faith to pay his fare, a charge assuming that he was a passenger is erroneous.⁴⁵ But the mere fact that a per-

37. Presumption of intention.—*Broyles v. Central, etc., R. Co.*, 166 Ala. 616, 52 So. 81.

38. Passenger.—*Holt v. Hannibal, etc., R. Co.*, 87 Mo. App. 203; *Ruch v. Aurora, etc., R. Co.*, 150 Ill. App. 329, petition stricken out for certiorari. *Aurora, etc., R. Co. v. Ruch*, 243 Ill. 474, 90 N. E. 924; *Powell v. St. Louis, etc., R. Co.*, 229 Mo. 246, 129 S. W. 963; *International, etc., R. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350; *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, 15 R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25, reversing 78 S. W. 1085; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179; *Missouri, etc., R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096, see 93 Tex. 691, no op.; *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780, affirmed in 98 Tex. 614, no op. See, also, *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277; *St. Louis, etc., R. Co. v. Fussell* (Tex. Civ. App.), 97 S. W. 332.

39. Presumption.—*Cleveland, etc., R. Co. v. Scott*, 111 Ill. App. 234.

40. No ticket office.—*Western, etc., R. Co. v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655.

41. No ticket for child.—*Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

42. Merely getting upon train platform at night, and killed before seen by conductor—Ready to pay fare—Question for jury.—Where the evidence showed that decedent and another got upon a plat-

form of a passenger train about 10 o'clock at night, attempting to ride to a certain junction one mile distant, the fare for which was five cents; that the conductor did not see them on the platform; and that they did not offer to pay fares, though the person with decedent testified they were ready and willing to pay the fares, and expected to do so when the conductor should ask for them, whether decedent was a passenger was a question for the jury. *St. Louis, etc., R. Co. v. Sanderson*, 99 Miss. 148, 41 R. R. 193, 64 Am. & Eng. R. Cas., N. S., 193, 54 So. 885.

43. Proof of payment not essential.—*West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958.

44. Boarding without intention to pay.—*Gates v. Quincy, etc., R. Co.*, 102 S. W. 50, 125 Mo. App. 334; *Lugner v. Milwaukee Elect. R., etc., Co.*, 131 N. W. 342, 146 Wis. 175, 41 R. R. 186, 64 Am. & Eng. R. Cas., N. S., 186.

45. Alighting from moving street car without paying fare—Good faith.—Plaintiff, a minor, and his friends boarded the running board of a street car, intending only to ride a short distance, and then to continue their journey by wagon. Plaintiff had money, and agreed to pay the fare for both. Plaintiff claimed that, after signaling the car to stop, the car slowed up but slightly, and then began to run faster, and he believing it would not stop, stepped off and was injured. It was held that it could not be found, as a matter of law, that plaintiff, in good faith, intended to pay his fare, and hence it was error, in the instructions, to as-

son rides on the platform of a train to avoid paying his fare does not deprive him of the right to become a passenger if he pays the regular fare when demand is made, and commits no breach of the peace.⁴⁶

Steamboat Passenger.—It is immaterial whether a person boarding a passenger boat, there being no binding rule requiring fare to be paid before the boat started, for the purpose of being carried on its trip pays the fare or not. If he goes on the boat meaning to pay his fare and be a passenger, the relation of carrier and passenger is formed, and lasts so long as he intends to pay his fare at any point of the trip.⁴⁷

Passenger on Connecting Roads.—A passenger who has been carried on the line of a railway in a passenger car which company switches off upon the line of a connecting railway, sustains the relation of passenger to such connecting railway company during the time the car is stationed and he remains in it, if according to the usual course of business that company is accustomed to receive presently cars so delivered to it, couple them to its trains and carry them over its own line, and this it true whether the passenger, at the time of being injured, has procured a ticket or paid his fare for a passage over the connecting line or not.⁴⁸

Requiring Ticket Prior to Entering Train.—Although a statute providing that all passengers who fail to procure tickets shall be transported at the rate charged for such tickets, does not prevent a carrier from enforcing reasonable rules refusing to permit persons without tickets to enter passenger trains, yet travelers must be given an opportunity to purchase tickets, and one given no such opportunity may become a passenger without one.⁴⁹ But where the law substantially provides that the purchase of a ticket is not a prerequisite to the relation of passenger and carrier, one who in good faith goes to a railroad station intending to take passage on one of the carrier's regular passenger trains, who is able and intends to pay his fare upon demand of the carrier, and who enters over the steps of a passageway to a passenger car, and through an unobstructed entrance which passengers may freely use, is a passenger, although he has not purchased a ticket, and did not enter at a place where an employee was stationed to inspect tickets, and he passed over to, and is found by such employee standing temporarily upon, the platform of a coach in which passengers were not permitted to ride.⁵⁰

Rules as to Freight Train Passengers.—A railroad company has the

sume that plaintiff was a passenger. *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25, 82 S. W. 649.

46. Right to become passenger by payment of fare.—*Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179.

47. Steamboat passenger.—*Bartlett v. New York, etc., Transp. Co.*, 57 N. Y. Super. Ct. 348, 8 N. Y. S. 309, 29 N. Y. St. Rep. 357.

On steamboat in good faith.—One who enters upon a steamboat in good faith to take passage thereon is there as a passenger, and the owner of the boat owes to him the duties of a carrier of passengers, although he has not paid his fare. *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306.

48. Passenger on connecting roads.—*Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848.

49. No opportunity to purchase ticket.—*St. Louis, etc., R. Co. v. Hammett*, 98 Ark. 418, 40 R. R. R. 702, 63 Am. & Eng. R. Cas., N. S., 702, 136 S. W. 191;

Missouri, etc., R. Co. v. Mills, 27 Tex. Civ. App. 245, 65 S. W. 74.

Failure to purchase ticket—Violation of carrier's regulations.—And in *Missouri, etc., R. Co. v. Mills*, 27 Tex. Civ. App. 245, 65 S. W. 74, it is held that those operating a passenger train do not owe to one attempting to board it unlawfully, without procuring a ticket as required by the company's regulations, the duty to assist him on, nor do they owe such trespasser a duty to prevent him from getting on.

50. Instruction and ability to pay fare—State law.—*St. Louis, etc., R. Co. v. Kilpatrick* (Ark.), 17 Am. & Eng. R. Cas., N. S., 212.

Under *Sayles' Civ. St.*, art. 4258b, § 9, fixing the rates to be charged by railroads for carrying passengers when the fare is paid to the conductor, one who in good faith boards a passenger train without a ticket, intending to pay his fare to the conductor, becomes a passenger. *Houston, etc., R. Co. v. Washington* (Tex. Civ. App.), 30 S. W. 719.

right to prescribe reasonable conditions for the admittance of passengers on its freight and cattle trains, and requiring the payment of a fare to their agents or the procurement of a ticket prior to taking passage is a reasonable condition.⁵¹ But such a condition can be waived.⁵²

§§ 2169-2173. Free Transportation—§ 2169. In General.—A person may be entitled to all the rights of a passenger though carried gratuitously. It is sufficient that he has been properly accepted as a passenger, even as a mere matter of favor.⁵³ The fact that a person is carried gratuitously is not sufficient to show that he is not entitled to the rights of a passenger. Thus, where in accordance with custom, a steamboat man is carried free,⁵⁴ or where, because of an injury sustained by a passenger in boarding a steamer, no fare is paid or demanded,⁵⁵ the person so carried is nevertheless entitled to the rights of a passenger. Upon whatever terms a common carrier voluntarily receives and carries a person the relation of common carrier and passenger exists, and the voluntary waiver of all claim for compensation for carriage of such person

51. Rules as to freight train passengers.—Cleveland, etc., R. Co. v. Bartram, 11 O. St. 457.

52. Condition waived.—Plaintiff, desiring to ship certain horses, stated to defendant's agent that he wanted to ride with them. He put the horses into the car, and, when the train arrived, told the conductor he wanted to ride with them. He was informed that he could, but would have to buy a ticket and sign his name. He went to the depot, with the conductor and other members of the train crew, and signed his name in a book; but the agent not being present, plaintiff did not buy a ticket, but boarded the car and was injured in switching operations before the train started. Held, that plaintiff was a passenger, though he did not have a ticket when injured. *Szczepanski v. Chicago, etc., R. Co.*, 147 Wis. 180, 132 N. W. 989.

53. Free transportation.—United States. —Indianapolis Tract., etc., Co. v. Lawson, 74 C. C. A. 630, 24 R. R. R. 219, 47 Am. & Eng. R. Cas., N. S., 219, 143 Fed. 834, 6 Am. & Eng. Ann. Cas. 666; *Steamboat New World v. King* (U. S.), 16 How. 469, 14 L. Ed. 1019; *Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314.

Alabama.—Lawrence v. Kaul Lumber Co., 171 Ala. 300, 55 So. 111, 41 R. R. R. 141, 64 Am. & Eng. R. Cas., N. S., 141.

Illinois.—Ohio, etc., R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336.

Indiana.—Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339; Indianapolis, etc., Co. v. Klentschy, 167 Ind. 598, 23 R. R. R. 64, 46 Am. & Eng. R. Cas., N. S., 64, 79 N. E. 908, 10 Am. & Eng. Ann. Cas. 869; Louisville, etc., R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869.

Louisiana.—Thompson v. Yazoo, etc., R. Co., 47 La. Ann. 1107, 17 So. 503.

Maryland.—Abell v. Western Maryland

R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Massachusetts.—Todd v. Old Colony, etc., R. Co. (Mass.), 3 Allen 18, 80 Am. Dec. 679; Wilton v. Middlesex R. Co., 125 Mass. 130.

Minnesota.—Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, Gil. 110, 18 Am. Rep. 360.

Missouri.—Buck v. People's St. R., etc., Co., 46 Mo. App. 555; Lemon v. Chancellor, 68 Mo. 340, 30 Am. Rep. 799; Muehlhausen v. St. Louis R. Co., 91 Mo. 332, 2 S. W. 315, 28 Am. & Eng. R. Cas. 157; Sherman v. Hannibal, etc., R. Co., 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423.

New York.—Nolton v. Western R. Corp., 15 N. Y. 444, 69 Am. Dec. 623, affirming 10 How. Prac. 97.

North Carolina.—McNeill v. Durham, etc., R. Co., 135 N. C. 682, 47 S. E. 765.

Texas.—Gulf, etc., R. Co. v. McGown, 65 Tex. 640; Gulf, etc., R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

54. Steamboat man carried gratuitously.—*Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019.

55. Person injured in boarding steamer—No fare demanded or paid.—When a woman has been severely injured in getting aboard a steamer, by the alleged carelessness of the servants of the boat, in putting out an improper sort of gang plank, the fact that she is unwilling to pay fare for her passage, and that the captain makes no demand of fare from her, is no release of her right of action against the owners of the boat for the injuries done to her, unless she at the time understands it to be so and consents that it shall be so. This is true even though the passage be one two days and a half long. *Packet Co. v. Clough* (U. S.), 20 Wall. 528, 22 L. Ed. 406.

does not take away the status, of common carrier with respect to such person.⁵⁶ It is enough, to fix the liability of a carrier for injuries occasioned by the negligence of its servants, that the passenger be lawfully on the train, whether by reason of having paid his passage money or by permission or invitation of officers or agents of the company,⁵⁷ and such a passenger is entitled to the same degree of care as if he had paid his fare.⁵⁸ So where a street railroad company offers the free use of its cars to take members of a woman's convention for a ride about the city, if the offer is accepted, the car being operated by regular employees of the company, such persons are passengers.⁵⁹

Stockholder of Road on Tour of Inspection.—A stockholder of a railroad company, taken over the road by the president to examine its condition, and of whom no fare is required, is entitled to the protection of a passenger.⁶⁰

§ 2170. Free Transportation to Small Children.—Where it is the custom of the carrier to allow small children to ride with older persons without paying fare, a child so riding free, without objection from the employee in

56. Waiver of claim for compensation.—*Walther v. Southern Pac. Co.*, 159 Cal. 769, 41 R. R. R. 466, 64 Am. & Eng. R. Cas., N. S., 466, 116 Pac. 51, 37 L. R. A., N. S., 235.

Same liability.—A carrier is liable to persons it accepts as passengers, and of whom it demands no fare, to the same extent as it is liable to persons who pay fare. *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339.

57. Lawfully on train.—*Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

Carried as mere favor.—The right which a railroad passenger has to be carried does not depend on his having made a contract, but the fact of his being in a car creates a duty on the part of the railroad to carry him safely. It is sufficient to enable him to maintain an action for negligence that he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him. *Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314.

Policeman carried free on street car—Unconstitutional ordinance.—A street railway carrying a police officer free of charges as required by a municipal ordinance is liable, as a carrier of passengers, for injuries sustained by him through the negligence of its motor-man in charge of the car though the ordinance is in conflict with Wash. Const., art. 2, § 39, and art. 12, § 20, prohibiting the granting of passes to officers. *Bradburn v. Whatcom County R., etc., Co.*, 45 Wash. 582, 22 R. R. R. 782, 45 Am. & Eng. R. Cas., N. S., 782, 88 Pac. 1020, 14 L. R. A., N. S., 526.

A policeman entered a street car in good faith believing that he had a right to ride free, and was permitted to ride because of a custom based on an ordinance requiring the free transportation of policeman, and paid no fare. Held, that he was a passenger, even if the ordi-

nance was void under the law prohibiting the granting of free transportation. *Gabbert v. Hackett*, 135 Wis. 86, 115 N. W. 345, 14 L. R. A., N. S., 1070.

Employee's wife and child riding without pass.—In *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277, it is held that the wife and child of an employee of the railroad, traveling to the point where her husband is at work, without a ticket or pass, is not a trespasser, and is within the protection of the law applicable to other passengers, although before she boarded the train the conductor had stated that he could not take her without a pass; that she was entitled to a pass, and ought to have it.

58. Same degree of care.—*Abell v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

59. Free cars for woman's conventions.—*Indianapolis, etc., Co. v. Klentschy*, 167 Ind. 598, 23 R. R. R. 64, 46 Am. & Eng. R. Cas., N. S., 64, 79 N. E. 908, 10 Am. & Eng. Ann. Cas. 869.

60. Stockholder of road on tour of inspection.—*Philadelphia, etc., R. Co. v. Derby (U. S.)*, 14 How. 468, 14 L. Ed. 502. See, also, *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408.

Where a suit was brought against a railroad company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that, if the plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances, that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars. *Philadelphia, etc., R. Co. v. Derby (U. S.)*, 14 How. 468, 14 L. Ed. 502.

charge of the train or street car, has the same right to recover against the carrier for injuries as an ordinary paying passenger.⁶¹ Hence, the fact that no fare is paid for a child by the person in charge of him upon the train does not deprive him of the character of a passenger, where he is riding with the knowledge of and without objection by the conductor or agent,⁶² there being no intention on the part of the person with him to defraud the carrier.⁶³

§§ 2171-2172. Persons Traveling on Pass—§ 2171. In General.—

The rule seems to be that the fact that a person is traveling upon a free pass will not prevent him from holding the carrier responsible for his wrongs to the same extent as if he were an ordinary passenger for hire.⁶⁴ So a person who is negotiating with a railroad for the sale of a patent and who accepts and uses a pass from the company in order that he may travel to see one of its officers with respect to the matter, is a passenger.⁶⁵ However, it has been held that in the

61. Free transportation of children.—*Ball v. Mobile, etc., R. Co.* 146 Ala. 309, 18 R. R. R. 614, 41 Am. & Eng. R. Cas., N. S., 614, 39 So. 584, 119 Am. St. Rep. 32; *Southern R. Co. v. Lee*, 30 Ky. L. Rep. 1360, 26 R. R. R. 285, 49 Am. & Eng. R. Cas., N. S., 285, 101 S. W. 307; *Austin v. Great Western R. Co.*, L. R. 2 Q. B., 442, 8 B. & S. 327, 36 L. J. Q. B. 201, 15 W. R. 863, 16 L. T. 320.

Small child on street car with mother—Custom.—A small child riding on a street car in company with his mother, who pays a fare for herself, is a passenger, although no fare is paid for such child, where there is a general custom on the part of the street railway not to charge fare for the carriage of small children. *Ball v. Mobile, etc., R. Co.*, 146 Ala. 309, 18 R. R. R. 614, 41 Am. & Eng. R. Cas., N. S., 614, 39 So. 584, 119 Am. St. Rep. 32.

62. Failure of conductor to object.—*Southern R. Co. v. Lee*, 30 Ky. L. Rep. 1360, 26 R. R. R. 285, 49 Am. & Eng. R. Cas., N. S., 285, 101 S. W. 307.

63. Child over statutory age injured—Age not questioned—No intention on part of mother to defraud.—By statute, railroad companies were bound to carry by certain trains children under three years of age without charge, and were entitled to half fare for children between three and twelve years of age. Plaintiff's mother carrying in her arms the plaintiff, a child of three years and three months, took a ticket for herself by one of these trains, but did not procure a ticket for the plaintiff. In the course of the journey an accident occurred through the negligence of the defendants, and plaintiff was injured. At the time plaintiff's mother bought her ticket, no question was asked by defendant's servants as to the age of the child, and there was no intention on part of the mother to defraud the company. It was held that the company was liable. *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442, 8 B. & S. 327, 36 L. J. Q. B. 201, 15 W. R. 863, 16 L. T. 320.

64. Free pass.—*Grand Trunk R. Co. v.*

Stevens, 95 U. S. 655, 24 L. Ed. 535; *In re California Nav., etc., Co.*, 110 Fed. 670; *Waterbury v. New York, etc., R. Co.*, 17 Fed. 671, 21 Blatchf. 314; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339; *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Todd v. Old Colony, etc., R. Co. (Mass.)*, 3 Allen 18, 80 Am. Dec. 679.

Holder of pass in officer's car by invitation.—In *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107, 17 So. 503, it appeared that plaintiff held an annual free pass over defendant's railroad; that he was on a trip by invitation in the officer's car and was not called upon to pay or show his ticket. It was held that he was a passenger in such car.

Person negotiating for adoption of patent coupling by railroad—Traveling at request and expense of railroad.—The owner of a patented car-coupling, for the adoption of which by a railroad company he was negotiating, went, at the request and expense of the company, to a point on its road to see one of its officers about the matter. A free pass was furnished by the company to carry him in its cars. During the passage, the car in which he was riding was thrown from the track by reason of the defective condition of the rails, and he was injured. It was held that he was a passenger for hire while riding on such pass. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535.

Valuable consideration.—A passenger riding on a free pass given for a valuable consideration has the same rights as a passenger for hire. *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115.

65. Person negotiating with road for sale of patent and riding on pass.—A., who was the owner of a patented car coupling, for the adoption and use of which by a railway company he was negotiating, went, at the request and ex-

absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. And under this decision the fact that a railroad may have failed properly to maintain a bridge so as to ensure the safety of persons traveling upon its trains, does not constitute evidence of the gross negligence necessary to sustain an action for damages for the death of a gratuitous passenger.⁶⁶

§ 2172. Drover's Pass or under Shipping Contract.—According to the weight of authority, a person riding on a drover's pass, or otherwise by virtue of a contract of shipment, in order to accompany live stock transported by the railroad company, is a passenger for hire,⁶⁷ and the carrier can not by special

pense of the company, to a point on its road to see one of its officers in relation to the matter. A free pass was furnished by the company to carry him in its cars. During the passage, the car in which he was riding was thrown from the track, by reason of the defective condition of the rails, and he was injured. Held, that the pass was given for a consideration, and that he was a passenger for hire. That, being such, his acceptance of the pass did not estop him from showing that he was not subject to the terms and conditions printed on the back of the pass, exempting the company from liability for any injury he might receive by the negligence of the agents of the company, or otherwise. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535.

66. Must be gross negligence—Evidence.—*Nightingale v. Union Colliery Co.*, 35 Can. Sup. Ct. 65.

67. Drover's pass or under shipping contract.—*United States*.—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Chicago, etc., R. Co. v. Williams*, 200 Fed. 207.

Arkansas.—*Little Rock, etc., R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10; *St. Louis, etc., R. Co. v. Loyd (Ark.)*, 150 S. W. 864.

Delaware.—*Flinn v. Philadelphia, etc., R. Co. (Del.)*, 1 Houst. 469.

Illinois.—*Chicago, etc., R. Co. v. Winthers*, 175 Ill. 293, 12 Am. & Eng. R. Cas., N. S., 93, 51 N. E. 901; *Illinois Cent. R. Co. v. Jennings*, 217 Ill. 140, 20 R. R. 15, 43 Am. & Eng. R. Cas., N. S., 15, 75 N. E. 457; *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 4 Am. & Eng. R. Cas., N. S., 174, 43 N. E. 809; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *Southern R. Co. v. Cullen*, 221 Ill. 392, 24 R. R. 195, 47 Am. & Eng. R. Cas., N. S., 195, 77 N. E. 470; *Illinois Cent. R. Co. v. Rothschild*, 134 Ill. App. 501.

Indiana.—*Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493; *Lake Shore, etc., R. Co. v. Teeters*, 166 Ind. 335, 24 R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36, 77 N. E. 599, 5 L. R. A., N. S., 425; *Ohio, etc., Co. v. Nickless*, 71 Ind. 271; *Ohio, etc., R. So. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719, 8 Am. R. Rep. 177.

Kentucky.—*Louisville, etc., R. Co. v.*

Bell, 100 Ky. 203, 8 Am. & Eng. R. Cas., N. S., 413, 38 S. W. 3; *Memphis, etc., Packet Co. v. Buckner*, 108 Ky. 701, 57 S. W. 482.

Maryland.—*Western Maryland R. Co. v. Shirk*, 95 Md. 637, 53 Atl. 969.

Michigan.—*Weaver v. Ann Arbor R. Co.*, 139 Mich. 590, 16 R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603, 102 N. W. 1037, 5 Am. & Eng. Ann. Cas. 764.

Missouri.—*Carroll v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. Cas. 268, 88 Mo. 239, 57 Am. Rep. 382.

New York.—*Pitcher v. Lake Shore, etc., R. Co.*, 55 Hun 604, 8 N. Y. S. 389, 28 N. Y. St. Rep. 647; *Poucher v. New York, etc., R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Smith v. New York, etc., R. Co.*, 24 N. Y. 222, affirming 29 Barb. 132.

Ohio.—*Cleveland, etc., R. Co. v. Curran*, 19 O. St. 1.

Pennsylvania.—*Goldey v. Pennsylvania R. Co.*, 30 Pa. 242, 72 Am. Dec. 703; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Rowdin v. Pennsylvania R. Co.*, 13 R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672, 57 Atl. 1125, 208 Pa. 623.

Texas.—*American Express Co. v. Ogles*, 36 Tex. Civ. App. 407, 81 S. W. 1023; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758.

Utah.—*Saunders v. Southern Pac. Co.*, 13 Utah 275, 44 Pac. 932.

West Virginia.—*Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

Servant of shipper riding on train to unload it.—Defendant ran its cars to and from a stock house of T., plaintiff's employer, for the purpose of unloading them there, it being agreed between defendant and T. that the cars, after being delivered and unloaded, were to be cleaned out by the servants of T., and the defendant should convey such servants on its cars to the place of unloading. It was held that plaintiff, in being so conveyed on defendant's cars as such servant of T., was a passenger of defendant, so that the negligence of defendant's engineer, through which plaintiff was injured while being so conveyed, was not that of a fellow servant. *Holmes v. Birmingham, etc., R. Co.*, 140 Ala. 208, 14 R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815, 37 So. 338.

contract exempt itself from liability for its own negligence or that of its servants.⁶⁸ A person traveling on what is designated a "drover's pass" is a passenger of the railroad company both in going with his stock and in returning on another train.⁶⁹ A shipper of live stock, who receives from the railroad company undertaking the transportation of his stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconvenience as necessarily attend upon caring for such stock; but, modified accordingly, the liability of the railroad to such shipper for personal injuries to him sustained by reason of the negligence of its employees, is that of common carrier of passengers for hire.⁷⁰ The rule that it is the duty of a railway company to have its station platform reasonably safe for persons accompanying an intending passenger who is about to take a train in the course of the regular passenger traffic, does not apply to the case of persons accompanying one who is about to leave in a freight car in charge of live stock.⁷¹

Consideration.—Where the common-law duty of a carrier to care for live stock in shipment is limited by its contract and a duty as to its care imposed upon the shipper, the consideration for the shipper's care is the carrier's agreement or duty to carry him as a passenger.⁷²

Who May Use—Stipulation.—A stipulation in the bill of lading of live stock that the shipper designated in it may accompany the stock on the freight train free of charge can be availed of only by him; and another, though assisting the shipper, and claiming an interest in the stock, who, without procuring a ticket or tendering his fare, also boards the train with the shipper, intending to ride free, does not thereby become a passenger.⁷³

No Name on Contract.—A person accompanying stock on a train to care for it, with the consent of the agent of the express company which was transporting the stock and of the conductor of the train, was a passenger, and entitled to protection as such, although his name did not appear on the written contract as an attendant who was to accompany the stock.⁷⁴

No Provision in Bill of Lading.—So where the agent of the carrier was told on making out the bill of lading that there was no one to accompany the shipment, and the bill was made out without provision for any one to accompany it, an agent of the shipper who had previously accompanied shipments under a provision of the bills of lading was not entitled to be in the car as a passenger.⁷⁵

Minors Traveling in Violation of Stipulation.—If a conductor of a train receives minors, knowing that they are traveling on a drover's pass as assistants

68. **Exemption from liability.**—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748. See post, "Limitation of Liability for Negligence," chapter 23.

69. **Passenger going and returning.**—Cleveland, etc., R. Co. v. Curran, 19 O. St. 1; Lake Shore, etc., R. Co. v. Hotchkiss, 24 O. C. C. 431.

70. **Nature of carrier's modified responsibility.**—Chicago, etc., R. Co. v. Troyer, 70 Neb. 287, 97 N. W. 308; Omaha, etc., R. Co. v. Crow, 47 Neb. 84, 66 N. W. 21.

One who under contract with a railroad company accompanies a shipment of live stock is not a passenger, within Cobbey's Ann. St. 1903, § 10,039, and, in an action for injuries received, the common law, and not the statutory rule of liability, applies. Riley v. Chicago, etc., R. Co., 78 Neb. 748, 111 N. W. 847.

71. Dowd v. Chicago, etc., R. Co., 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917.

72. **Consideration of contract.**—Pittsburg, etc., R. Co. v. Brown (Ind.), 97 N. E. 145.

73. **Who may use—Stipulation.**—Richmond, etc., R. Co. v. Burnsed, 70 Miss. 437, 12 So. 958, 35 Am. St. Rep. 656.

74. **Accompanying stock—Name not on contract.**—American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023.

75. **No provision made.**—Chicago, etc., R. Co. v. Hostetter, 171 Ind. 465, 30 R. R. 242, 53 Am. & Eng. R. Cas., N. S., 242, 84 N. E. 534.

In an action for injuries to a person accompanying a shipment of poultry, evidence held not to show a usage whereby the plaintiff had accompanied such shipments without any provision therefor in the bill of lading, but that the right had been given by the bill of lading on former occasions. Judgment 82 N. E. 1134, reversed. Chicago, etc., R. Co. v. Hostetter, 171 Ind. 465, 84 N. E. 534, 30 R. R. 242, 53 Am. & Eng. R. Cas., N. S., 242.

to a drover, in violation of a provision of the pass that minors should not be permitted to travel as assistants on such pass, the minors are entitled to all the rights, as against the railroad, for injuries sustained through the negligence of its employees, that any other passenger would have.⁷⁶

As Affected by Position Occupied.—One authorized by contract to accompany cattle while in transport is a passenger, and his status as such is not changed by the fact that while accompanying the same he rides on an engine, there being no more suitable place available.⁷⁷

§ 2173. Free Transportation by Permission or Invitation of Agent.

—A carrier of passengers has the right to make and enforce reasonable rules for the control of its vehicles and persons thereon, not only to provide for the security of its passengers and employees,⁷⁸ but to protect itself from imposition and wrong, and such rules can not be abrogated by subordinate employees.⁷⁹ Hence, it is held that persons riding free by permission or invitation of an agent or employee, can not hold the carrier liable for injuries as a carrier of passengers, unless it has expressly or impliedly conferred special authority upon which such employee to so increase its obligations.⁸⁰ So where a boy boards a street car with the consent of the gripman in charge thereof, who has no authority to grant the boy permission to ride on the car, he is trespasser, and not a passenger.⁸¹ And a person riding on the engine of a passenger train

76. Minor traveling contrary to stipulation.—Texas, etc., R. Co. *v. Garcia*, 62 Tex. 285.

77. As affected by position occupied.—Southern R. Co. *v. Cullen*, 122 Ill. App. 293, judgment affirmed 77 N. E. 470, 221 Ill. 392.

78. Right of carrier to make rules.—Chattanooga Rapid Transit Co. *v. Venable*, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886; Railway Co. *v. Wilson*, 88 Tenn. (4 Pickle) 316, 12 S. W. 720.

79. Abrogation of rules.—Chattanooga Rapid Transit Co. *v. Venable*, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886.

80. Free transportation upon permission of trainmen.—*United States*.—Purple *v. Union Pac. R. Co.*, 51 C. C. A. 564, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711, 114 Fed. 123, 57 L. R. A. 700; Davis *v. Chicago, etc., R. Co.*, 45 Fed. 543; Thompson *v. Nashville, etc., Railway*, 160 Ala. 590, 49 So. 340.

Arkansas.—Kruse *v. St. Louis, etc., R. Co.*, 97 Ark. 137, 39 R. R. R. 376, 62 Am. & Eng. R. Cas., N. S., 376, 133 S. W. 841.

Illinois.—Chicago, etc., R. Co. *v. Casey*, 9 Ill. App. 632.

Indiana.—Menaugh *v. Bedford Belt R. Co.*, 157 Ind. 20, 22 Am. & Eng. R. Cas., N. S., 1, 60 N. E. 694; Smith *v. Louisville, etc., R. Co.*, 124 Ind. 394, 24 N. E. 753; Stalcup *v. Louisville, etc., R. Co.*, 16 Ind. App. 584, 45 N. E. 802.

Iowa.—Daugherty *v. Chicago, etc., R. Co.*, 137 Iowa 257, 28 R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558, 114 N. W. 902, 14 L. R. A., N. S., 590.

Massachusetts.—Files *v. Boston, etc., R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; Wakefield *v. South*

Boston R. Co., 117 Mass. 544, 6 Am. R. Rep. 238.

Missouri.—Snyder *v. Hannibal, etc., R. Co.*, 60 Mo. 413.

New York.—Eaton *v. Delaware, etc., R. Co.*, 57 N. Y. 382, 7 Am. R. Rep. 67, 15 Am. Rep. 513.

Tennessee.—Railroad *v. Hailey*, 94 Tenn. 383, 29 S. W. 367; Illinois Cent. R. Co. *v. Meacham*, 91 Tenn. (7 Pickle) 428, 19 S. W. 232.

Texas.—San Antonio, etc., R. Co. *v. Lynch* (Tex. Civ. App.), 40 S. W. 631.

One riding on a train by the invitation of the conductor which was extended at his own request is not a passenger in the full legal sense of that term but only sub modo and to a limited extent. Higgins *v. Cherokee R. Co.*, 73 Ga. 149.

Neither the master mechanic of a railroad nor a conductor, nor an engineer of a train, has any implied authority to agree to carry a person on such train without payment of fare. Clark *v. Colorado, etc., R. Co.*, 165 Fed. 408, 91 C. C. A. 358, 19 L. R. A., N. S., 988.

Yardmaster giving himself and fellow servants free ride on passenger car to and from meeting.—In Chicago, etc., R. Co. *v. Bryant*, 13 C. C. A. 249, 65 Fed. 969, it appeared that a yard master, after 6 p. m., on being relieved from duty, took a passenger car and engine to give himself and fellow servants a free ride to and from a meeting of theirs, without notice or permission from any officer who had authority to permit the passage of such a train. It was held that the railroad company was not liable as to a passenger for injury to one of such employees riding on the train.

81. Authority of gripman on street car.—Drogmund *v. Metropolitan St. R. Co.*, 98 S. W. 1091, 122 Mo. App. 154.

by invitation of the conductor, engineer, and fireman, and without paying or intending to pay fare, it not appearing that there is any rule or custom permitting persons to so ride, is a trespasser;⁸² and the burden in such a case is on the plaintiff to show authority or custom.⁸³

Effect of Commission of Conductor.—However, the presumption is that every one, not an employee in the services of the company in running the train, and traveling openly in the coaches upon a passenger train, is a passenger, and if riding with the knowledge of the conductor, and without interference from him, that he has been accepted by the company as such.⁸⁴ The fact that such person is riding without the payment of fare makes him none the less a passenger.⁸⁵ A person riding in a railroad car, without paying fare, by the courtesy and permission of the conductor, although the conductor in permitting him to do so violated the company's rules, if he accepted such permission innocently, is entitled to all the rights of a passenger as to injuries sustained by him while so traveling,⁸⁶ unless he has eluded payment of the fare by some wrongful means such as fraud, etc.⁸⁷ And it is evident that such a person can not be converted into a trespasser until he resists or refuses to comply with the reasonable demand of him who is in charge of the train to pay his fare.⁸⁸ The presence of such a person on the train by the permission of the conductor, to be implied from his knowledge that he was there, and his neglect to enforce the carriers rule by requiring the fare or a pass, makes such person a passenger, who thereby becomes entitled to the highest degree of care for his safety.⁸⁹ A child nine years of age who is carried several blocks on a street car, the driver, who is also the conductor, knowing

82. Riding on engine by invitation.—*Morris v. Georgia R., etc., Co.*, 131 Ga. 475, 62 S. E. 579.

83. Burden of proof.—*Morris v. Georgia R., etc., Co.*, 131 Ga. 75, 62 S. E. 579.

84. Permission of conductor—Presumption of relation as passenger.—*Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886.

85. Affect of nonpayment of fare.—*Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886; *Washburn v. Nashville, etc., R. Co.*, 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

86. Good faith.—*Louisville, etc., R. Co. v. Scott*, 108 Ky. 392, 22 Ky. L. Rep. 30, 56 S. W. 674, 50 L. R. A. 381.

Employee riding free, without pass, in violation of rule—Knowledge of conductor.—In *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 461, 58 S. W. 861, 51 L. R. A. 886, 19 Am. & Eng. R. Cas., N. S., 768, it is held that a railroad employee riding on his company's train, openly, with knowledge of the conductor, is not a trespasser, although the conductor is permitting him to ride without demanding a pass or fare from him, in violation of the company's rule; and the company may be liable to him for injuries sustained by him through negligence while he is so riding.

In this case it is said in the opinion: "The case at bar, according to the testimony most favorably for the company, is that a party traveling on a passenger

train under the eye of the conductor, and who knows that under the rule his duty is to pay fare or furnish a pass, but who is not called upon to do either up to the time of the accident. * * * We think in such a case the railroad company can not be exonerated from responsibility to such a party who suffers injury as a consequence of its negligence or want of care. On the contrary his presence on the train by the permission of the conductor, to be implied from his knowledge that the party was there, and his neglect to enforce the company's rule by requiring fare or a pass, made such person a passenger and entitled him to the highest degree of care for his safety. *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. 239; *Washburn v. Nashville, etc., R. Co.*, 40 Tenn. (3 Head) 638, 75 Am. Dec. 784."

87. Fraud, etc.—See post, "Evasion of Payment of Fare," § 2178.

88. When persons become trespasser.—*Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886.

89. Failure of conductor to collect fare.—*Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 461, 58 S. W. 861, 51 L. R. A. 886, 19 Am. & Eng. R. Cas., N. S., 768; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. 239; *Washburn v. Nashville, etc., R. Co.*, 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

him to be on board, is a passenger whether he intended to pay fare or not.⁹⁰ And where a child, while riding on the platform of a horse car, by the invitation of the driver, and without collusion with him to defraud the company, was injured through negligence in driving the car, it was held that it was a question for the jury whether the child was a passenger.⁹¹

§ 2174. Refusal to Pay Fare.—Although a person is rightfully upon a train, he becomes a trespasser upon refusing to pay the proper fare upon demand.⁹²

Ejection for Refusal to Pay Fare.—As to the rule that the relation of carrier and passenger terminates upon the failure or refusal of the latter to pay his fare on demand, and that the carrier may, in a proper manner, eject such person, see post, "Ejection of Passengers," Chapter 25. While one who has no ticket and who willfully refuses to pay fare is not a passenger, yet, if he intends to pay fare and has the ability to do so, he is entitled to a reasonable time to get the money after demand, and does not become a trespasser on the very instant of failure or refusal.⁹³ But on refusing to pay his fare, such a person becomes a trespasser *ab initio*.⁹⁴ So where certain persons attempted to procure passage in a stock car, some of whom had transportation and others did not, those holding transportation and refusing to show the same when demanded by the conductor, and those refusing to pay fare when demanded, became trespassers.⁹⁵ And where a child nine years of age enters a passenger train with her mother, who has provided herself with a ticket, the child is a passenger, whether the contract of carriage, if any, is made with her or with her mother, and as such is not entitled to be carried unless paid for.⁹⁶

Person Allowed to Remain after Refusal.—If a person has entered a car and is allowed to remain upon it after refusal to pay fare because of his threats to resist removal by force, he can not be deemed a passenger, and the company owes him no personal duty.⁹⁷

Refusal Justifiable.—If, however, the refusal to pay fare is justifiable, the traveler does not forfeit his right as a passenger. Thus, where a person entered a car which started before he had an opportunity to leave it, and the conductor failed or refused to provide him with a seat as required by law, his refusal to pay fare was justifiable, and he did not thereby forfeit any of the rights of a passenger.⁹⁸

§ 2175. Evasion of Payment of Fare.—As fraud vitiates any contract, one fraudulently evading the payment of the proper fare is either not a passenger, or he thereby forfeits his status as such. Where a person knowingly in-

90. Child on car—Fare immaterial.—Metropolitan St. R. Co. v. Moore, 83 Ga. 453, 10 S. E. 730.

91. Invitation no collusion.—Wilton v. Middlesex R. Co., 125 Mass. 130.

92. Refusal to pay fare.—Texas, etc., R. Co. v. Diefenbach, 33 R. R. R. 213, 56 Am. & Eng. R. Cas., N. S., 213, 167 Fed. 39; Wyman v. Northern Pac. R. Co., 34 Minn. 210, 25 N. W. 349; Moore v. Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

One who fails to provide himself with a ticket before entering a car, or who fails to tender enough money to pay fare when requested, is a trespasser, and not a passenger. Louisville, etc., R. Co. v. Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871, 13 L. R. A., N. S., 624.

93. Entitled to reasonable time.—St. Louis, etc., R. Co. v. Fussell (Tex. Civ. App.), 97 S. W. 332, questions from court

of civil appeals certified 99 S. W. 1024, and judgment reversed on rehearing, 101 S. W. 276.

94. Trespasser ab initio.—Moore v. Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

95. Refusal to show transportation.—Texas, etc., R. Co. v. Diefenbach, 33 R. R. R. 213, 56 Am. & Eng. R. Cas., N. S., 213, 167 Fed. 39.

96. Refusal to pay child's fare.—Beckwith v. Cheshire R. Co., 27 Am. & Eng. R. Cas. 192, 143 Mass. 68, 8 N. E. 875.

97. Persons allowed to remain after refusal.—Gilmer v. Highley, 110 U. S. 47, 28 L. Ed. 62, 3 S. Ct. 471.

98. Refusal justifiable.—Hardenbergh v. St. Paul, etc., R. Co., 39 Minn. 3, 34 Am. & Eng. R. Cas. 359, 38 N. W. 625, 12 Am. St. Rep. 610; Allender v. Chicago, etc., R. Co., 37 Iowa 264, 8 Am. R. Rep. 113.

duces the conductor of a train to carry him on it without paying fare, contrary to the rules of the company and the conductor's instructions, it is a fraud upon the railroad, which will prevent a recovery by such person for any injury sustained by him while being so transported,⁹⁹ and the same rule applied where he evades paying the full fare required of him.¹ Where a person gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or, if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger, and the obligations resulting from that relation, are not thereby established between him and the company.² Nor is a person who obtains free transportation on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of a want of authority on the part of the conductor to allow such free passage, a lawful passenger without reward within the meaning of a statute requiring ordinary care and diligence for his safe carriage. He is a trespasser,³ but if a person has boarded a street car prepared and willing to pay his fare in case he can not obtain a free ride, the fact that he asks for a free ride does not deprive him of his character as a passenger.⁴

99. Fraudulent evasion of payment.—

United States.—*Condran v. Chicago, etc., R. Co.*, 14 C. C. A. 506, 67 Fed. 522, 28 L. R. A. 749.

Illinois.—*Chicago, etc., R. Co. v. Mehlsack*, 131 Ill. 61, 41 Am. & Eng. R. Cas. 60, 22 N. E. 812, 19 Am. St. Rep. 17; *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245.

Iowa.—*Way v. Chicago, etc., R. Co.*, 64 Iowa 48, 52 Am. Rep. 431, 19 N. W. 828; *S. C.*, 73 Iowa 463, 34 Am. & Eng. R. Cas. 286, 35 N. W. 525.

Kansas.—*Railway Co. v. Nicholas*, 8 Kan. 505.

Minnesota.—*McVeety v. St. Paul, etc., R. Co.*, 45 Minn. 268, 47 Am. & Eng. R. Cas. 471, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728.

New York.—*Robertson v. New York, etc., R. Co. (N. Y.)*, 22 Barb. 91.

Texas.—*Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, 41 Am. & Eng. R. Cas. 100.

Wisconsin.—*Daley v. Chicago, etc., R. Co.*, 129 N. W. 1062, 145 Wis. 249, 32 L. R. A. N. S., 1164.

Where intestate at the time of his injury had obtained permission to ride on a local freight train by falsely representing to the conductor that he was riding on an employee's pass, he was a trespasser, and not a passenger, as to whom the carrier was only liable for willful or wanton injury. *Neyman v. Alabama, etc., R. Co.*, 172 Ala. 606, 55 S. W. 509, Ann. Cas. 1913 E. 232.

1. **Effect of collusion and fraud.**—*Toledo, etc., R. Co. v. Brooks*, 81 Ill. 292.

Agreement with conductor.—Where a

person enters a train without an intention to pay fare, but under a collusive agreement with the conductor to ride free, in violation of rules of the railroad company, and does not pay a fare, he does not legally become a passenger for whose safety as a passenger the carrier is liable. *Kruse v. St. Louis, etc., R. Co.*, 97 Ark. 137, 39 R. R. R. 376, 62 Am. & Eng. R. Cas. N. S., 376, 133 S. W. 841.

Evading payment of full fare.—Plaintiff, boarding defendant's freight train, and giving the conductor an amount less than the regular fare, does not become a passenger. *McDonald v. St. Louis, etc., R. Co. (Mo. App.)*, 146 S. W. 83.

2. *Chicago, etc., R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 41 Am. & Eng. R. Cas. 60, 19 Am. St. Rep. 17; *Condran v. Chicago, etc., R. Co.*, 14 C. C. A. 506, 67 Fed. 522, 28 L. R. A. 749; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 292; *Railroad Co. v. Michie*, 81 Ill. 431; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *McVeety v. St. Paul, etc., R. Co.*, 45 Minn. 268, 47 N. W. 809, 47 Am. & Eng. R. Cas. 471, 11 L. R. A. 174, 22 Am. St. Rep. 728; *Robertson v. New York, etc., R. Co. (N. Y.)*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, 41 Am. & Eng. R. Cas. 100; *Way v. Chicago, etc., R. Co.*, 73 Iowa 463, 34 Am. & Eng. R. Cas. 286, 35 N. W. 525.

3. **Free transportation obtained from conductor—Fraud and notice.**—*Sessions v. Southern Pac. Co.*, 159 Cal. 599, 41 R. R. R. 781, 64 Am. & Eng. R. Cas. N. S., 781, 114 Pac. 982.

4. **Persons ready to pay, but asking free ride.**—*Lugner v. Milwaukee Elect.*

Fraud in Obtaining Pass or Rates.—A person traveling on a pass fraudulently obtained, and using a fictitious name to carry out the description, is not a passenger.⁵ And although the law provides that a railway may make contracts for the conveyance of passengers at such reduced rates of fare as the parties may agree on, one riding on a ticket procured at a reduced rate by false representations to the effect that she was a student at a certain school is not a passenger.⁶

As Dependent upon Surrender of Ticket.—If a railroad passenger, who has in his possession a ticket good from one station to another on that road, leaves the car at an intermediate station, not having had an opportunity to surrender the ticket or pay his fare, it can not be assumed, as a matter of law, in an action against the carrier for causing his death, that he was riding upon the ticket which he held, or that he intended to evade payment of fare, or left the car for that purpose.⁷

§ 2176. Nontransferable Ticket.—The relation of carrier and passenger does not exist between a railroad company and one who is riding, or attempting to ride, on a train of the company upon a nontransferable ticket, pass or check of another.⁸ In pursuance of this rule it is held that a person entering a train,

R., etc., Co., 146 Wis. 175, 41 R. R. R. 186, 64 Am. & Eng. R. Cas., N. S., 186, 131 N. W. 342.

5. Pass obtained by false representations—Wrong name.—Plaintiff, proposing to make a trip over defendant's railroad, a pass for part of the distance was obtained for her by an acquaintance who falsely represented that she was his sister. Plaintiff, with knowledge of the fraud, used the pass, changing her name to carry out the deception, and while riding on the return coupon of such pass was injured in a collision due to a misplaced switch. It was held that she was not a passenger, but a trespasser, as to whom the carrier was only bound to refrain from willful or wanton injury. *Denny v. Chicago, etc., R. Co.*, 150 Iowa 460, 40 R. R. R. 559, 63 Am. & Eng. R. Cas., N. S., 559, 130 N. W. 363.

6. Reduced rate secured by false representations.—*Fitzmaurice v. New York, etc., R. Co.*, 192 Mass. 159, 20 R. R. R. 635, 43 Am. & Eng. R. Cas., N. S., 635, 78 N. E. 418, 6 L. R. A., N. S., 1146, 16 Am. St. Rep. 236.

7. As dependent on surrender of ticket.—*McKimble v. Boston, etc., Railroad*, 139 Mass. 542, 2 N. E. 97.

8. Nontransferable ticket.—*Cody v. Central Pac. R. Co.*, 4 Sawy. 114, Fed. Cas. No. 2940; *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Gregory v. Burlington, etc., R. Co.*, 10 Neb. 250, 4 N. W. 1025; *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 15 N. W. 225, 45 Am. Rep. 100; *Way v. Chicago, etc., R. Co.*, 64 Iowa 48, 52 Am. Rep. 431, 19 N. W. 828; *Langdon v. Howells, L. R.* 4 Q. B. Div. 337, 48 L. J. M. C. 113, 40 L. T. 880, 27 W. R. 657, 3 Ry. & C. T. Cas. XXII; *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, 25 Pac. 733; *Walker v. Wabash, etc., R. Co.*, 15 Mo. App.

333, 16 Am. & Eng. R. Cas. 380; *Odell v. New York Cent. R. Co.*, 45 N. Y. S. 464, 18 App. Div. 12.

Plaintiffs were injured in a collision while riding on a special train run by defendant railroad company to give a free excursion to its employees, but on which it also carried passengers at a reduced round trip rate of fare. A friend of plaintiff, who was an employee of defendant, procured free nontransferable tickets in the names of members of his family, which were written therein and, gave them to plaintiffs, who used them. Held, that they were bound to know the contents of tickets received under such circumstances that they were making a fraudulent use of the same; and that they were not passengers, but had no contractual relations with defendant. *Harmon v. Jensen*, 176 Fed. 519, 100 C. C. A. 115, 20 Am. & Eng. Ann. Cas. 1224.

Free ticket for lady to each member of band—Use by brother of member.—In *Crosby v. Maine Cent. R. Co.*, 69 Me. 418, it is held that where a railroad company had employed a band to attend an excursion on their road, at a fixed sum, and a ticket for a lady to each member, and the prepared tickets for the ladies contained the following words only: "Main Central R. R., July 30, 1877. Dexter"—which was different from common tickets, in an action by a brother of a member of the band for refusing to carry him on such a ticket, it was held that an instruction that the ticket did not, on its face, entitle him to a passage afforded the plaintiff no ground for exception.

Using pass of another reporter—Knowledge of officers.—Defendant had issued a free pass, not transferable, to a newspaper reporter, and on the ticket was a memorandum to the effect that any person other than the person named in

and on demand for fare, gives a pass, issued for others, which the conductor takes, is a trespasser on the train, even though he did not know about the pass, and can not recover for injuries resulting from simple negligence.⁹ But it has been held that if a person in good faith presents a nontransferable ticket which was issued to another, and his claim to be carried is recognized, and he is carried as a passenger, he is entitled to rights of a passenger.¹⁰

Adult Son Riding on Family Commutation Ticket.—A son, although he has reached his majority, is entitled to all the rights of a passenger while riding on the family commutation ticket, if he resides with his father as a member of his family.¹¹

§ 2177. Payment of Fare under Collusive Agreement.—See ante, "Acceptance or Invitation by Trainmen," § 2163.

§ 2178. Refusal to Accept Fare, Transfer or Ticket.—A mere refusal to accept a fare or transfer does not conclusively preclude a traveler as to the status of a passenger.¹² If a transfer given to a street car passenger is valid, he is entitled to carriage on a car on the line to which he is transferred, and he is a passenger thereon, though the conductor refuses the transfer.¹³

§§ 2179-2192. Particular Classes of Persons Considered—§ 2179. Circus Company Employees.—Where a railroad company has merely contracted to haul the cars of a circus company, by means of a locomotive operated by the railroad's employees, the employees of the circus company while on the latter's cars, which are being so hauled, are not passengers of the railroad company.¹⁴

the pass should be subject to a penalty for using the pass, or should be liable to a penalty for using the pass, or liable to pay fare. Plaintiff, while traveling on the business of the newspaper, was entitled by custom to a privilege of this nature, but took a ticket in which another reporter of the same newspaper was named. On several previous occasions he had made use of such tickets with the knowledge of some of defendant's officers and employees. The reporter, while riding on such pass, received an injury, for which he brought suit. It was held that it was for the jury to say whether he was lawfully on the train; and that if the use of the pass was unauthorized and the plaintiff thereby became liable for increased fare, he could not be considered a trespasser. *Great Northern R. Co. v. Harrison*, 10 Exch. 376, 2 C. L. R. 1136, 23 L. J. Ex. 308.

9. Person held to be a trespasser.—*Broyles v. Central, etc., R. Co.*, 166 Ala. 616, 52 So. 86.

10. Good faith—Accepted as passenger.—*Robostelli v. New York, etc., R. Co.*, 33 Fed. 796, 34 Am. & Eng. R. Cas. 515.

Family ticket—Neighbor as visitor—Good faith.—In *Odell v. New York Cent. R. Co.*, 18 App. Div. 12, 45 N. Y. S. 464, it appeared that a "50-Trip Family Ticket" issued by a railroad company, with coupons attached, provided that "each undetached coupon of this ticket will entitle A. R. Heath, a member of his immediate family, or a visitor to, or a servant therein, to one continuous passage in ei-

ther direction between New York and Tarrytown," and also that "it will be forfeited if presented for transportation of persons other than those indicated on its face." This ticket was used by a person who was a mere neighbor of the family, having social intercourse with it and in the habit of visiting it. It was held that she was not entitled to use the ticket, but that if she acted in good faith in using it, and it was accepted by the carrier, she was entitled to the care due a passenger while riding on it.

11. Adult son riding on family ticket.—*Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584.

12. Refusal to accept fare, etc.—*Hickey v. Chicago City R. Co.*, 148 Ill. App. 197.

13. Refusal to accept valid transfer.—*Daniel v. Brooklyn Heights R. Co.*, 121 N. Y. S. 577, 67 Misc. Rep. 78.

Where a person boards a street car and tenders the conductor a transfer in payment of his fare, he is a passenger, although the conductor refuses to accept the transfer, and the carrier is liable for an assault upon him by the conductor. *Lewyt v. Dry Dock, etc., R. Co.*, 107 N. Y. S. 14, 56 Misc. Rep. 496.

14. Circus company employees.—*Robertson v. Old Colony R. Co.*, 31 N. E. 650, 156 Mass. 526, 32 Am. St. Rep. 482.

Where a carrier leased motive power, the use of its tracks, and train operatives to a circus company, under a contract exempting the carrier from liability for all injuries, the relation of passenger and carrier did not exist between the railroad

§ 2180. Postal Clerks.—In the absence of a statute controlling the question it is generally held that a railroad postal clerk, while traveling on a railroad train in charge of the mails, under a contract between the railroad company and the government, is a passenger of the company.¹⁵ In such cases employees of the railway mail service, traveling in the postal or mail cars in charge of the mails under a contract between the government and the carrier for the carriage of mail and the mail clerks, are "passengers for hire," to whom the carrier owes the same duty that it owes to passengers riding in passenger cars in so far as its liability for personal injuries arising from its negligence is concerned.¹⁶ Some of the cases hold that a railroad company is under the same legal duty to avoid injury to a mail clerk carried in pursuance of a contract with the government as toward an ordinary passenger, regardless of whether the relation of carrier and

company and an employee of the circus company traveling solely by virtue of his employment, who was not a party to such transportation contract, so as to entitle such employee to recover against the railroad company for injuries sustained in a collision between two sections of the circus train. *Clough v. Grand Trunk Western R. Co.*, 85 C. C. A. 1, 155 Fed. 81, 11 L. R. A., N. S., 446.

Control of cars retained by circus company—Defective trucks—Derailment.—In *Robertson v. Old Colony R. Co.*, 31 N. E. 650, 156 Mass. 526, 32 Am. St. Rep. 482, it was held that where a railroad company contracted with circus proprietors to haul the cars of the latter, and by the terms of the contract the company had no control over the condition of the cars or power to interfere with them, an employee or the proprietors on board one of the cars did not stand in the relation of a passenger to the railroad company so as to render the latter liable for an injury received by him by reason of the derailment of one of such cars caused by the improper condition of the trucks.

15. Postal clerks.—*United States*.—*Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. 165; *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859; *Baltimore, etc., R. Co. v. Voight*, 176 U. S. 498, 44 L. Ed. 560.

Alabama.—*Southern Ry. Co. v. Harrington*, 166 Ala. 630, 36 R. R. R. 148, 59 Am. & Eng. R. Cas., N. S., 148, 52 So. 57.

District of Columbia.—*Lindsey v. Pennsylvania R. Co.*, 26 App. D. C. 503; *Wood v. Philadelphia, etc., R. Co.* (Del. Super.), 1 Boyce 336, 76 Atl. 613.

Illinois.—*Barker v. Chicago, etc., R. Co.*, 149 Ill. App. 520, judgment affirmed in 90 N. E. 1057.

Indiana.—*Malott v. Central Trust Co.*, 168 Ind. 428, 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189, 79 N. E. 369, 11 Am. & Eng. Ann. Cas. 879.

Kentucky.—*Louisville, etc., R. Co. v. Kingman*, 18 Ky. L. Rep. 82, 5 Am. & Eng. R. Cas., N. S., 411, 35 S. W. 264.

Maine.—*Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Minnesota.—*Decker v. Chicago, etc., R. Co.*, 102 Minn. 99, 24 R. R. R. 587, 47 Am. & Eng. R. Cas., N. S., 587, 112 N. W. 901.

Missouri.—*Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36.

Montana.—*Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174, 102 Pac. 988.

New York.—*Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162, 47 Am. Rep. 75, affirming 31 Hun 100.

South Carolina.—*Hammond v. Northeastern R. Co.*, 6 S. C. 130, 24 Am. Rep. 467.

Tennessee.—*Illinois Cent. R. Co. v. Porter*, 117 Tenn. 13, 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686, 94 S. W. 666.

Texas.—*Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. 392; *International, etc., R. Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. 540; *Houston, etc., R. Co. v. Hampton*, 64 Tex. 427; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. 392, affirmed in 93 Tex. 731, no op.; *International, etc., R. Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. 540, affirmed in 93 Tex. 710, no op.; *Sproule v. St. Louis, etc., R. Co.* (Tex. Civ. App.), 91 S. W. 657.

Utah.—*Schuyler v. Southern Pac. Co.*, 37 Utah 581, 37 R. R. R. 521, 60 Am. & Eng. R. Cas., N. S., 521, 109 Pac. 458.

Virginia.—*Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

England.—*Collett v. London, etc., R. Co.*, 16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411.

16. Passenger for hire.—*Schuyler v. Southern Pac. Co.*, 37 Utah 581, 37 R. R. R. 521, 60 Am. & Eng. R. Cas., N. S., 521, 109 Pac. 458.

passenger technically exists or not.¹⁷ But where a state statute provides that such clerks shall be entitled only to the rights of employees, and not to the rights of passengers, a clerk injured in such state is governed by that statute.¹⁸ Hence a postal clerk, when traveling on trains in the pursuance of his duties, is not a passenger within the meaning of a state statute providing, in substance, that the right of action or recovery for injuries sustained by a person not a passenger nor an employee of the railroad, while he is lawfully employed on a railroad train, shall be only such as would exist if he were an employee of the railroad company.¹⁹

Burden of Proof.—If a railway postal clerk was in charge of the mail at the time he was injured by the derailment of a train, in an action against the railroad company for his injuries the burden of proving he was a passenger would not rest on him, as U. S. Rev. Stat., 4000, imposes on railway companies carrying mail the duty to also carry, without extra compensation, the person in charge thereof.²⁰ But where, in an action against a railroad company by a railway postal clerk for injuries incurred when he was off duty, caused by the derailment of a train, plaintiff elected to rest his case without offering any testimony as to

17. Same duty.—*Barker v. Chicago, etc., R. Co.*, 243 Ill. 482, 35 R. R. R. 470, 58 Am. & Eng. R. Cas., N. S., 470, 90 N. E. 1057, 26 L. R. A., N. S., 1058.

Same degree of care due.—A railroad owes the same degree of care to mail agents riding in postal cars in charge of the mails as they do to passengers. *Seybolt v. New York, etc., R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75, affirming 31 Hun 100.

Position as advantageous.—A postal agent on a railroad train, under a contract with the United States for the transportation of mails and postal clerks, occupies a position as advantageous as that of a passenger, if not in fact one, in case of injury by the negligence of the railroad. *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798.

18. State statute denying to postal clerk rights of passenger.—*Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 51 L. Ed. 184, 27 S. Ct. 100, 8 Am. & Eng. Ann. Cas. 87; *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 28 L. Ed. 980, 5 S. Ct. 427; *P. & L. E. R. Co. v. Bishop*, 13 O. C. C. 380, 7 O. C. D. 73.

A railway postal clerk, injured by a railroad upon which he is employed, has no other or greater rights than those given by the laws of the state wherein his injury occurs, and where a valid state statute denies to him the rights of a passenger and puts him on the footing of an employee, he can not recover, in an action brought in another state, as for injuries to a passenger. *Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 51 L. Ed. 184, 27 S. Ct. 100, 8 Am. & Eng. Ann. Cas. 87.

A state statute which classifies certain persons, including railway postal clerks, employed in connection with railroads, but not employed by them, with employees, with respect to their rights against the railroad for injuries, and which de-

prives such person of the rights of passengers, is not in conflict with any provision of the federal constitution. *Martin v. Pittsburg, etc., Co.*, 203 U. S. 284, 51 L. Ed. 184, 27 S. Ct. 100, 8 Am. & Eng. Ann. Cas. 87 (construing Pennsylvania act of April 4, 1868, P. L. 58).

19. Pennsylvania statute.—*Foreman v. Pennsylvania R. Co. (Pa.)*, 17 Am. & Eng. R. Cas., N. S., 246.

A route or mail agent in the employ of the United States Post Office Department, while traveling on a railroad in the performance of his duties, is not a passenger within the meaning of Pa. Act of April 4th, 1868. *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. Cas. 234, 96 Pa. 256, 2 Ky. L. Rep. 183.

Rationale of rule.—In *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 28 L. Ed. 980, 5 S. Ct. 427 (Construing the Pa. Stat.), it is held that one traveling on a railroad in charge of mail, under the provision of § 400 U. S. Rev. Stat., does not thereby acquire the rights of a passenger, in case he is injured on the railroad through negligence of the company's servants. In this case it is said in the opinion: "The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation."

20. Burden of proof.—*Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174, 102 Pac. 988.

the cause of the derailment, the burden was on him to prove that he was a passenger, and it was incumbent on him to show, either that defendant was under a specific contractual or statutory obligation to the government to carry him in the mail car where he was at the time or that defendant recognized the request for transportation embodied in a photograph commission, relating to his transportation when he was off duty.²¹

§ 2181. Express Messengers.—It seems that an express messenger, while riding in an express car, in the course of his employment, by virtue of the contract between the express company and the railroad company, may, in the absence of a stipulation in the contract, actually or impliedly accepted by such messenger, be considered as holding a relation similar to that of²² a passenger of the railroad company, so far as its liability for injuries sustained by him is concerned. The true principle seems to be that the messenger in accepting his employment takes upon himself the risk of accidents incident to the nature of

21. Clerk off duty—Burden.—Hoskins v. Northern Pac. R. Co., 39 Mont. 394, 34 R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174, 102 Pac. 988.

22. Express messengers.—*United States.*—Voight v. Baltimore, etc., R. Co., 79 Fed. 561.

Alabama.—Southern R. Co. v. Harrington, 166 Ala. 630, 36 R. R. 148, 59 Am. & Eng. R. Cas., N. S., 148, 52 So. 57.

Arkansas.—Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597.

California.—Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

Georgia.—Savannah, etc., R. Co. v. Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104.

Kentucky.—Davis v. Chesapeake, etc., R. Co., 122 Ky. 528, 29 Ky. L. Rep. 53, 92 S. W. 339, 24 R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170, 5 L. R. A., N. S., 458, 121 Am. St. Rep. 418.

New York.—Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647.

Ohio.—Pennsylvania, etc., R. Co. v. Woodworth, 26 O. St. 585.

Texas.—Missouri, etc., R. Co. v. Black, 105 Tex. 296, 147 S. W. 559, affirming judgment 128 S. W. 706; Gulf, etc., R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Texas, etc., R. Co. v. Fenwick, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; San Antonio, etc., R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

Canada.—Jennings v. Grand Trunk R. Co., 15 Ont. App. 477.

In the absence of express stipulations, a railroad company owes to the express messenger in a car provided by it for the use of the express company, the same duty to use every reasonable precaution as it owes to an ordinary passenger. Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 579; Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55.

One temporarily supplying the place of an express messenger stands in the same position with him and is entitled to the same protection. Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55.

The danger incident to the messenger's position upon the train, does not exonerate the railroad company from liability for negligence. Pennsylvania, etc., R. Co. v. Woodworth, 26 O. St. 585.

Nor does the fact that deceased is carried without ticket or payment of fare under a contract with the express company, exonerate the railroad company in the absence of express stipulation. Jennings v. Grand Trunk R. Co., 15 Ont. App. 477, distinguishing Blackmore v. Toronto, etc., R. Co., 38 U. C. Q. B. 172, quoting Austin v. Gt. Western R. Co. L. R., 2 Q. B. 442.

But where an express messenger holds a season ticket and desires to ride for the conduct of his business in the baggage car, in contravention of the railroad company's rules, and cares to assume all risk of injuries therefrom, the company is not liable. Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652; Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633.

Union Pac. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475. It was held that an express messenger was not warranted in introducing a person into the car for the purpose of enabling him to learn the route, and that the company did not owe such a person the duty which it owed to the messenger. Compare Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55.

Fellow servant.—Where the railroad company does its own express business, a messenger was held a fellow servant of the engineer. Baltimore, etc., R. Co. v. Mackenzie, 81 Va. 71, 24 Am. & Eng. R. Cas. 395. But in Jennings v. Grand Trunk R. Co., 15 Ont. App. 477, a messenger was held, in no sense, a fellow servant of the railroad employees. See, also, Runney v. Midland R. Co. L. R., 1 C. P. 291.

the business, but not the risks resulting from the negligence of the railroad company in the management of its trains.²³ On the other hand it is held that an express messenger, while riding in a car furnished by a railroad company to the express company by which he is employed, under a contract by which he is carried free, and which stipulates that he assumes the risk of all accidents and injuries, if he is bound by the contract, occupies a relation to the railroad company analogous to that of one of its own employees, and the care which the railroad owes him in respect to the condition of its track, engine, and the operation of its train is measured by that it owes to those in its immediate service. In such cases the carrier is no more than a private carrier, and is liable only to that extent.²⁴ It seems settled that where an express messenger consents to be bound by the terms of such a contract, there can be no doubt that the carrier may plead such contract in bar of any action brought against it for injuries received by the messenger in course of his employment.²⁵ But the question arises as to whether or not an express messenger is chargeable with notice of the terms of a contract existing between the carrier and the express company. On this point there is a conflict. The federal circuit court has held that an express messenger riding in a railway car in the discharge of his duties is chargeable with notice of the contract under which he is being transported by the railroad company.²⁶ On the other hand it is decided by the New York court that such a person is not chargeable in the absence of actual notice, with a knowledge of such a stipulation.²⁷ It does not seem reasonable that an express messenger could, without his knowledge or consent, be placed in such relation to the railroad company as to relieve it from liability to him for the consequences of its negligence. In fact it seems that he is not chargeable with knowledge of any stipulations in the contract existing between the express company for which he works and the railroad company, except so far as they, through notice to him or otherwise, enter into the contract pursuant to which he goes into or remains in the service of the express company.²⁸

23. True principle—Risks assumed.—*Pennsylvania, etc., R. Co. v. Woodworth*, 26 O. St. 585.

24. Carrier contracting as a private carrier.—*Chicago, etc., R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593. See *Long v. Lehigh Valley R. Co.*, 65 C. C. A. 354, 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508, 130 Fed. 870.

An express messenger, while on duty in a car provided by the express company under a contract between it and the railroad company, is not a passenger, since in carrying the property and employees of the express company the railroad company is a private carrier. *Perry v. Philadelphia, etc., R. Co. (Del.)*, 1 Boyce 399, 77 Atl. 725.

25. Where messenger consents to contract.—*Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 44 L. Ed. 560, 20 S. Ct. 385; *Chicago, etc., R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593; *Long v. Lehigh Valley R. Co.*, 65 C. C. A. 354, 130 Fed. 870, 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508; *Kelly v. Malott*, 67 C. C. A. 548, 135 Fed. 74; *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633; *Peterson v. Chicago, etc., R. Co.*, 119 Wis. 197, 96

N. W. 532, 110 Am. St. Rep. 879; but see *Davis v. Chesapeake, etc., R. Co.*, 122 Ky. 528, '92 S. W. 339, 29 Ky. L. Rep. 53, 5 L. R. A., N. S., 458, 121 Am. St. Rep. 418, 24 R. R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170; *Shannon v. Chesapeake, etc., R. Co.*, 104 Va. 645, 52 S. E. 376.

26. Conflicting decisions—Federal circuit decision.—*Long v. Lehigh Valley R. Co.*, 65 C. C. A. 354, 130 Fed. 870, 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508. The court in this case quotes the dissenting opinion of Judge Earl in *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55.

27. Constructed notice held insufficient.—*Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647.

28. Stipulation not binding unless part of contract by notice or otherwise.—*Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, citing *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623; *Smith v. New York, etc., R. Co. (N. Y.)*, 29 Barb. 132; *Collett v. Railroad Co.*, 16 Adol. & De. (N. S.) 984.

In *Kenney v. New York, etc., R. Co.*,

To make the cases of express messengers and postal clerks analogous it should be made to appear that the government in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that such clerks, in consideration of securing their positions, had concurred in releasing the railroad company.²⁹

Effect of Statute Making Railroad Liable for Negligence.—Where a statute makes a railroad company liable for damages to persons or property by any neglect on its part, and for damages done to any of its employees by any negligence of the agents or mismanagement of its employees, though an express company contracts with a railroad company that it assumes all risk of injury to its employees, and undertakes to save the railroad company harmless from all claims in respect thereto, and contracts with an employee that neither it nor the railroad company shall be liable to him for any injury while traveling on any of such trains in his employment, the employee may still maintain an action against the railroad company for injuries received while so traveling in consequence of the negligence of its agents.³⁰

§ 2182. Passengers in Sleeping Cars or on Express Trains.—According to the weight of authority, passengers while on the cars of a sleeping car company, are the passengers of the railroad company of whose train the sleeping car forms a part.³¹

Person Riding Express Company's Train.—Where a passenger is being carried by an express company on a special train, made up expressly for it, and is injured through the negligence of the railroad hauling such train, he is a passenger of the express company, and may sue either it or the railroad.³²

§ 2183. Sleeping Car Employees—Employees on Private Cars.—According to the weight of authority, the employees of a sleeping car company, while on the train of a railroad company of which a car or cars of the sleeping car company form a part, in such capacity, are not entitled to the care and protection from the railroad company which it owes its passengers.³³ Hence he

125 N. Y. 422, 26 N. E. 626, it did not appear that there had been assent to or knowledge of the stipulation in the contract on the part of the messenger, and he was permitted to recover, notwithstanding the existence of the agreement.

29. Cases not analogous.—Baltimore, etc., R. Co. v. Voigt, 176 U. S. 498, 44 L. Ed. 560, 20 S. Ct. 385, but there appears to be no case in which a postal clerk has voluntarily entered into such an agreement.

30. Statute making railroad liable for negligence.—Sewell v. Atchison, etc., R. Co., 78 Kan. 1, 96 Pac. 1007.

31. Passengers on sleeping cars.—Denver, etc., R. Co. v. Derry, 47 Colo. 584, 36 R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 108 Pac. 172, 27 L. R. A., N. S., 761.

Blind passenger injured on sleeper not yet attached to train—Direction of porter.—With the knowledge of a railroad company, it was customary for a sleeping car company to have its sleeper ready for passengers of the railroad company before the train to which it was to be attached arrived. A blind passenger, having a through ticket, changed cars at a station where a sleeping car was ready,

and having a berth therein, the porter of the train on which he had arrived took him over to the porter of the sleeping car who was informed of his blindness, and through his negligence he was injured while attempting to go to his berth. It was held that such passenger was a passenger of the railroad company when he was so injured. Denver, etc., R. Co. v. Derry, 47 Colo. 584, 36 R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 108 Pac. 172, 27 L. R. A., N. S., 761.

32. On special train made up for express company—Relation to express company.—American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023.

33. Sleeping car company's employees.—Denver, etc., R. Co. v. Whan, 39 Colo. 230, 23 R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70, 89 Pac. 39, 11 L. R. A., N. S., 432, 12 Am. & Eng. Ann. Cas. 732; Hughson v. Richmond, etc., R. Co., 2 App. D. C. 98.

One not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, the Pullman Car Company, which simply permits his carriage for and in connection with the business of his employer conducted on the

does not require of the railroad company the highest degree of skill and care in the operation of its road, and if injured negligence on part of the railroad will not be presumed *prima facie*, as in the case of a passenger, from the mere fact of the occurrence of the accident and infliction of the injury.³⁴ But it has been held that a porter of a palace car, whose duties are to wait on passengers and collect the fares in such car, and who, by his contract with the palace car company and the contract between the latter and the railroad company, is subject to the rules and regulations of the railroad company, is a passenger of the railroad company in respect to the careful running and management of the train. In this connection it has been said: "Plaintiff was transported over defendant's road under a contract which was supported by a sufficient consideration; he was entitled to the rights of a passenger in respect to the careful running and management of the train. The rights of plaintiff and the obligations of defendant do not differ materially in these respects from those which are implied under contracts between a transportation company and the government by which the former agrees to carry the agents which have charge of the mails; or under contracts with express companies to transport their agents who are in charge of their business; or with shippers of live stock to carry the persons in charge of the stock."³⁵ And it is held that a person in charge of a private car, and acting on it as brakeman, is not a servant of the carrier so as to preclude recovery for the loss of his life by the negligence of the servants of the road; strictly speaking he is not, but he is a passenger entitled to the rights of a passenger so far as injury to him from the negligence of the servants of the railroad is concerned.³⁶

§§ 2184-2186. Carrier's Employees Riding upon Its Vehicles—

§ 2184. Riding to or from Work.—On the question whether employees of the railroad company, when being transported to or from work on the company's trains or cars, whether on passenger, freight, or construction trains, street cars, or hand cars, are passengers, even when they are being carried outside of their hours of labor and have nothing to do in connection with the operation of the trains or cars upon which they are riding, there seems to be a sharp conflict of authority. But according to what seems to be the weight of authority, a railroad employee while riding to or from work on his company's train or street car, upon which he has no duties to perform, where he is granted free transportation not as part of his wages, but according to the custom of the railroad, is not a passenger for hire, and can not hold the company liable as a carrier of passengers for injuries sustained by him while so traveling.³⁷ There are a great

railroad, is not a "passenger," but a fellow servant, under Act April 4, 1868 (P. L. 58), of the trainmen. *Lewis v. Pennsylvania R. Co.*, 69 Atl. 821, 220 Pa. 317, 18 L. R. A., N. S., 279, 13 Am. & Eng. Ann. Cas. 1142.

34. Degree of care—Presumption.—*Hughson v. Richmond, etc.*, R. Co., 2 App. D. C. 98.

35. Other ruling—Porter in Pullman car.—*Jones v. St. Louis, etc.*, R. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514.

Under these contracts the persons carried are uniformly held to be entitled to the protection of passengers. *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Tibby v. Missouri Pac. Co.*, 82 Mo. 202; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382, 26 Am. & Eng. R. Cas. 268; *Hutch. Carr.*, §§ 564, 565; *Kenney v. New York, etc.*,

R. Co., 125 N. Y. 422, 26 N. E. 626; *Jones v. St. Louis, etc.*, R. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514.

36. Person in charge of private car and acting as its brakeman—Relation to railroad.—*Lockhart v. Lichtenthaler*, 46 Pa. 151.

37. United States.—*Louisville, etc.*, R. Co. *v. Stuber*, 48 C. C. A. 149, 108 Fed. 934, 54 L. R. A. 696.

Alabama.—*Birmingham R., etc., Co. v. Sawyer*, 156 Ala. 199, 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779, 47 So. 67, 19 L. R. A., N. S., 717.

Arkansas.—*St. Louis, etc.*, R. Co. *v. Harmon*, 85 Ark. 503, 29 R. R. R. 104, 52 Am. & Eng. R. Cas., N. S., 104, 109 S. W. 295; *St. Louis, etc.*, R. Co. *v. Wiggam*, 98 Ark. 259, 135 S. W. 889.

Indiana.—*Indianapolis, etc.*, Co. *v. Andis*, 33 Ind. App. 625, 72 N. E. 145.

Kansas.—*Kansas Pac. R. Co. v. Salmon*,

many cases which maintain the doctrine that a person employed by a railroad company and who is transported to and from his work free of charge by the railroad company, and who while so traveling has nothing to do with the control or operation of the train on which he is riding, is a passenger, to the extent that the company is bound to exercise extraordinary diligence to keep from in-

11 Kan. 83; *McQueen v. Central Branch, etc.*, R. Co., 30 Kan. 689, 1 Pac. 139.

Massachusetts.—*Kilduff v. Boston Elevated R. Co.*, 195 Mass. 307, 25 R. R. R. 166, 48 Am. & Eng. R. Cas., N. S., 166, 81 N. E. 191, 9 L. R. A., N. S., 873; *O'Brien v. Boston, etc.*, R. Co., 138 Mass. 387, 52 Am. Rep. 279; *Gillshannon v. Stony Brook R. Corp. (Mass.)*, 10 Cush. 228.

Pennsylvania.—*Ryan v. Cumberland Valley R. Co.*, 23 Pa. 384.

Rhode Island.—*Ionnone v. New York, etc.*, R. Co., 21 R. I. 452, 44 Atl. 592, 16 Am. & Eng. R. Cas., N. S., 359, 46 L. R. A. 730, 79 Am. St. Rep. 812.

Canada.—*May v. Ontario, etc.*, R. Co., 10 Ont. 70, 26 Am. & Eng. R. Cas., N. S., 337.

Paymaster traveling from station to station—Construction of insurance policy.—A paymaster of a railroad company traveling upon business of the company from station to station on the line of the company, and stopping between stations for the purpose of paying off employees of the company wherever they may be, is not, while so doing, a "passenger," within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a car using steam as a motive power. *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 5 R. R. R. 433, 28 Am. & Eng. R. Cas., N. S., 433, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125.

Bridge superintendent requested to go to point on line where construction is incomplete.—A superintendent of railroad construction who requests a bridge superintendent, in the course of his employment, to go to a point on the line where the construction is incomplete, does not thereby, on behalf of the railroad company, invite the bridge superintendent to become a passenger. *Evansville, etc.*, R. Co. *v. Barnes*, 137 Ind. 306, 36 N. E. 1092.

Riding home in caboose of freight train.—In *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83, it is held that one in the employment of a railroad company, while riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and the understanding of the parties, from which car and train all persons except employees of the company are excluded, of which exclusion such person has full knowledge, is not a passenger of the railroad.

Construction gang carried in special

car.—Men engaged in constructing railroad tracks were taken to and from the place of work in a special car furnished by the company for the mutual accommodation of the men and the company. The men paid no fare. It was held that the men were not passengers. *Kilduff v. Boston Elevated R. Co.*, 195 Mass. 307, 25 R. R. R. 166, 48 Am. & Eng. R. Cas., N. S., 166, 81 N. E. 191, 9 L. R. A., N. S., 873.

Common laborer riding to work place on gravel train.—In *Gillshannon v. Stony Brook R. Corp. (Mass.)*, 10 Cush. 228, it is held that a common laborer on a railroad while riding on a gravel train to his place of labor, and injured by the negligence of his employer's servants in charge of the train, was not entitled to recover as a passenger of the railroad company. In this case it is said, in the opinion: "If the plaintiff was by the contract of service entitled to be carried by the defendants to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnished no ground for maintaining this action."

Section master riding to his lodging place.—In *Wright v. Northampton, etc.*, R. Co., 10 Am. & Eng. R. Cas., N. S., 151, 122 N. C. 852, 29 S. E. 100, it is held that a section master, who, after his day's work, rides on a train of his employer to his lodging place without paying or expecting to pay fare, is not a passenger. In this case it is said in the opinion: "He (the section master) invariably used the handcar or the train of the company to aid him in the prosecution of his work. The act of going to and from his work in the manner pointed out, although for the benefit of the plaintiff, connects him with the service of the company, although he was not actually engaged in the work for which he was employed at the time of his injury. If there had been a contract between the plaintiff and the company that the plaintiff should be carried to and from his work to his sleeping place then certainly the plaintiff would

jurying him.³⁸ Thus, it is held that where a servant performs all his work at a fixed place, and his master, either by custom or as a gratuity, carries him to and from his work, merely for the servant's convenience, the servant doing no services for the master on the train, he is to be treated as a passenger.³⁹ The

have been injured while engaged in the service for which he was employed.

Employee invited to ride to point adjacent to his home.—In *Ionnone v. New York, etc., R. Co.*, 21 R. I. 452, 44 Atl. 592, 16 Am. & Eng. R. Cas., N. S., 359, 46 L. R. A. 730, 79 Am. St. Rep. 812; it is held that where a servant of a railroad company, upon the completion of his work, is invited to ride in the company's car to a point adjacent to his home, the carriage being gratuitous, the relation of carrier and passenger is not thereby created between them, but it is to be regarded as a privilege incident to the contract of service accorded by the company merely by reason of such contract.

Riding from work on slide board.—Plaintiff was employed as a section hand, the crew working on the top of a mountain in the daytime and descending in the evening after the day's work was done. While the men sometimes descended on a train, they were also furnished slide boards, which were attached to the rails, and on which they descended by gravity. It was held that plaintiff was not a passenger in descending on a slide board, his ride down the mountain being a mere incident to his employment. *Kindellan v. Mt. Washington R. Co.*, 76 N. H. 54, 79 Atl. 691; 41 R. R. 430, 64 Am. & Eng. R. Cas., N. S., 430.

Engineer riding to examine road—Derailment.—But where one, after securing an appointment of locomotive engineer, was traveling on a locomotive for the purpose of informing himself more particularly as to the character of the road, and was killed by the train leaving the track, owing to the negligence of the engineer in charge, whether deceased was or was not a passenger was for the jury. *Wilkes v. Buffalo, etc., R. Co.*, 216 Pa. 355, 23 R. R. 49, 46 Am. & Eng. R. Cas., N. S., 49, 65 Atl. 787.

38. Contrary view.—*Georgia.*—*Carswell v. Macon, etc., R. Co.*, 9 R. R. 833, 32 Am. & Eng. R. Cas., N. S., 833, 45 S. E. 695, 118 Ga. 826; *Central R. Co. v. Henderson*, 69 Ga. 715; *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141. *Indiana.*—*Indiana Union Tract. Co. v. Langley*, 178 Ind. 135, 98 N. E. 728.

Louisiana.—*Dobson v. New Orleans, etc., R. Co.*, 52 La. Ann. 1127, 27 So. 670.

Maryland.—*Abell v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Tennessee.—*Chattanooga Rapid Transit Co. v. Venable*, 19 Am. & Eng. R. Cas., N. S., 768, 105 Tenn. 461, 58 S. W. 861, 51 L. R. A. 886.

Bridge builder riding in order to assist in loading timber on cars.—Defendants employed the plaintiff to frame and build a bridge on their road, and while he was engaged in the work, the defendants directed him to proceed in their cars to a certain point, and assist in loading timbers for the bridge. It was held that plaintiff was a passenger while riding to such point on defendant's cars. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101.

39. Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 461, 58 S. W. 861, 19 Am. & Eng. R. Cas., N. S., 768, 51 L. R. A. 886; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. 239; *Fitzpatrick v. New Albany, etc., R. Co.*, 7 Ind. 436; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; *McNulty v. Pennsylvania R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, 8 Am. & Eng. R. Cas., N. S., 685; *New York, etc., R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630; *Abell v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

The mere fact that a passenger was accustomed to perform the duties imposed upon his sister as defendant's station agent at a certain point, and was injured while traveling for his own convenience from such point to his home, after his labors in performing such duties had ceased for the day, was immaterial in this connection. *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 5 L. R. A. 381.

Power house employee riding to or from work on pass—not fellow servant of motorman.—A servant employed to labor by the day in the power house of a railroad company, and who is furnished with a free pass, under a rule of the company, which entitled him to ride on any of the company's cars at any time, and about his own business, during the continuance of his employment, is a passenger when riding either to or from his place of labor, and not a fellow servant of the motorman in charge of the car, and is entitled to the same rights as a passenger for hire. *Harris v. City, etc., R. Co.*, 69 W. Va. 65, 40 R. R. 610, 63 Am. & Eng. R. Cas., N. S., 610, 70 S. E. 859, Ann. Cas. 1912D, 59. In this case it is said in the opinion. "Counsel for defendant rely upon the cases of *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; and *Kniceley v. West Virginia Mid. R. Co.*, 64 W. Va. 278, 61 S. E. 811,

reasonable rule seems to be that to exclude a party from the right to recover as a passenger for an injury received by him, from the carelessness of the servants operating a train, he must not only be shown to be at the time in the position of an employee, but, also, must stand in the relation, at the time, of a co-servant to the negligent or incompetent servants so occasioning the injury.⁴⁰

Employees Using Elevator.—An employer who owns and operates an elevator in his hotel is subject to all the duties toward his employees that obtain in other cases, such as the duty to instruct ignorant servants of dangers not obvious, and to use reasonable care to provide, maintain, etc., safe machinery appliances, etc., but the relation of carrier and passenger does not exist where such employees use the elevator while being carried to and from their work.⁴¹

17 L. R. A., N. S., 370, as decisive of this case. In all these cases the injury occurred at the very moment while the servant was engaged in the service of his master and was evidently one of the risks which the servant had assumed while engaged in such service."

Night watchman and gatekeeper riding to work.—In *Chattanooga Rapid Transit Co. v. Venable*, 19 Am. & Eng. R. Cas., N. S., 768, 105 Tenn. 461, 58 S. W. 861, 51 L. R. A. 886, it is held that an employee of the railroad, having nothing to do with the operation of trains, but performing service at a station as night watchman and gatekeeper, who is permitted by the company to ride to and from his place of service on its trains, without payment of fare, is a passenger while thus on its trains.

Employee of lumber company returning from work on its train.—As regards liability, an employee of a lumber company, who, having boarded a train on its logging road, as was his custom, to return to his home from his work at night, was injured while alighting through negligent operation of the train, was a passenger. *Roberson v. Greenleaf Johnson Lumber Co.*, 154 N. C. 328, 40 R. R. 593, 63 Am. & Eng. R. Cas., N. S., 593, 70 S. E. 630.

40. Reasonable rule.—See *Manville v. Cleveland*, etc., R. Co., 11 O. St. 417, affirming 2 West. L. M. 495, 2 O. Dec. Reprint 359 in which it was held that the plaintiff, although having no duties to perform on the passenger train, was to be regarded as an employee of the defendant. That this duty being, like that of the servants operating the train, to promote the active business of the railroad company upon the road, the plaintiff is to be regarded as engaged with them in the same common duty. That his relation of fellow servant to the employees operating the train entitled the plaintiff only to the exercise on their part of ordinary care; and not that extraordinary care due to a common passenger.

An employee of a stone quarry company who has no connection with the operation of the train while being transported to and from work is a passenger

of the railroad company over whose track the train is operated by the quarry company with the railroad company's consent. *Gregory v. Georgia Granite R. Co.*, 64 S. E. 686, 132 Ga. 587.

In an action against a carrier to recover for the death of an employee while riding on defendant's car, plaintiff alleged that decedent was employed by defendant, and that after finishing his day's work he was given a ticket by defendant good on any of its cars to enable him to ride home. Held, that the allegations as to his employment were not inconsistent with the allegation that he was a passenger on defendant's car. *Indianapolis Tract., etc., Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068.

In an action against a carrier to recover for the death of plaintiff's intestate, the jury found that he was in defendant's employ; that on the day of the accident he was riding home on defendant's car, after finishing his day's work, on a ticket given him for that purpose by defendant's foreman, in accordance with a custom of defendant; that he did not pay for the ticket, and the ticket was not furnished as a part of the contract of employment; that tickets were furnished employees when sent out on the road on the company's business, and were also furnished on other occasions; that the intestate, when killed, was riding on the car in the same manner as any other passenger; that he had nothing to do with operating the car; and that there was no contract between defendant and intestate by reason of his using such ticket. Held, that such findings are not in irreconcilable conflict with a general verdict finding that intestate was a passenger. *Indianapolis Tract., etc., Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068.

41. Employees using elevator.—*Walsh v. Cullen*, 85 N. E. 223, 235 Ill. 91, 18 L. R. A., N. S., 911.

Where a waitress in a hotel left her room for the street and returned late in the evening, using her employer's elevator, she did not thereby become a passenger, but the relation of master and servant continued. *Walsh v. Cullen*, 85

It is undoubtedly true that a change in the relation may occur, and an employee may cease to occupy that relation and become a passenger when carried on his own independent business or an excursion for his own pleasure, entirely disconnected with his service.⁴²

§ 2185. Riding for Purposes Disconnected with Work, Custom to Give Free Transportation to Carrier's Employees.—According to the weight of authority, a railroad employee, while on his company's train or car, not to ride to or from work or for a purpose in any way connected with his employment, but for some other purpose of his own, although not paying fare, and being carried under a custom to give free transportation to employees of the railroad, is entitled to the same care and protection as an ordinary passenger for hire.⁴³ Though one may be an employee of a railroad company, yet if his agency is disconnected from the running of trains, and, while traveling on a free ticket, he is injured by the running of a train, he stands in the position of a passenger.⁴⁴ But where deceased and other employees of defendant railroad company had borrowed a car and engine for their own purposes, by permission of defendant's yardmaster, and in the negligent management thereof plaintiff's

N. E. 223, 235 Ill. 91, 18 L. R. A., N. S., 911.

Employees of a packing company in riding between floors on a freight elevator in the course of their duties, with the packing company's knowledge and consent, were not passengers, but employees, so that the company was only required to use ordinary care for their protection. *Indianapolis Abattoir Co. v. Neidlinger*, 173 Ind. 400, 92 N. E. 169.

42. *Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223, 1 L. R. A., N. S., 911, citing *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335.

"When that case was again in the supreme court, it was held that the ticket was not a gratuity, but part of the consideration by which the employee was induced to enter and to continue in the employment of the defendant. *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417." *Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223, 18 L. R. A., N. S., 911.

43. Riding for purposes disconnected with work.—*McDaniel v. Highland Ave.*, etc., R. Co., 90 Ala. 64, 8 So. 41; *Simmons v. Oregon R. Co.*, 41 Ore. 151, 4 R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896, 69 Pac. 440; *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284; *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381.

Day laborer allowed to attend his own affairs when not needed for the day.—In *McDaniel v. Highland Ave.*, etc., R. Co., 90 Ala. 64, 8 So. 41, it is held that one who is employed by a railroad company as a day laborer, reporting daily for service, and subject to call as such, but allowed to attend to other business when not needed for the day, and who gets on a train of the com-

pany for his own purposes when "off duty," occupies the position of a passenger.

Station agent riding by permission of conductor.—In *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381, it is held that a station agent, while riding to his home on a passenger train of his employer, by permission of the conductor, five hours after his labors of the day had ceased, was a passenger, and did not assume the risks attending the operation of the train with the coach, instead of the engine, in front.

Motorman riding to dinner on front platform—Rule—Fellow servant.—In *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284, it is held that a motorman in the employ of a street car company, when going home to dinner after his morning's work, riding free on the front platform of a car of the company under a rule permitting employees of the company in uniform to do so, is a passenger, and not a fellow servant of the motorman operating the car.

44. Free ticket.—*Central R. Co. v. Henderson*, 69 Ga. 715; *Gregory v. Georgia Granite R. Co.*, 132 Ga. 587, 64 S. E. 686.

"One may be both a passenger and an employee of a railroad company; an employee when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged but riding from one place to another, even though continuing all the while in a popular sense in the employ of the company." *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 42 S. E. 522, 94 Am. St. Rep. 125, 5 R. R. R. 433, 28 Am. & Eng. R. Cas., N. S., 433, 59 L. R. A. 107, quoting 5 Am. & Eng. Enc. L. (2d Ed.) 516.

An employee of a railroad company

intestate was killed, it was held that the relation of carrier and passenger did not exist.⁴⁵

§ 2186. Right to Transportation Secured by Contract of Employment.—The general rule seems to be that when an employee of a railroad company is riding upon a train of his employer, upon which he has no duties to perform, and he is entitled to such transportation as part of his wages, under his contract of employment, his relation to the railroad company is that of a passenger for hire.⁴⁶ So where a railroad, in consideration of payment of a

riding on a trip pass, between his home and place of business, furnished by the company is entitled to be treated as a passenger. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593, 36 R. R. R. 438, 59 Am. & Eng. R. Cas., N. S., 438.

45. Car and engine borrowed.—*Davis v. Chicago, etc., R. Co.*, 45 Fed. 543.

46. United States.—*Whitney v. New York, etc., R. Co.*, 43 C. C. A. 19, 19 Am. & Eng. R. Cas., N. S., 184, 102 Fed. 850, 50 L. R. A. 615.

Illinois.—*St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

Maine.—*Hebert v. Portland R. Co.*, 103 Me. 315, 28 R. R. R. 512, 51 Am. & Eng. R. Cas., N. S., 512, 69 Atl. 266, 13 Am. & Eng. Ann. Cas. 886.

Massachusetts.—*Dugan v. Blue Hill St. R. Co.*, 193 Mass. 431, 26 R. R. R. 159, 49 Am. & Eng. R. Cas., N. S., 159, 79 N. E. 748.

Michigan.—*Eberts v. Detroit, etc., R. Co.*, 151 Mich. 260, 115 N. W. 43, 28 R. R. R. 159, 51 Am. & Eng. R. Cas., N. S., 159.

New Jersey.—*New York, etc., R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630.

Pennsylvania.—*McNulty v. Pennsylvania R. Co.*, 182 Pa. 479, 38 Atl. 524, 8 Am. & Eng. R. Cas., N. S., 685, 38 L. R. A. 376, 61 Am. St. Rep. 721.

"*McNulty v. Pennsylvania R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, 8 Am. & Eng. R. Cas., N. S., 685, affirms the doctrine that 'a person employed by a railroad company at a certain amount of wages per day and free transportation to and from his home is to be regarded as a passenger while traveling to his home after his day's work is done.'" *Goehring v. Beaver Valley Tract. Co.*, 222 Pa. 600, 72 Atl. 259, 32 R. R. R. 459, 55 Am. & Eng. R. Cas., N. S., 459.

Rhode Island.—*Enos v. Rhode Island, etc., R. Co.*, 28 R. I. 291, 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612, 67 Atl. 5, 12 L. R. A., N. S., 244.

Washington.—*Harris v. Puget Sound Elect. Railway*, 52 Wash. 289, 34 R. R. R. 45, 57 Am. & Eng. R. Cas., N. S., 45, 100 Pac. 838.

West Virginia.—*Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841.

A railroad employee traveling free ac-

cording to his contract of service, but on his own private business, and when his time is his own, is, so far as relates to the company's liability for injuries due to the negligence of its employees, a passenger. *Simmons v. Oregon R. Co.*, 41 Ore. 151, 4 R. R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896, 69 Pac. 440.

In *Williams v. Oregon, etc., R. Co.*, 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777, it is held that where one agrees with a carrier to enter into its employment at a certain place in the future, and, in consideration of the mutual interests of both, a free pass is given to the place of employment, purporting to render the carrier not liable for injuries caused by its agents, while he is traveling on the carrier's road to the place of employment, on such pass, such person is to be regarded as a passenger for hire, and not an employee.

A railroad employee, while riding on a train of his company, upon a pass to and from his residence to the place of his employment, is entitled to the same care and protection due other passengers. *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

Street railway employee paying fare in coupons issued as part of wages.—Where an employee of a street railway is riding on a regular street car of his company from his home to his assigned place of work, if he so rides of his own volition, and not by the direction of the company, and pays his fare in coupons for fare issued to him by the company as a part of his wages, he is a passenger. *Hebert v. Portland R. Co.*, 103 Me. 315, 28 R. R. R. 512, 51 Am. & Eng. R. Cas., N. S., 512, 69 Atl. 266, 13 Am. & Eng. Ann. Cas. 886.

Tickets as part of flagman's wages.—A railroad flagman, who received as compensation for his services a weekly sum of money and transportation tickets on the railroad to convey him to and from his work, was a passenger while riding home on one of the tickets after his day's work has been fully completed. *Enos v. Rhode Island, etc., R. Co.*, 28 R. I. 291, 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612, 67 Atl. 5, 12 L. R. A., N. S., 244.

Transportation as part of wages.—Traveling on company's time.—The rights of one injured while riding on a

certain sum per year by the person in question, and of his agreement to supply the passengers on one of its trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all its trains, his relation to them, while traveling under such contract, was that of a passenger, and not of a servant of the company.⁴⁷ Such a person is, nevertheless, a passenger although the contract of hiring may have been authorized.⁴⁸ An employee of a street railroad company while riding on a car to his place of work is a passenger, if he so rides of his own volition and pays his fare in coupons issued to him by the company as a part of his wages.⁴⁹ But there are cases which hold that a person in the employ of a railroad company who travels back and forth from his home to the place where his services are rendered, upon the cars of the company, his transportation, free of charge, constituting part of the contract of service, is while so traveling an employee, and not a passenger.⁵⁰ And in such cases, when the status of the party at the time is in dispute, the question is for the jury.⁵¹

train were those of a passenger, and not of an employee, though he was also an employee of the road, he not only having ridden on transportation furnished as part of his wages, but had no duties to perform on the train, and this though after boarding the train he was traveling on the time of the company. *Harris v. Puget Sound Elect. Railway*, 52 Wash. 289, 34 R. R. R. 45, 57 Am. & Eng. R. Cas., N. S., 45, 100 Pac. 838.

47. Season ticket issued to person supplying train with ice water and selling popped corn.—*Commonwealth v. Vermont, etc.*, R. Co., 108 Mass. 7, 7 Am. R. Rep. 394, 11 Am. Rep. 301.

48. Traveling on gang pass issued to foreman of "bonder gang."—*Hiring unauthorized.*—One who was riding with H. on a pass issued by the carrier to H., who was in its employ as foreman of a "bonder gang," reciting "pass H. and five men, bonders," was a passenger, as respects liability of the carrier for his injury from the wreck of the train, even if his hiring by H. as a bonder at a certain amount per day and transportation to and from work was unauthorized. *Harris v. Puget Sound Elect. Railway*, 52 Wash. 289, 34 R. R. R. 45, 57 Am. & Eng. R. Cas., N. S., 45, 100 Pac. 838.

49. Coupons issued as wages.—Where the assigned place of work of a street railroad employee is at a distance from his home, he may nevertheless be a passenger, with the rights of one, while riding in the cars of the company from his home to his place of work. *Hebert v. Portland R. Co.*, 69 Atl. 266, 103 Me. 315, 28 R. R. R. 512, 51 Am. & Eng. R. Cas., N. S., 512, 13 Am. & Eng. Ann. Cas. 886.

50. Contrary view.—*New York, etc.*, R. Co. *v. Vict.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267. See also, *Russell v. Hudson River R. Co.*, 17 N. Y. 134, reversing 5 Duer 39.

Day laborer's work connected with train—Agreement to take home at night—Right to services in emergency.—In *Russell v. Hudson River R. Co.*, 17 N.

Y. 134, it is held that a laborer employed by a railroad to work in connection with a train of cars, under an arrangement by which he was to be conveyed to his home every night in such cars free of charge, can not maintain an action against the company for an injury sustained, while thus riding, in consequence of the negligence of the engineer. In this case it is said in the opinion: "But conceding that the plaintiff was not bound to return, even if the defendants insisted upon it, it does not follow that while actually returning to the city with the train he was not a servant of the company. If he were a mere passenger, he was not bound to do anything to facilitate the return of the train. If an emergency arose, requiring the use of the brakes, he might refuse to raise his hand. If an obstruction was met upon the track, he might fold his arms until the company removed it, and what he might do in this respect, every other hand returning to the city under similar circumstances might also do. Such, could not, I think, have been the true relation of the parties. The plaintiff was employed by defendants as a day laborer. He was to be taken up at the city where he lived in the morning, and set down there at night, and he should, I think, be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid if necessary in promoting the passage of the train, both to and from the city. This is decisive of the case."

As between an employer and an employee, when the employee receives transportation as a part of his contract of employment, the law requires no more than ordinary or reasonable care on the part of the employer. *Eidem v. Chicago, etc.*, R. Co., 158 Ill. App. 82.

51. Borough policeman preserving order in street cars—Riding on front platform—Derailment.—A borough policeman, not paid by the borough, but by persons needing police protection, rendered serv-

§ 2187. Working Passage under Agreement with Trainmen.—It may be stated as a general rule that trainmen have no implied authority to give transportation in consideration of services to be rendered by the person carried, and a person so working his passage is not entitled to the rights of a passenger.⁵²

§ 2188. Newsboys on Street Cars.—A newsboy jumping on and off a moving street car to sell his newspapers, not hailing to stop the car to receive him, nor signaling to stop to allow him to alight, not asking nor receiving permission either express or tacit, nor asking or waiting for leave or license, but jumping on and off under circumstances that clearly indicate no purpose to pay fare, and no aim to be transported, but only to avail himself of the presence of persons on the car likely to buy his papers, is in no sense a passenger, and the carrier is not under obligation to observe toward him the same degree of care that the law requires to be observed towards a person in the hands of the carrier to be transported.⁵³ And it has been intimated that it is a matter of

ices to a traction company in preserving order on its cars, and was paid a small sum, with the right of free transportation, he was asked by a conductor to board a car on an outward trip, and there being no disorder on the return trip, the conductor asked the policeman to go on the front platform with the motorman, where he was severely injured by the car leaving the track at a curve. It was held that whether the policeman was a passenger at the time of the accident was for the jury. *Goehring v. Beaver Valley Tract. Co.*, 222 Pa. 600, 32 R. R. R. 459, 55 Am. & Eng. R. Cas., N. S., 459, 72 Atl. 259.

52. Working passage under agreement with trainmen.—*Clarke v. Louisville, etc., R. Co.*, 33 Ky. L. Rep. 797, 111 S. W. 344, 30 R. R. R. 542, 53 Am. & Eng. R. Cas., N. S., 542; *O'Donnell v. Kansas City, etc., R. Co.*, 197 Mo. 110, 21 R. R. R. 542, 44 Am. & Eng. R. Cas., N. S., 542, 95 S. W. 196, 114 Am. St. Rep. 753; *Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79; *Vassor v. Atlantic, etc., R. Co.*, 142 N. C. 68, 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629, 54 S. E. 849, 7 L. R. A., N. S., 950, 9 Am. & Eng. Ann. Cas. 535.

Plaintiff boarded defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train. The conductor replied that he could, and that he was to help unload and load freight. Plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter. Held, that the conductor had no authority to employ plaintiff as a servant or permit him to work his passage on the train, and hence the carrier owed plaintiff no duty as a passenger. *Vassor v. Atlantic, etc., R. Co.*, 54 S. E. 849, 142 N. C. 68, 7 L. R. A., N. S., 950, 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629, 9 Am. & Eng. Ann. Cas. 535.

Plaintiff assisted the train crew in making up a freight train, and got onto the

train when it left toward his home. He knew that the train did not carry passengers. He paid no fare, offered none, and none was demanded. At various stops he assisted in loading and unloading freight, but did not claim that the conductor requested him to do so, though he said that the conductor knew what he was doing and did not object, and was present when one of the brakemen furnished him with a pair of overalls to prevent soiling his clothes. At a certain station he was directed by the conductor to uncouple the engine from a freight car so that the engine might go down on a switch and get another car. In attempting to make the coupling plaintiff was injured. Held, that plaintiff was not a passenger. *Clarke v. Louisville, etc., R. Co.*, 111 S. W. 344, 33 Ky. L. Rep. 797, 30 R. R. R. 542, 53 Am. & Eng. R. Cas., N. S., 542.

On engine of freight train—Agreement to shovel coal.—In *Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79, it is held that a person riding on the locomotive of a freight train by agreement with its fireman to shovel coal for the privilege of riding, he being on the train without the knowledge or consent of the conductor, is not a passenger.

53. Newsboys.—*Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268; *Padgett v. Moll*, 159 Mo. 143, 60 S. W. 121, 52 L. R. A. 854, 81 Am. St. Rep. 347.

A newsboy, entering a street car for the purpose of selling papers, and without paying fare, is not a "passenger" but a mere licensee or trespasser, and the company owes him no duty, except to use ordinary care for his preservation after discovering his peril, and to refrain from inflicting willful, reckless, and wanton injury. *Rosenkovitz v. United R., etc., Co.*, 108 Md. 306, 70 Atl. 108.

It has been said: "If a newsboy is a passenger, then he has the right to hail a car in the middle of a block, for the purpose of selling papers thereon; stop it in full motion; get off; sell his papers;

common knowledge of which the courts can take judicial notice that a newsboy who hops on a car while at full speed, tries to sell papers and then hops off again while the car is in rapid motion, is in no sense, either in fact or in intention or law, a passenger.⁵⁴

§ 2189. Persons Engaged in Private Business under Contract.—If a navigation or railway company, engaged in transporting freight and passengers for hire, as common carriers, rents a room on a boat to a person for selling liquors and cigars, at a stipulated rent, and are to carry and board him as a part of the contract, he is not an employee, and the carrier is not released from liability for injuries he may sustain from the negligence of its employees, but must stand by the rule applicable to passengers.⁵⁵

§ 2190. Employees of Third Persons.—Where, by a contract between a third person and a railroad company, the latter agrees to carry such person's employees to and from work, an employee riding to work on a train, by virtue of such contract is entitled to the rights of a passenger of the railroad company.⁵⁶ And where a railroad company verbally consents for a quarry company to operate cars on its tracks, and the quarry company transports over such road its employees to and from their work, an employee of the quarry company, who has no connection with the operation of the train while being so transported sustained to the railroad company the relation of passenger, to the extent that

pay no fare, and then signal again, stop the car and get off. If this were the law, it is easy to see that street cars would be at the mercy of newsboys and could not be practically operated." *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268, citing *Blackmore v. Toronto St. R. Co.*, 38 Up. Can. Q. B. 217; *Fleming v. Brooklyn City R. Co.* (N. Y.), 1 Abb. N. C. 433; *Duff v. Allegheny Valley R. Co.*, 91 Pa. 458.

Boarding without signal.—Not seen by conductor.—Intention to pay fare if demanded.—In *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268, it is held that a newsboy who jumps on a street car without signaling it to stop, for the purpose of selling papers, is not a passenger, so as to charge the company with special care to avoid injuring him, though he intended to pay fare if the conductor asked him, it appearing that the conductor did not see him, and that the gripman, who had no authority to grant or refuse him permission to ride, tried to eject him.

54. Judicial notice.—*Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268.

55. Room of steamboat rented to person for selling liquors and cigars.—*Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

56. Railroad contracting to carry lumber company's employees to and from work.—*Trinity Valley R. Co. v. Stewart* (Tex. Civ. App.), 62 S. W. 1085.

Plaintiff was the servant of one who had contracted with a railroad company to erect fences along the right of way, the contract requiring the railroad to

transport the contractor's servants. When the road was sufficiently completed the railroad put on a train, consisting of a water tank car, some freight cars, and a passenger coach. When the conductor and crew of such train were preparing to take the locomotive and tank car to a certain place, the contractor requested the conductor to carry plaintiff there on the tank car, and while riding thereon, plaintiff was injured owing to the derailment of the train. There was a rule of the company forbidding freight conductors to allow passengers on freight cars. Held that, under the facts, a contention that the relation of passenger and carrier did not exist between plaintiff and the railroad because of the rule forbidding the carrying of passengers on freight cars was of no merit. *Gray v. Columbia, etc., R. Co.*, 49 Ore. 18, 88 Pac. 297.

Employee of another company riding on defendant's train to inspect ties purchased from defendant.—In *St. Louis, etc., R. Co. v. Kitchen*, 98 Ark. 507, 41 R. R. R. 178, 64 Am. & Eng. R. Cas., N. S., 178, 136 S. W. 970, it is held that a tie inspector of another railroad company, who was, with the consent of defendant railroad, riding on its train in order to examine certain ties bought by his company, while not technically a passenger, was entitled to the same care as a passenger, his condition being analogous to that of an express messenger; and this duty was not lessened by the Oklahoma statute providing that a carrier of persons without reward must use ordinary care for their safety, as that statute applies to persons carried gratuitously, and not by virtue of a contract.

the railroad and its licensees are bound to exercise extraordinary diligence to keep from injuring him.⁵⁷

Employee of News Company.—A newsboy on a train is considered to be a passenger thereon, arrangements having been made by his employees with the carrier which he is transported between certain points named from time to time.⁵⁸

Employee at Station.—An employee of an express company employed to load and unload express matter into and from railroad cars at a station was not a passenger.⁵⁹

§ 2191. Persons Traveling on Sunday.—One may be entitled to all the rights of a passenger, although he is knowingly traveling upon a train or conveyance in violation of a Sunday law.⁶⁰ A contract to carry made on Sunday, or to be performed on Sunday, is by force of the statute, illegal and void. No action could be maintained for the breach of such a contract nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments.⁶¹ It can not be said that such person's violation of the law was the cause of the injury. It is only the occasion for the injury by the carrier's unlawful act and hence the passenger's wrongdoing did

57. Quarry company operating cars on railroad's track by consent — Quarry company's employees riding to work—Relation to railroad.—*Gregory v. Georgia Granite R. Co.*, 132 Ga. 587, 64 S. E. 686.

58. Employees of news companies.—*Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282.

59. Employee at station.—*Piper v. Boston, etc., Railroad*, 72 Atl. 1024, 75 N. H. 228.

60. Sunday travelling.—*United States, —Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co. (U. S.)*, 23 How. 209, 16 L. Ed. 433.

Minnesota.—*Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575, 5 Ky. L. Rep. 187 note. *New Jersey.*—*Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178, 7 L. R. A. 435.

New York.—*Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, 7 Am. R. Rep. 25, 9 Am. R. Rep. 486, affirming 65 Barb. 32; *Landers v. Staten Island R. Co.*, 13 Abb. Prac., N. S., 338, reversed in 53 N. Y. 450, 14 Abb. Prac., N. S., 346.

Wisconsin.—*Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278, 18 N. W. 17.

61. Reason of rule.—*Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

In *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 7 Am. R. Rep. 25, 9 Am. R. Rep. 486, 17 Am. Rep. 221, affirming 65 Barb. 32 it is said in the opinion: "It

would be a great perversion of right and of law, in my opinion, to hold that a common carrier may invite and receive into his conveyance a passenger for transportation for hire on Sunday, and be freed from all such duty and responsibility for his preservation and safety on that day as is clearly the carrier's duty and required by law on the other six days of the week. Such is not the law in Pennsylvania, as clearly held in *Mahony v. Cook*, 62 Penn. 342. Nor does the Supreme Court of the United States regard it as sound law. See *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co. (U. S.)*, 23 How. 209, 16 L. Ed. 433. Nor is it, in my opinion, or ever will be, the law of this State."

Particeps criminis—Not limited by contract—Public policy.—In *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575, 5 Ky. L. Rep. 187 note, it is said in the opinion: "It is further contended that the deceased was, by accepting passage upon the steamboat, engaged in an unlawful act, and was particeps criminis with the defendant and their agents in violating the Sunday law. It is a sufficient answer to this objection that the defendants on that day occupied the relation of common carriers of passengers; and their general obligations to use such care and diligence as the law enjoins is not limited by the contract with the passengers, * * *, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question."

not contribute to the injury in such a sense as to deprive him of his legal right of action.⁶²

§ 2192. Person Forcibly Carried Aboard by Carrier's Agents.—A petition showing that plaintiff's decedent was forcibly carried aboard defendant's street car by defendant's servants to carry decedent to a police station, showed the relation of carrier and passenger between defendant and decedent.⁶³

§ 2193. Union Depots.—Where the law creates a terminal company and require a railroads to use its union station, one who has purchased a ticket and expects to board a train leaving the union station is not a passenger until about to step upon the train.⁶⁴ And where one railroad company leases the rights to use another carrier's depot, in common with the lessor, for the arrival and departure of trains, with the use of the waiting rooms, etc., a person who comes to such depot as a passenger on the lessee road is as to the lessor a mere stranger and not a passenger.⁶⁵

62. Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

63. Person forcibly carried aboard.—Lewis *v.* Bowling Green R. Co., 144 S. W. 377, 147 Ky. 460, 39 L. R. A., N. S., 929.

64. Union depots.—Hunt *v.* New York, etc., R. Co., 98 N. E. 787, 212 Mass. 102.

65. Passengers of lessee of union depot not passenger of lessors.—The building in the city in question, known as the "Union Depot," with the yard or grounds annexed was the property of S. and the L. railroad companies, but the M. railroad company acquired by lease the right to use the property in common with them, for the arrival and departure of its trains, with the use of its waiting rooms, etc. Plaintiff came to such city on the

M. railroad, and on alighting at the "Union Depot," desiring to find a toilet room, made inquiry of a stranger, who pointed in the direction of a house erected on the bank of the river, at the further end of the station platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff and was injured. The platform was well lighted, and extended from the depot to the river, but there was no light at the toilet room, and a house intervened between it and the lights on the platform. It was held that plaintiff had no cause of action against such lessor railroads, being as to them a mere stranger, and not a passenger. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

CHAPTER XXII.

FARES, TICKETS, SPECIAL CONTRACTS, TRANSFERS, ETC.

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§ 2194. Right of Carrier to Compensation.—In the absence of contractual or other valid exemptions a carrier is entitled to compensation for carrying a passenger.¹ The authority given a corporation to carry persons implies authority to charge a reasonable sum for the carriage.² Where bonds for the construction of a subway pledge, as required by statute, the amount of tolls for persons passing through the subway, for the payment of principal and interest, and the subway maintains two stations besides the stations at the termini,

1. Right of carrier to compensation—

Illustrations.—Plaintiff purchased a ticket on defendant's railroad from W. to N., but, because a certain train did not stop at W., went up the line to C., and there boarded train for N. Held, he should have paid the fare from C. to W. *Illinois Cent. R. Co. v. Billington*, 17 Ky. L. Rep. 271, 30 S. W. 885.

Where an intending passenger on a street car asked the conductor if it was a M. P. car, and he answered that it was, and the car was not going to M. P., but returning therefrom, plaintiff, on its arriving at the terminus, could not ride from there to M. P. without the tender of another fare. *McGarry v. Holyoke St. R. Co.*, 65 N. E. 45, 182 Mass. 123.

Train not scheduled to stop at passenger's destination.—The plaintiff purchased a ticket at reduced rates from agent of defendant at W. to go to N. and return, signing a contract endorsed on the ticket to make a continuous journey each way. By the regular schedule

for several months the mail trains at night did not stop at W.; the plaintiff resided near W., and was frequently there, but testified he did not know said mail train did not stop there, and had seen notices and posters in the depot, but had not read them. On his return trip he got on said mail train at C. and came to K., where a new conductor took charge of the train, to whom plaintiff presented his ticket, when said conductor told him the train did not stop at W., and he could not put him off there. Plaintiff requested a check to get off at M., which was refused. The conductor punched and took up the ticket. The train did not stop at W. but went on to R. some miles beyond. It was held that the conductor was entitled to exact the regular fare beyond W. *Trotlinger v. East Tennessee, etc., R. Co.*, 79 Tenn. (11 Lea) 533.

2. Stone v. Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191.

a person who takes a car and rides through a part of the subway and voluntarily leaves it at an intermediate station passes through within the statute, and is liable to pay the prescribed toll.³ A county treasurer is not a "messenger," within the meaning of a statute imposing upon a railroad the duty of transporting public messengers free of charge.⁴

Passenger on Wrong Train.—It is held that where a passenger, by mistake, gets on a train other than the one he intended to take, the company may charge him for the distance it carries him on such train.⁵ It is also held that the rule that a person who, by mistake, takes a wrong train, is not obliged to pay for his ride to the first station at which he has an opportunity to alight, is not available to one having a season ticket and taking a train in the belief that it was good on such train.⁶

Failure to Procure Ticket or Pay Fare as Ground for Ejection.—See post, "Ejection of Passengers," chapter 25.

Action to Recover Charges.—Under a statute imposing a tax upon receipts of common carriers, and authorizing them to add the tax to their rates of fare, an action will not lie by a carrier to recover the amount of the tax upon a fare which has been paid, but the fare paid will be presumed to have included the tax.⁷ In an action by a railroad company to recover the fare for a certain trip to which defendant claims he was entitled under his season ticket, a schedule of trains in force at the time is admissible to show that the train upon which defendant rode did not regularly stop at his destination, and that he did not have the right to ride on it under the contract in his season ticket.⁸

§§ 2195-2201. Amount of Fare—§ 2195. In General.—Common carriers may, within legal limits, fix the fare to be charged,⁹ and may carry passengers at a rate less than that fixed by law.¹⁰ Where the rate charged by a carrier for a ticket is less than the rate authorized by law to be charged, the ticket fare is *prima facie* reasonable.¹¹ Under a statute authorizing railroad companies to make certain charges "per mile" for carrying passengers, the same fare can be charged for a part of a mile that is charged for a whole mile.¹² Under a railroad commission rule that ten cents as a minimum fare may be collected, where the regular fare would be less than that, a carrier, whose regular fare is four cents a mile, has no legal right to demand of a passenger, tendering for his passage from one station to another, a distance of 126 miles, his mileage book for 125 miles and five cents in money, an additional five cents.¹³

Who May Establish Rates.—The rates of fare of a railroad corporation

3. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038. Mass. St. 1897, p. 498, c. 500.

4. Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404. Cal. St. 1863-64, p. 344.

5. Passenger on wrong train.—Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

Plaintiff boarded the wrong train, without being misled by an employee of defendant, and the mistake was not discovered till the conductor took up tickets, when plaintiff refused to pay his fare to the next station; but he obeyed the conductor in getting off when the train stopped for him. Held, that it was not the conductor's duty to carry plaintiff to the next station, or to a place where he could rest in comfort, so that he might return on the next train. Missouri, etc., R. Co. v. Dawson, 10 Tex. Civ. App. 19, 29 S. W. 1106.

6. New York, etc., R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20.

7. Action for charges.—Section 103, Act of Congress, June 30, 1864. Clayton v. Smith, 1 Colo. 95.

8. Admissibility of evidence.—New York, etc., R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20.

9. Right of carrier to fix fare.—Knoxville Tract. Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

10. Less than statutory rate.—Johnson v. Georgia R., etc., Co., 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502.

11. Powell v. Pittsburg, etc., R. Co., 5 O. Dec. 89, 2 Am. L. Rec. 403.

12. Kirby's Dig., § 6611. Jonesboro, etc., R. Co. v. Brookfield, 87 Ark. 409, 112 S. W. 977.

13. Louisville, etc., R. Co. v. Berry, 58 Fla. 300, 50 So. 579.

need not be established by the board of directors and proved by a record of their action. Agents other than the directors may be empowered to regulate such matters.¹⁴

Construction of Franchise.—A provision in a franchise granted by a township to an electric suburban railway that the rate of fare from any point in the township to a certain city, and vice versa, should, at no time, exceed the rate then charged by the company from the city to a certain point in the township, and vice versa, includes such rate on any line subsequently built or purchased by the corporation.¹⁵

Permitting a person to travel at a rate lower than that given to the general public, by a carrier, is a mere gratuity, which the carrier can withhold at its pleasure, and even a custom to allow a lower rate imposes upon it no obligation to give such permission.¹⁶

Effect of Custom of Selling Tickets at Reduced Rates.—The fact that a railroad company has been accustomed, on certain days to sell round-trip tickets at a reduced rate of fare, does not entitle a person, who fails to procure such a ticket by reason of the fact that the agent is absent and the ticket office is closed, to be carried the round trip upon a tender to the conductor of the fare which the company has been in the past accustomed to charge. The closing of the ticket office is prima facie evidence that the company intended to abandon its custom, which it had a right to do, and, in the absence of facts showing that such was not its intention, such custom can not be relied on to constitute a contract of carriage at the reduced rate which the company was formerly in the habit of charging.¹⁷

Statutory Regulation of Rate.—See ante, "Charges," §§ 35-95.

Preferences and Discriminations.¹⁸—Where a street railway company under an ordinance of a city, which requires that pupils of schools be given reduced rates of transportation, grants reduced rates to the students of one college, they can not deny the same to students of another college. Any discrimination between the students of the two colleges would be arbitrary and capricious.¹⁹ Common carriers are not required, at common law, to charge a uniform rate per mile for the carriage of passengers over their entire lines, without reference to circumstances and conditions. Under substantially similar circumstances and conditions this is required, and when unequal rates are charged between different points, such inequalities in rates must not be undue or unreasonable.²⁰ A statute making it unlawful for a common carrier to give any undue or unreasonable preference to any particular locality, or to subject any particular locality to any undue or unreasonable prejudice or disadvantage does not forbid discrimination in rates between different localities, but requires that discrimination shall not be undue or unreasonable.²¹ Where it is charged that a railroad company is giving an undue and unreasonable preference in passenger rates to one or more localities over other localities on its line, competition

14. *Who may establish rates.*—*Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276.

15. *Construction of franchise.*—*West Bloomfield Tp. v. Detroit United Railway*, 146 Mich. 198, 109 N. W. 258.

16. *Illinois Cent. R. Co. v. Dunnigan*, 95 Miss. 749, 50 So. 443, 24 L. R. A., N. S., 503.

17. *Effect of custom of selling tickets at reduced rates.*—*Johnson v. Georgia R., etc., Co.*, 34 S. E. 127, 108 Ga. 496, 46 L. R. A. 502.

18. *Preferences and discriminations.*—See ante, "Preferences and Discriminations," §§ 96-108.

19. *Northrop v. Richmond*, 105 Va. 341, 53 S. E. 963.

20. *Discrimination in rates between different localities.*—*Hocking Valley Railway v. Railroad Comm. (O.)*, 5 N. P., N. S., 265.

21. Section 23; *Ohio Rd. Comm. Act. (Rev. St. 244-33)*. *Hocking Valley Railway v. Railroad Comm. (O.)*, 5 N. P., N. S., 265, holding that the lower passenger rates charged by the defendant carrier between Columbus and Lancaster and Columbus and Logan than it charged between Columbus and Athens, do not constitute an undue or unreasonable preference in favor of the localities of Lancaster and Logan, as against the locality of Athens.

of other roads in the carriage of passengers between such localities is a factor to be considered in determining whether such inequality in rates is or is not undue or unreasonable.²²

§§ 2196-2201. Extra Fare—§ 2196. In General.—Carriage on Freight Trains.—A railroad company may charge extra rates to passengers on freight trains, provided the same terms are extended to all such passengers, and ample facilities accommodate all the travel on the road.²³

Carriage on Train Composed of Pullman Cars.—The right of a railroad passenger who purchased a first-class ticket and entered a train apparently ready to receive passengers for carriage to his destination is subject to his observance of all reasonable rules adopted by the carrier, including the requirement of payment of Pullman car fare, the train being composed of sleepers only, though he had no notice of such rules.²⁴

Failure to Observe Regulation as to Entering Car.—A regulation of a street railway company that requires persons desiring to take its cars at a transfer station to enter the cars within, and not beyond, the prescribed limits of the station, and for their failure to do so declaring their right of transportation forfeited except upon payment of an additional fare, is reasonable.²⁵

Passenger Entering Another Car of Same Train.—Where a carrier has a rule which requires the collection of fares on each car of the train by the different conductors on such cars, and that passengers changing cars must pay a second fare, a passenger, after taking passage on one car and paying his fare, is not authorized to take another car and refuse to pay a second fare when demanded after being informed of the rule, although insufficient accommodations are provided on the first car.²⁶ And where a person boards an open street car, and then, because of a sudden change in the weather, leaves such car, and takes passage in a closed one, attached to the other, he becomes a new passenger, and liable for another fare.²⁷

Returning to Station Platform.—A rule that no one leaving a station platform should be permitted to return to it without paying a second fare is not unreasonable.²⁸

Passenger to or from Other than Regular Stations.—In Arkansas by statute railroad companies are authorized to make special charges to passengers boarding or alighting at other than regular stations.²⁹

22. *Hocking Valley Railway v. Railroad Comm. (O.)*, 5 N. P., N. S.; 265.

23. *Carriage on freight trains.*—*Arnold v. Illinois Cent. R. Co.*, 83 Ill. 273, 25 Am. Rep. 386.

24. *Pullman car fare.*—*Doherty v. Northern Pac. R. Co.*, 43 Mont. 294, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 401, 36 L. R. A., N. S., 1139.

25. *Failure to observe regulation as to entering car.*—*Nashville St. R. Co. v. Griffin*, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

26. *Passenger entering another car of same train.*—*Birmingham R., etc., Co. v. Yielding*, 155 Ala. 359, 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285, 46 So. 747; *Birmingham R., etc., Co. v. Stallings*, 154 Ala. 527, 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319, 45 So. 650; *Birmingham R., etc., Co. v. McDonough*, 153 Ala. 122, 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618, 44 So. 960, 13 L. R. A., N. S., 445.

27. *Lasker v. Third Ave. R. Co.*, 57 N. Y. S. 395, 27 Misc. Rep. 824.

28. *Returning to station platform.*—*Sickles v. Brooklyn Heights R. Co.*, 99 N. Y. S. 953, 113 App. Div. 680, wherein it appeared that plaintiff, after paying his fare and passing the turnstile at an elevated station, discovered he had lost a paper, and informed defendant's servant of his desire to go back and find it, but was told that if he did so, in conformity with the rules of the company, he would have to pay another fare. He went, and on returning demanded to be allowed to go upon the station platform without paying another fare, which was denied. Held, that plaintiff was not entitled to recover for defendant's refusal to allow him access to the platform without payment of a second fare, and for the indignity to which he was subjected.

29. *Passengers to or from other than regular stations — Arkansas statute.*—*Kirby's Dig.*, § 6612. *Clark v. Jonesboro, etc., R. Co.*, 87 Ark. 385, 112 S. W. 961.

Station held not regular station.—A railway station was a "flag station," and not a "regular station," within the stat-

§§ 2197-2201. Failure to Procure Ticket—§ 2197. In General.—A railroad company may charge more as fare to those paying on the train than it charges for tickets purchased before entering the train,³⁰ where the failure to

ute where the company had no depot there and no joint agency with the railroad which it crossed and did not use the other company's depot, though trains stopped at the crossing opposite the depot and passengers were received and discharged there on signal, and freight, express, and mail matter was received there; no tickets, bills of lading nor baggage checks being issued, and such stations being designated "flag stations" by the railroad, as distinguished from regular stations at which tickets were sold, baggage checked, bills of lading issued, and station houses and agents were maintained [citing 7 Words and Phrases, pp. 6039, 6644]. *Clark v. Jonesboro, etc., R. Co.*, 87 Ark. 385, 112 S. W. 961.

30. Extra fare for failure to procure ticket.—*Georgia.*—*Southern R. Co. v. Jones*, 8 Ga. App. 225, 68 S. E. 1011; *Georgia, etc., R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Georgia R., etc., Co. v. Murden*, 83 Ga. 753, 10 S. E. 364; *S. C.*, 86 Ga. 434, 12 S. E. 630; *Phillips v. Southern R. Co.*, 114 Ga. 284, 40 S. E. 268.

Illinois.—*St. Louis, etc., R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353.

Indiana.—*Evansville, etc., R. Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. 992; *Sage v. Evansville, etc., R. Co.*, 134 Ind. 100, 33 N. E. 771; *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Indianapolis, etc., R. Co. v. Rinard*, 46 Ind. 293; *Toledo, etc., R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277.

Iowa.—*State v. Chovin*, 7 Iowa 204. Laws 15th Gen. Assem. c. 68 provided that an extra fare of 10 cents could be exacted of passengers not purchasing tickets where they have a reasonable opportunity to obtain them. *Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

Kansas.—Where one enters a car without attempting to buy a ticket, though the ticket office was open and convenient, he is liable to the excess fare authorized under Laws 1886, c. 139. *Union Pac. R. Co. v. Wolf*, 54 Kan. 592, 38 Pac. 786.

Minnesota.—*Du Laurans v. First Division, etc., R. Co.*, 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102; *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628.

Mississippi.—*Forsee v. Alabama, etc., R. Co.*, 63 Miss. 66, 56 Am. Rep. 801.

Ohio.—*Railroad Co. v. Skillman*, 39 O. St. 444.

Tennessee.—A railroad company may, by a regulation of which the public are duly notified, establish a higher rate of fare if paid on the cars than in the purchase of a ticket for the same trip. *Louisville, etc., R. Co. v. Guinan*, 79 Tenn. (11 Lea) 98, 47 Am. Rep. 279.

Texas.—The statutory provision fixing the rate of passenger fare at three cents per mile contains a proviso that where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold. *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350; *Missouri, etc., R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096, see 93 Tex. 691, no op.

It is the duty of a passenger to procure a ticket before getting on the train, and if he fails to do so he is not entitled to transportation without paying extra fare. *McCook v. Dublin, etc., R. Co.*, 58 S. E. 491, 2 Ga. App. 374.

New York statute.—In view of Laws 1889, c. 38, authorizing railroads to collect an excess charge of ten cents over the regular rate of fare from any passenger who pays fare in the car, except where the passage is wholly within the limits of an incorporated city, provided that it shall give the passenger a receipt which shall legibly state that it entitles the holder thereof to have the excessive charge refunded, a carrier is not entitled to take excess fare for passage wholly within the limits of an incorporated city, even for temporary detention, and though the amount was repayable to the passenger on the presentation of a slip given him in making the payment. *Hogan v. Long Island R. Co.*, 142 App. Div. 29, 126 N. Y. S. 449.

Contra.—In South Carolina by 18 St. at Large, p. 759, it was provided that an additional sum might be charged passengers who neglect to purchase tickets, but this law was abrogated by an act passed in 1900 (23 St. at Large, p. 457-459), under which act it is held that where a passenger does not buy a ticket when opportunity is given, a railroad company has no right to charge excess fare and give rebate checks therefor between points within the state. *Weber v. Southern R. Co.*, 43 S. E. 888, 65 S. C. 356.

have tickets is not due to the company.³¹ And so it is a reasonable regulation for the company to fix rates by a tariff posted at the stations, and to allow a uniform discount on these rates to those who purchase tickets before entering the cars.³² A railroad company may run an excursion train at reduced rates, and require passengers to purchase tickets as a condition on which they shall obtain the benefit of excursion rates, and it may enforce this rule as against all who by their own fault fail to comply with it.³³ A regulation requiring an additional sum from passengers who fail to purchase tickets is not a discrimination in violation of the constitution,³⁴ but is reasonable,³⁵ and enforceable,³⁶ and a passenger is chargeable with notice of it.³⁷ Exempting from a regulation requiring extra fare on trains passengers who board a train at stations where tickets are not on sale,³⁸ or where, on account of the excessive rush of business, it is impossible to issue refunding checks,³⁹ does not render the regulation partial

31. Georgia.—*Phillips v. Southern R. Co.*, 114 Ga. 284, 40 S. E. 268; *Georgia Southern, etc., R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Georgia R., etc., Co. v. Murden*, 83 Ga. 753, 10 S. E. 364; *Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Georgia R., etc., Co. v. Murden*, 86 Ga. 434, 12 S. E. 630.

Illinois.—*Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Chicago, etc., R. Co. v. Brisbane*, 24 Ill. App. 463.

Indiana.—*Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. 170; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Sage v. Evansville, etc., R. Co.*, 134 Ind. 100, 33 N. E. 771.

Iowa.—*Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

Kansas.—*Union Pac. R. Co. v. Wolf*, 54 Kan. 592, 38 Pac. 786.

Ohio.—*Cincinnati, etc., R. Co. v. Skillman*, 39 O. St. 444.

Oregon.—*Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Texas.—See *Gulf, etc., R. Co. v. Dyer*, 43 Tex. Civ. App. 93, 95 S. W. 12.

Failure to procure ticket due to passenger.—Where a passenger without fault of the railroad company, but solely because of his own lack of reasonable diligence, fails to buy a ticket, he is not entitled to transportation without paying the higher rate exacted by the rules of the company. *McCook v. Dublin, etc., R. Co.*, 2 Ga. App. 374, 58 S. E. 491; *Southern R. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481, 10 Am. & Eng. Ann. Cas. 921; *Georgia, etc., R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

32. State v. Goold, 53 Me. 279.

33. Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256. See *Johnson v. Georgia R., etc., Co.*, 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502.

34. Regulation not discriminatory.—*Ritter v. Philadelphia, etc., R. Co. (Pa.)*, 2 Wkly. Notes Cas. 382.

35. Regulation is reasonable.—*Georgia.*—*Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163 (one cent extra per mile).

Illinois.—*Illinois Cent. R. Co. v. Bauer*, 66 Ill. App. 124.

Iowa.—*State v. Chovin*, 7 Iowa 204.

Kentucky.—*Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, 7 Ky. L. Rep. 498; *Wicks v. Louisville, etc., R. Co.*, 15 Ky. L. Rep. 605.

Louisiana.—*McGowen v. Morgan's, etc., Steamship Co.*, 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817 (25 cents extra).

New Hampshire.—*Hilliard v. Goold*, 34 N. H. 230, 66 Am. Dec. 765 (5 cents additional).

A regulation requiring passengers who do not purchase their tickets at a ticket office to pay a uniform excess of ten cents over the regular fare, which excess the passenger is entitled to have refunded on the presentation at any ticket office of a refunding check delivered to him by the conductor, is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveler. *Reese v. Pennsylvania R. Co.*, 131 Pa. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529.

Not question for jury.—Where a statute provides that an extra charge may be exacted of passengers not purchasing tickets where they have a reasonable opportunity to obtain them, the reasonableness of defendant's regulation providing for the extra charge is not a question for the jury. *Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

36. Wilsey v. Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

37. Passenger chargeable with notice.—*Toledo, etc., R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277.

38. McGowen v. Morgan's, etc., Steamship Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817; *Reese v. Pennsylvania R. Co.*, 131 Pa. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529.

39. Reese v. Pennsylvania R. Co., 131 Pa. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529.

or unfair. And the fact that the company gives a draw-back coupon for the extra fare, on which the passenger may collect it back from any agent at a station, does not affect the validity of the regulation.⁴⁰

Must Not Exceed Maximum Allowed by Statute or Charter.—A railroad company can not impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by statute,⁴¹ or the charter or franchise of the company.⁴² But it is held that the whole amount charged may exceed the maximum allowed by statute when the passenger is furnished with a receipt which entitles him to a refundment of the extra fare.⁴³

Must Be Reasonable.—In the absence of a statutory limitation as to the amount of fare, the higher price charged for carrying passengers when the fare is paid on the train than it does at its ticket offices, must be reasonable.⁴⁴

Extra Fare at Each Station.—If a passenger, neglecting to purchase a ticket, pays such increased fare to a way station, and afterwards concludes to go on to a further station, he may be chargeable with a second increase on his fare between the last two points.⁴⁵ It is held that where a passenger riding to a certain station on a ticket, decides to go on to the next station, and at the station to which his ticket carried him he has no opportunity to purchase a ticket, he need not pay the additional charge required for cash fares;⁴⁶ but there is a contrary holding.⁴⁷

As to right to eject a person for failing to pay extra fare, see post, "Ejection of Passengers," chapter 25.

§§ 2198-2199. Reasonable Opportunity to Procure Ticket—§ 2198. In General.—A railroad company can not exact a higher rate from a passenger who has no ticket, unless it has afforded him a reasonable opportunity to pur-

40. *McGowen v. Morgan's, etc., Steamship Co.*, 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817.

41. **Whole amount must not exceed statutory maximum.**—*Zagelmeyer v. Cincinnati, etc., R. Co.*, 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514; *Fulmer v. Southern R. Co.*, 67 S. C. 262, 45 S. E. 196; *Railroad Co. v. Skillman*, 39 O. St. 444.

42. *Louisville, etc., R. Co. v. Guinan*, 79 Tenn. (11 Lea) 98, 47 Am. Rep. 279.

The right of a passenger on a suburban electric railway to be carried at the rate of fare prescribed in the company's franchise can not be made dependent on compliance with a rule of the company requiring the purchase of tickets at regular stations. *Coy v. Detroit, etc., Railway*, 85 N. W. 6, 125 Mich. 616.

43. *Reese v. Pennsylvania R. Co.*, 131 Pa. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529, holding the excess not a "charge for transportation." See *Allen v. Chicago, etc., Ry. Co.*, 116 Minn. 119, 133 N. W. 462. But see *Baltimore, etc., Turnpike Road v. Boone*, 45 Md. 344, holding that while a railroad company may provide for any reasonable "draw-back" for its own security, yet it may not provide for a "drawback" on a fare in excess of that allowed by law, though below that limit as a maximum it may exercise its own discretion as to the amount of fare or any discount thereon.

44. **Extra fare must be reasonable.**—*Railroad Co. v. Skillman*, 39 O. St. 444.

45. **Extra fare at each station.**—*Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562.

46. *Phettiplace v. Northern Pac. R. Co.*, 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

Kansas.—Gen. St. 1889, par. 1325, permits the collection by railroad companies of fares in excess of the regular rates from passengers who have no tickets, but provides that the act shall not apply to any passenger taking passage from a station where the office was not kept open thirty minutes prior to the starting of the train. Held, that a company could not charge fare in excess of the regular rate where a passenger, deciding to continue his journey, got off at a station to buy a ticket, and waited at the window until the conductor shouted, "All aboard," the agent in the meanwhile being busy on the platform handling baggage. *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40, 31 Pac. 698, following *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500.

47. *Lake Erie, etc., R. Co. v. Quisenberry*, 48 Ill. App. 338.

Where a passenger concludes to go to a station beyond the one to which he has a ticket, he can not demand that the train be stopped long enough for him to buy a ticket. *Easton v. Waters*, 4 Tex. Civ. App. 71, 16 S. W. 540.

chase one before entering the cars.⁴⁸ So if a passenger, before boarding the train, applies at the carrier's ticket office for a ticket, and, without fault on his part, but from either the willfulness or the mistake or inadvertence of the ticket agent,⁴⁹ or because the agent is asleep,⁵⁰ or absent,⁵¹ is unable to procure a ticket, he is under no legal obligation to pay extra fare. If a passenger has not been afforded a reasonable opportunity to purchase a ticket at the station where his journey began, he is not bound to leave the train at a station en route and purchase a ticket back to the station whence he started, and another to his destination, but it is his right to complete his intended journey by paying the ticket rate for his fare.⁵² Where a passenger could have purchased a round-trip ticket at the starting point, the fact that there was no ticket station at

48. Reasonable opportunity to purchase ticket.—*Georgia*.—*Phillips v. Southern R. Co.*, 114 Ga. 284, 40 S. E. 268; *Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Georgia R., etc., Co. v. Murden*, 86 Ga. 434, 12 S. E. 630; *Johnson v. Georgia R., etc., Co.*, 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502; *Georgia, etc., R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Illinois.—*Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Chicago, etc., R. Co. v. Brisbane*, 24 Ill. App. 463.

Indiana.—*Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256; *Sage v. Evansville, etc., R. Co.*, 134 Ind. 100, 33 N. E. 771.

Minnesota.—*Du Laurans v. First Division, etc., R. Co.*, 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102.

New York.—*Porter v. New York Cent. R. Co.* (N. Y.), 34 Barb. 353; *Chase v. New York Cent. R. Co.*, 26 N. Y. 523. See *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505. Compare *Bordeaux v. Erie R. Co.* (N. Y.), 8 Hun 579.

Ohio.—*Cincinnati, etc., R. Co. v. Skillman*, 39 O. St. 444.

Oregon.—*Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Texas.—*Gulf, etc., R. Co. v. Dyer*, 43 Tex. Civ. App. 93, 95 S. W. 12; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657.

Excursion train.—A railroad company may run an excursion train at reduced rates, and require passengers to purchase tickets as a condition on which they shall obtain the benefit of excursion rates, but, where a passenger is unable to procure a ticket through the fault of the company, he may take passage on the train and on a tender of the ticket fare will be entitled to all the rights and privileges that an excursion ticket will

afford him. *Chicago, etc., R. Co. v. Graham*, 29 N. E. 170, 3 Ind. App. 28, 50 Am. St. Rep. 256.

49. Wrong of ticket agent.—*Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103.

50. Ticket agent asleep.—*Forsee v. Alabama, etc., R. Co.*, 63 Miss. 66, 56 Am. Rep. 801.

51. Absence of ticket agent.—*Gulf, etc., R. Co. v. Sparger* (Tex. Civ. App.), 39 S. W. 1001; *Georgia, etc., R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

The railroad company must have an agent at the station to sell tickets. *Forsee v. Alabama, etc., R. Co.*, 63 Miss. 66, 56 Am. Rep. 801. But he need not be at the ticket office after the train has arrived. *Talbert v. Charleston, etc., R. Co.*, 72 S. C. 137, 51 S. E. 564.

Where a passenger who has gone to a railroad ticket office to purchase his ticket in ample time to do so is unable to buy a ticket, and is compelled to go on the train without one, because, although the ticket office is open, as required by *Sayles' Civ. St.*, art. 4258b, § 9, there is no one in the office to sell tickets, the ticket agent being busy unloading baggage, such passenger has a right to travel on the train without paying the additional fare allowed by statute to be exacted from passengers without tickets. *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657.

A statute requiring railroads to keep their ticket offices open for an hour prior to the departure of trains means not only that the office itself shall be open but that someone shall be there to sell tickets. *Rev. St.*, art. 4542. *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497.

Where the conductor did not know of the absence of the ticket seller, and in good faith exacted the extra fare, it was held that under *Laws 1857*, p. 488, the company was guilty of the extortion defined by the statute, which consisted in asking and receiving a greater rate than that established by law. *Porter v. New York Cent. R. Co.* (N. Y.), 34 Barb. 353.

52. *Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

his destination, thus preventing him from buying a ticket home, does not excuse his refusal to pay the extra fare required by the carrier's rules, which was to be returned to him.⁵³ Whether a passenger has been given a reasonable opportunity to purchase a ticket is generally a question for the jury.⁵⁴

§ 2199. Keeping Ticket Office Open.—Where the failure to procure a ticket is due to the ticket office being closed, the carrier has no right to demand the extra fare.⁵⁵ It is held that a railroad company is not bound to keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity is afforded all persons desiring tickets to obtain them.⁵⁶ Under a requirement that a passenger be given a reasonable time before the departure of the train in which to procure a ticket, it is not necessary, at a small station, that a ticket office should be kept open to the very moment of the train's departure, in order to justify the demand for the additional charge.⁵⁷ And the company is not required to keep its ticket office open within such time, before the departure of the train, that a person can not procure a ticket and get upon the train before it begins to move.⁵⁸ It is generally held that a railroad company is not required to keep its ticket office open after the published time of the departure of a train, and up to the actual time of its departure,⁵⁹ so that its failure to keep the office open after the published time, whereby one is unable to purchase a ticket, is no excuse for the refusal to pay extra fare charged on the train.⁶⁰

Statutory provisions requiring that ticket offices be kept open for a specified time "prior to the departure of each train,"⁶¹ or "immediately prior to the starting of the train,"⁶² are held to mean the actual departure and not the advertised time for starting. It is held that if a statutory provision as to the time a ticket office shall be kept open is not complied with the company has no right to collect extra fare from one who failed to get a ticket,⁶³ whether he applied for a ticket or used any diligence in an attempt to procure one.⁶⁴

Closing Ticket Office as Withdrawal of Discrimination.—It has been held that a regulation making a discrimination in fares in favor of purchasers of tickets could be withdrawn by the railroad company at any time before be-

53. *Snellbaker v. Paducah, etc., R. Co.*, 94 Ky. 597, 23 S. W. 509, 15 Ky. L. Rep. 380.

54. **Question for jury.**—*State v. Hungerford*, 39 Minn. 6, 38 N. W. 628. And see *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291.

55. **Keeping ticket office open.**—*Georgia R., etc., Co. v. Murden*, 86 Ga. 434, 12 S. E. 630.

56. *Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

Negligence.—Failure to allow reasonable time, after opening a ticket office, to purchase tickets and board the cars, is negligence. *Gulf, etc., R. Co. v. Fox (Tex.)*, 6 S. W. 569. See *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857.

Failure to keep ticket office open thirty minutes before the departure of a passenger train, as required by the statute, is negligence per se. *International, etc., R. Co. v. Lister (Tex. Civ. App.)*, 72 S. W. 107.

57. *Everett v. Chicago, etc., R. Co.*, 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

58. *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628.

59. *St. Louis, etc., R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Chicago, etc., R. Co. v. Brisbane*, 24 Ill. App. 463.

60. *St. Louis, etc., R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103.

61. **Statutory provisions.**—*Porter v. New York Cent. R. Co. (N. Y.)*, 34 Barb. 353.

62. *Kan. Laws 1886*, c. 139. *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500.

63. *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500.

64. *Sayles' Ann. Civ. St.* 1897, art. 4542; *Gulf, etc., R. Co. v. Dyer*, 43 Tex. Civ. App. 93, 55 S. W. 12. See *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530, 1 S. W. 576, distinguished in *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, wherein it is held that where a person intending to become a passenger on a train failed to apply for a ticket in time to have gotten it had the agent been in the office, the absence of the agent from the office was not a denial of any right of the passenger and would not entitle him to admission to the train without a ticket.

ing actually accepted by a passenger, and that the closing of the ticket office for the night before the plaintiff applied for a ticket was a withdrawal of the offer to so discriminate.⁶⁵ But it is also held that the fact that a ticket office is closed creates no presumption of law or fact that a regulation of the company to sell tickets for less than the fare charged on board the cars has been withdrawn.⁶⁶

Question for Jury.—Whether the company has performed its duty as to keeping open its ticket office is a question for the jury.⁶⁷

§ 2200. Sufficiency of Attempt to Procure Ticket.—A passenger is not bound to wait at a ticket office an unreasonable time for the appearance of the agent to sell him a ticket, or to call again and again at the office to procure one, provided, in good faith and with due diligence, he endeavors to do so before the time for closing the office arrives.⁶⁸ One who offers to purchase a railroad ticket to be used upon a given train after the ticket office, so far as relates to the sale of tickets for that train, has been lawfully closed, can not demand the right to ride upon that train without paying the train rate of fare.⁶⁹ The fact that a passenger was too late in reaching a station to purchase a ticket before entering the train will not relieve him from liability to pay an additional amount of fare required by a regulation of the carrier because of his failure to purchase a ticket.⁷⁰

Question for Jury.—Whether a passenger has performed the duty devolving on him to use good faith and due diligence to procure a ticket as a question for the jury.⁷¹

65. Closing ticket office as withdrawal of discrimination.—*Crocker v. New London, etc., R. Co.*, 24 Conn. 249. See *Johnson v. Georgia R., etc., Co.*, 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502.

In *Bordeaux v. Erie R. Co.* (N. Y.), 8 Hun. 579, it was held that where under its charter a railway company, was bound to keep its ticket offices open at or for any particular time, the fact that a passenger is unable to procure a ticket, in consequence of the office being shut, does not entitle him to be carried to his place of destination, upon payment of the amount for which he could have procured a ticket at the office, if it had been open.

66. *Du Laurans v. First Division, etc., R. Co.*, 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102. See *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256.

Under Laws 1857, c. 228, which provides that the New York Central Railroad Company, at every station on its road where a ticket office shall be established, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger train from such station, but that it shall not be required to keep such offices open between 9 p. m. and 5 a. m., except at Utica and six other stations on its road, and that if any person shall, at any station where a ticket office is established and open, enter the cars as a passenger without first having purchased a ticket, it shall be lawful for the company to demand and receive from him a sum not exceeding five cents, in addition to the usual rate of fare, it was held that the

extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505.

67. Question for jury.—*Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

The question of what is a reasonable time under Iowa Laws 1874, c. 68, § 2, is for the jury, and depends principally on the requirements, convenience, and demands of the public at the station in question. *Everett v. Chicago, etc., R. Co.*, 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

68. Sufficiency of attempt to procure ticket.—*Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

69. *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Southern R. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481, 10 Am. & Eng. Ann. Cas. 921; *Illinois Cent. R. Co. v. Bauer*, 66 Ill. App. 124.

70. *Lake Erie, etc., R. Co. v. Mayo*, 4 Ind. App. 413, 30 N. E. 1106.

Where a passenger did not arrive at a depot until the scheduled time for the train to depart in the afternoon, the railroad company was not bound to hold the train till plaintiff could secure a ticket; the ticket office having been open for the sale of tickets the entire day till within a few minutes of the scheduled time of the train. *Allen v. Chicago, etc., R. Co.*, 116 Minn. 119, 133 N. W. 462.

71. Question for jury.—*Central R., etc., Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

§ 2201. Waiver of Right to Demand Extra Fare.—It is held that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare.⁷² In another decision it is held that the rule just stated is correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of his destination. Thus, if the conductor should receive and retain it, without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for nonpayment, the latter would have the right to assume that the amount paid was satisfactory.⁷³ But the receipt by the conductor, through mistake, for the full fare, of less than that fare will not constitute a waiver. He has a right, upon discovering the mistake, to require the passenger, within a reasonable time, on informing him of the error, to pay the full train fare.⁷⁴

§§ 2202-2206. Payment of Fare—§ 2202. Time, Place and Manner of Payment.—Carriers may make reasonable regulations fixing the time, place, and manner of payment of fares by passengers.⁷⁵ A reasonable regulation of a street railway, intended to secure the orderly and certain collection of fares or tickets from all passengers on its suburban railway trains, may be enforced against a passenger, although he had no previous notice of it.⁷⁶ Whether a rule regulating the manner of payment of fares is a reasonable one, is a question of law to be determined by the court.⁷⁷

Payment in Advance.—A railroad company may provide for payment in advance by requiring all persons before taking passage on its passenger trains to procure tickets.⁷⁸

72. Waiver of right to demand extra fare.—*Du Laurans v. First Division, etc.*, R. Co., 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102, discussed in *Wardwell v. Chicago, etc.*, R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

73. Wardwell v. Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

74. Wardwell v. Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

Where a conductor receives from a passenger in money the regular fare to the point of his destination, and is informed at the time that the passenger wishes to be carried to that point, he does not thereby contract to carry him to that point for that fare, if, after going several seats to the rear, he returns and demands the additional amount required by a regulation of the carrier because of the passenger's failure to purchase a ticket instead of paying in money, facilities for which purchase were afforded him at the station at which he entered the train. *Lake Erie, etc., R. Co. v. Mayo*, 4 Ind. App. 413, 30 N. E. 1106.

75. Right to make regulations as to payment of fares.—*Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641. See *McGowen v. Morgan's, etc., Steamship Co.*, 41 La. Ann.

732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817; *Martin v. Rhode Island Co.*, 32 R. I. 162, 78 Atl. 548, 32 L. R. A., N. S., 695, Ann. Cas. 1912C, 1283.

76. A rule requiring payment of fare on entering a street car is reasonable.—*Faber v. Chicago, etc., R. Co.*, 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789.

77. Question for court.—*Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

78. Payment in advance.—*Indiana.*—*Sage v. Evansville, etc., R. Co.*, 134 Ind. 100, 33 N. E. 771; *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68.

Ohio.—*Cincinnati, etc., R. Co. v. Skillman*, 39 O. St. 444; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457.

Oregon.—*Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Tennessee.—*Lane v. East Tennessee, etc., R. Co.*, 73 Tenn. (5 Lea) 124; *O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

Texas.—*Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291.

Extra fare for failure to procure ticket.—See ante, "Failure to Procure Ticket," §§ 2197-2201.

Payment on Demand.—A regulation that a passenger shall pay his fare on demand of the conductor is reasonable and so necessary for the orderly conduct and transaction of business that it may fairly be presumed to be a regulation which all railway companies carrying passengers adopt and expect to enforce.⁷⁹

Depositing Fare in Box.—A rule of a street railroad requiring passengers to deposit the fares in a box on entering the car,⁸⁰ and forbidding conductors from handling fares,⁸¹ is a reasonable one, and while exceptional circumstances may arise which will make the strict enforcement of the rule vexatious, the railroad need not provide for all the possible exceptions, justifying a suspension of the rule.⁸² When a passenger gives the conductor money to be changed and the latter retains the amount of the fare, the passenger is, in effect, prevented from putting the money into the box by the driver's own act, and does not violate a rule of the company which requires passengers to put the fare into the box.⁸³ Private instructions by a street railway company to its drivers, to go through the cars when crowded and collect the fares, will not render a passenger ignorant of such instructions, who, in obedience to a notice posted in the car prohibiting the driver from collecting fares, had deposited his fare in a box placed there for that purpose by the company, of which fact the driver had full knowledge, liable for the fare a second time.⁸⁴

§ 2203. Necessity for Tender of Exact Fare and Amount for Which Change Must Be Made.—While a street railway company can not require the exact fare charged to be tendered by its passengers,⁸⁵ and must change a reasonable amount tendered for fare,⁸⁶ it may make a reasonable rule fixing the maximum amount for which change will be made,⁸⁷ and refuse to carry a

79. **Payment on demand.**—Georgia, etc., *R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

80. **Depositing fare in box.**—*Elder v. International R. Co.*, 122 N. Y. S. 880, 68 Misc. Rep. 22; *Curtis v. Louisville City R. Co.*, 94 Ky. 573, 23 S. W. 363, 21 L. R. A. 649, 15 Ky. L. Rep. 351; *Nye v. Marysville, etc., R. Co.*, 97 Cal. 461, 32 Pac. 530, holding such a rule reasonable under Cal. Civ. Code, § 2187, providing that a "common carrier may demand the fare of passengers either at starting or at any subsequent time."

The requirement that a passenger pay his fare into the automatic collector is not a demand for a greater fare than allowed by the carrier's charter fixing a maximum rate of five cents, since the establishment of such maximum rate does not preclude the carrier from making reasonable regulations as to its payment. *Martin v. Rhode Island Co.*, 78 Atl. 548, 32 R. I. 162, 32 L. R. A., N. S., 695.

Unreasonable rule.—If the rule of the carrier be construed to require the passenger to put the fare in the box after the amount has been retained by the conductor, it is unreasonable, and will not be enforced. *Curtis v. Louisville City R. Co.*, 14 Ky. L. Rep. 272.

Ejection for refusal to deposit fare in box.—See post, "Ejection of Passenger," chapter 25.

81. *Elder v. International R. Co.*, 122 N. Y. S. 880, 68 Misc. Rep. 22.

82. *Elder v. International R. Co.*, 122 N. Y. S. 880, 68 Misc. Rep. 22.

83. **Where conductor retains amount of fare.**—*Curtis v. Louisville City R. Co.*, 14 Ky. L. Rep. 272.

84. *Perry v. Pittsburgh, etc., R. Co.*, 153 Pa. 236, 25 Atl. 772.

85. **Necessity for tender of exact fare.**—*Barrett v. Market St. R. Co.*, 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, 6 L. R. A. 336; *Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42; *Wynn v. Georgia R., etc., Co.*, 6 Ga. App. 77, 64 S. E. 278; *Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

86. **Carrier must change reasonable amount.**—*Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42; *Wynn v. Georgia R., etc., Co.*, 64 S. E. 278, 6 Ga. App. 77.

A tender of a ten-dollar bill for a five-cent fare is unreasonable. *Judge v. Columbus R., etc., Co. (O.)*, 17 O. D. N. P. 146.

A tender of a five-dollar bill for a five-cent fare is not a reasonable tender. *Muldorney v. Pittsburgh, etc., Tract. Co.*, 8 Pa. Super. Ct. 335; *Barker v. Central Park, etc., R. Co.*, 45 N. E. 550, 151 N. Y. 237, 35 L. R. A. 489, 56 Am. St. Rep. 626. But in *Barrett v. Market St. R. Co.*, 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, 6 L. R. A. 336, it was held that five dollars was such a reasonable amount.

87. **Right to make reasonable rule.**—*Burge v. Georgia R., etc., Co.*, 133 Ga.

passenger not complying therewith.⁸⁸ And whether the passenger had notice of such reasonable rule is immaterial.⁸⁹ It is held that while tendering more than the correct amount of car fare without demanding change, is a good tender, it is not good if coupled with a demand for change as a condition precedent to giving up the money.⁹⁰ Whether a rule fixing the maximum amount for which change will be made is or is not reasonable is a question of law to be determined by the courts.⁹¹

§ 2204. Medium of Payment.—Coin or Legal Tender Notes.—A railroad company can not exact payment of the legal rate of fare in gold coin, or the value thereof in paper currency which is of less value but good as legal tender.⁹² Where a railroad company had a rule requiring the payment of fares in coin, a passenger whose transportation had already commenced could offer legal tender notes in payment, the contract having already been made and the kind of money to be paid being no longer an open question.⁹³

Tax Receipts.—Railroad companies receiving the benefit of county subscriptions under a statute requiring that such railroads take tax receipts in payment of charges, may be compelled to take such tax receipts and issue tickets therefor.⁹⁴

Rare or Worn Coin.—A genuine silver coin worn smooth by use is a legal tender for car fare.⁹⁵ And a genuine silver coin of the United States, distinguishable as such, though somewhat rare and differing in appearance from other coin of the denomination and of later dates, is legal tender for fare.⁹⁶

§ 2205. Tender of Fare to Unauthorized Employee.—An offer to pay the fare to an employee on the train, unauthorized to receive the same, is not

423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42; *Wynn v. Georgia R., etc., Co.*, 6 Ga. App. 77, 64 S. E. 278; *Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

Two dollars maximum amount changed.

—A rule of a street railway prescribing \$2 as the maximum amount that will be changed by a conductor is reasonable. *Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42; *Wynn v. Georgia R., etc., Co.*, 6 Ga. App. 77, 64 S. E. 278. And under such a rule a conductor is not bound to change a \$5 bill, though he had sufficient change; he being allowed considerable discretion in deciding whether he had sufficient change for the probable demands of the trip to allow him to change more than \$2 in a particular case. *Funderburg v. Augusta, etc., R. Co.*, 61 S. E. 1075, 81 S. C. 141, 21 L. R. A., N. S., 868.

Where a rule that conductor shall make change to an amount not exceeding \$2 exists, the tender of a \$5 bill in payment of the five-cent fare, with request for change is not a good tender. *Wynn v. Georgia R., etc., Co.*, 6 Ga. App. 77, 64 S. E. 278. And a tender of \$5 is not good tender for three fares. *Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42.

Five dollars.—A rule requiring all conductors to be provided with currency or

fractional coins to the amount of five dollars and to change bills of that denomination or less when tendered in payment of car fare and not to make change for a greater amount is reasonable. *Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

88. *Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42.

89. *Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

90. *Louisville, etc., R. Co. v. Cottengim*, 104 S. W. 280, 31 Ky. L. Rep. 871, 13 L. R. A., N. S., 624.

91. Question for court.—*Burge v. Georgia R., etc., Co.*, 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42; *Knoxville Tract. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A., N. S., 579, 10 Am. & Eng. Ann. Cas. 641.

92. Medium of payment.—*Lewis v. New York Cent. R. Co.* (N. Y.), 49 Barb. 330.

93. *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616.

94. Tax receipts as fare.—*Mobile, etc., R. Co. v. Wisdom*, 52 Tenn. (5 Heisk.) 125.

95. Worn coin.—*Jersey, etc., R. Co. v. Morgan*, 52 N. J. L. 60, 18 Atl. 904.

96. Rare coin.—*Atlanta Consol. St. R. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

an offer to the company, and, in such case, does not entitle the person to a place on the train, as a passenger.⁹⁷

§ 2206. Rectifying Mistake.—A regulation of a street car company, requiring a passenger who inadvertently deposited an extra fare in the box to go to the company's office for reimbursement, and prohibiting its servant on the car from correcting the mistake, is unreasonable.⁹⁸

§§ 2207-2209. Excessive and Unauthorized Charges—§ 2207. Recovery Back of Fare.—Where a railroad company does not afford a passenger an opportunity to procure a ticket and charges him extra fare for failure to have a ticket, he may recover such extra fare.⁹⁹ Where, because of the wrecking of a ship by storm, a passenger was carried less than half the distance to the port of destination, and the shipowner made no offer to carry him further, he may recover the whole of the passage money paid.¹

§ 2208. As Authorizing Recovery of Damages.—The exaction of an excessive fare from a passenger renders the railway company liable for damages, especially if made under threats of ejection if not paid;² and it is immaterial what reason the passenger gave in objecting to the payment of such fare.³

The measure of damages where a conductor on a railroad exacts excessive fare, but without violence or injury, the passenger paying under protest, is the amount paid, with interest.⁴ Where the exaction of a fare is unlawful the pas-

97. Tender of fare to unauthorized employee.—Cleveland, etc., R. Co. v. Bartram, 11 O. St. 457.

98. Rectifying mistake.—Corbett v. Twenty-Third St. R. Co., 42 Hun 587, 4 N. Y. St. Rep. 536.

Plaintiff deposited, in defendant's fare box, an extra fare by mistake. On discovering the mistake, he applied to the driver for its restoration, which was refused, and he stated that plaintiff would have to go to the office of the company for his money. A lady subsequently entered the car, and delivered her fare to plaintiff who placed it in his pocket, and, on refusing to deposit the fare in the box the driver delivered plaintiff to a policeman, who confined him in a station house until the following morning, when he was discharged. Held, that plaintiff was entitled to retain the money so received to reimburse himself for the money inadvertently placed in the box, and hence was entitled to recover against the company for false imprisonment. Corbett v. Twenty-Third St. R. Co., 42 Hun 587, 4 N. Y. St. Rep. 536.

99. Recovery back of fare.—Chase v. New York Cent. R. Co., 26 N. Y. 523; Forsee v. Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801.

1. Brown v. Harris (Mass.), 2 Gray 359.

2. Exaction of excessive fare.—Southern Pac. Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

Exaction by bridge company.—A railroad company granted to a bridge company its right of way across a stream, and the bridge company built a railroad thereon, which was used by the railroad company. Held, that the railroad com-

pany was responsible for damages resulting from acts of a servant of the bridge company in demanding of a passenger on the railroad a toll for crossing the bridge which was more than the railroad company was allowed by law to charge. Galveston, etc., R. Co. v. Patterson (Tex. Civ. App.), 46 S. W. 848.

Ticket "not good over" bridge.—Where unlawful tolls over a bridge of which a railroad company had the use were collected by a person employed by the bridge company, and the railroad company permitted the exaction thereof, and assisted in their collection, the railroad company is liable to a passenger who paid the employee of the bridge company under threat of ejection if he refused; and such liability is not affected by the fact that on such passenger's mileage ticket was written, "Not good over" that bridge. Southern Pac. Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

3. Galveston, etc., R. Co. v. Patterson (Tex. Civ. App.), 46 S. W. 848.

4. Measure of damages.—Paine v. Chicago, etc., R. Co., 45 Iowa 569.

Plaintiff applied to a railroad company's agent for a ticket to a certain station. The agent, under the mistaken belief that the train on which plaintiff intended to go would not stop at plaintiff's destination, refused to sell him one. Plaintiff boarded the train, and the conductor, under the rules of the company, collected a small sum in addition to the regular fare, because plaintiff had no ticket. Plaintiff paid it under protest, and sued the company for damages. The petition did not allege any ground for punitive damages, nor did the evi-

senger may recover actual damages for the unlawful fare exacted, and for any assault, inconvenience, mental suffering and humiliation attending the act of the conductor in exacting it.^{4a}

Exemplary Damages.—The allowance of exemplary damages for the exaction of an unlawful fare by a railroad company is proper where it is a flagrant evasion of statutory obligations, and oppressive of the public.⁵

Pleading—Sufficiency of Petition.—A petition alleging that plaintiff was a passenger on defendant's railroad, which extended over a bridge, and that an extortionate and unlawful charge was exacted from him for crossing the bridge by one acting under the authority of defendant, states a cause of action, and it is immaterial that plaintiff assigned an erroneous reason—that his mileage ticket, though reciting it was not good over said bridge, had been taken up for the entire distance of his trip including the bridge—for the unlawfulness of the charge.⁶

Excessive Verdict.—Where the verdict in an action for damages for an unlawful collection of a fare is excessive it will be set aside on appeal.⁷

§ 2209. **As Authorizing Recovery of Penalty.**—See ante, "Penalties for Violation of Regulations," §§ 181-275.

§§ 2210-2211. **Acts and Statements of Agents or Employees—§ 2210. Of Ticket Agent.**—A carrier is liable for the conduct of its ticket agents acting within the apparent scope of their authority,⁸ and is chargeable with their misrepresentations or mistakes.⁹ So the representations of a ticket agent, made at the time of the sale of tickets as to the necessity for compliance with conditions contained therein, have been held binding on the carrier.¹⁰ It

dence disclose any. Held, that the measure of damages was the difference between the ticket fare and the amount collected by the conductor. *Courts v. Louisville, etc., R. Co.*, 99 Ky. 574, 36 S. W. 548.

4a. *Galveston, etc., R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848.

5. **Exemplary damages.**—*Galveston, etc., R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848.

Where an agent of a carrier, conscious of one's rights as a passenger, invades that right by exacting unlawful payment of money under threat of expulsion from the train, the conduct of the agent is willful or wanton, authorizing exemplary damages. *Tant v. Southern Railway*, 87 S. C. 184, 69 S. E. 158.

6. **Sufficiency of petition.**—*Galveston, etc., R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848.

7. *Galveston, etc., R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848, holding that a verdict of \$500 actual damages and \$1,500 exemplary damages for an unlawful collection of a fifty-cent fare, but without injuring plaintiff, is excessive.

8. **Liability for acts of agents.**—*Smith v. Southern Railway*, 70 S. E. 1057, 88 S. C. 421, 34 L. R. A., N. S., 708.

9. *Mexican Cent. R. Co. v. Goodman* (Tex. Civ. App.), 43 S. W. 580.

10. **Representations as to necessity for compliance with conditions.**—A carrier is bound to accept a ticket providing that it must be signed by the person using it, though tendered by a wife whose hus-

band signed it in his own name, where the company's agent told the husband that he could sign it. *Mexican Cent. R. Co. v. Goodman* (Tex. Civ. App.), 43 S. W. 580. See *Southern Pac. Co. v. Bailey* (Tex. Civ. App.), 91 S. W. 820, affirmed in 101 Tex. 659, no op.

A mileage book issued by defendant railroad to plaintiff's husband provided that, if it or any ticket issued in exchange for coupons from it should be presented by any person other than the original purchaser, both the book and ticket would be taken up and canceled, and that no employee had power to alter any of its conditions. The book also bore a notice, under the head of "Instructions to agent and conductors," that the coupons therefrom would be honored in exchange for tickets issued by defendant's agent "in accordance with special tariffs and circulars of instructions." Plaintiff's husband presented his book to defendant's ticket agent, requesting a ticket for himself, and also tendered the cash for a ticket for plaintiff, but was told by the agent that he could get both tickets out of the mileage book. Thereafter defendant's conductor refused to accept the husband's explanation, and demanded payment of fares under threat of expulsion, whereupon the husband paid plaintiff's fare; the conductor allowing him to ride on his ticket, but taking up both tickets and the mileage book. Held that, while the husband was charged with notice of the terms of the contract, he could not know whether defendant had

is the duty of a ticket agent to sell tickets to passengers upon the payment of the fare charged for the desired transportation. This is the obvious, as well as the clearly established purpose of his agency, and his implied authority will be limited to acts incident thereto, and of a like nature.¹¹ So the statement of a ticket agent to a passenger who had lost her ticket that the conductor would make it all right, and that she could travel without it, was not binding on the carrier.¹² And representations of the ticket agent to the purchaser of an ordinary railway ticket, containing a statement that it is good for passage between certain points if used within one day from date of sale, not made at time the ticket was sold, but on the next day, to the effect that the ticket would be good and might be used after the expiration of one day from the date of sale, are not binding on the company.¹³ An agent's affirmative answer to plaintiff's interrogation as to whether a limited train was on time is not a representation that plaintiff would be permitted to board the train at that station.¹⁴ Where a railroad company's rules required a passenger wishing to ride on a freight train to sign a special permit to be obtained from its ticket agent or conductor, the act of the agent in selling plaintiff a ticket that he might travel on a freight train without mentioning the permit did not create an unconditional contract to carry the plaintiff, as the rule was a reasonable one, which the agent could not abrogate, and plaintiff was bound to know that the company could make reasonable rules regarding transportation of passengers on freight trains.¹⁵

Representations as to Movement of Trains.—While it is the duty of a person purchasing a railroad ticket to inform himself as to the movement of trains, yet if he possesses no knowledge on that subject, he may rely on information received from the ticket agent, whom the company authorizes to contract for transportation.¹⁶

Representations as to Stops.—It is held that the ticket agent of a railroad company has implied authority to agree with and furnish information to persons desiring to become passengers that a train not scheduled to stop at a certain point will stop there to let him on or of, so that the company will be bound by his representations where the person with whom he makes the agreement, or to whom he gives the information, does not know that it was not within his power or authority to make the arrangement or to give the information.¹⁷ But

not issued a special circular of instructions to agents, authorizing them to issue tickets for coupons from such mileage books to other than the original purchasers, and hence he was entitled to relay on the agent's statements, and defendant was liable. *Smith v. Southern Railway*, 70 S. E. 1057, 88 S. C. 421, 34 L. R. A., N. S., 708.

11. *Texas, etc., R. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852.

12. **Statement that passenger having lost ticket could travel without it.**—*Texas, etc., R. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852.

13. *Hanlon v. Illinois Cent. R. Co.*, 80 N. W. 223, 109 Iowa 136.

14. *Ohage v. Northern Pac. R. Co.*, 118 C. C. A. 302, 200 Fed. 128.

15. **Failure to mention rule as to transportation on freight train.**—*Ellis v. Houston, etc., R. Co.*, 70 S. W. 114, 30 Tex. Civ. App. 172.

16. **Representations as to movement of trains.**—*Gulf, etc., R. Co. v. Moorman* (Tex. Civ. App.), 46 S. W. 662, affirmed in 93 Tex. 685, no op. See *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463,

21 S. W. 399; *McRae v. Wilmington, etc., R. Co.*, 88 N. C. 526, 42 Am. Rep. 745.

Evidence concerning the conduct of a station porter in acting as ticket agent is competent to show authority to make representations as to the running of trains which will bind the company. *Gulf, etc., R. Co. v. Moorman* (Tex. Civ. App.), 46 S. W. 662.

Where the carrier's ticket agent assured the purchaser of a ticket that his wife could take a certain designated train and be conveyed to her home without inconvenience, other than in merely changing cars with a wait of only a few minutes, the words on the ticket, "continuous passage," do not import an agreement that the passenger shall be carried without any stop or change of cars, but indicate that the agent selling such ticket might have had authority to issue it for such passage as he assured the purchaser could be had. *Southern R. Co. v. Daughdrill*, 75 S. E. 925, 11 Ga. App. 603.

17. **Representations as to stops.**—*Louisville, etc., R. Co. v. Scott*, 141 Ky. 538, 133 S. W. 800, Ann. Cas. 1912 C,

it has also been held that the agent can not bind the company by his statements to a person purchasing a ticket for a certain train to a certain station that the train would stop at such station, where it was not a regular stopping place for such train.¹⁸ Statements of a ticket agent that a certain train stopped at a certain station will bind the railroad company only when made contemporaneously with the sale of a ticket, and not when made several weeks before, and not referred to at the time the ticket was sold.¹⁹

Representations as to Best Route.—A railroad station agent, with authority to sell tickets over its line, has authority to furnish information to persons desiring to purchase tickets over the road he represents as to the best route for the intending purchaser to travel to reach his destination, rendering the railroad company liable for all damages proximately caused to such purchaser by the agent's misdirection.²⁰ Where plaintiff's ticket provides that it is good "via short line only," and he does not know which of the two routes is the shorter, he may rely on the statement of the ticket agent as to which route he could take.²¹

Representations as to Stop Over.—Where there is nothing on the face of the ticket to show that a stop over ticket from the conductor is required of a passenger as a condition precedent to his resuming his journey after a stop over, and there is no evidence that notice or knowledge of the existence of the rules of the carrier with respect to stop over privileges was brought home to the passenger at the time of purchasing the ticket or subsequently, it is proper for him to rely upon what the ticket agent told him with respect to the stop over in reply to his inquiry made when purchasing the ticket.²²

Representations as to Time of Arrival at Destination.—A purchaser of a ticket from a ticket agent at a union depot, selling tickets furnished by defendant railroad company and accepted by it, is, in the absence of a showing that he neglected other reasonable means of information, entitled to rely on the agent's statements as to the time of arrival of the train at his point of destination.²³ But it has been held that a casual statement by an agent at the time of the purchase of the ticket and order, but not shown to have been made prior to the purchase, and which was no part of the consideration on which the purchase was made, that the purchaser would reach his destination before the close of navigation, does not constitute a contract by the carrier to act as through carrier, or to

547. See *Gulf, etc., R. Co. v. Moorman* (Tex. Civ. App.), 46 S. W. 662, affirmed in 93 Tex. 685, no op. (Station porter acting as ticket agent).

18. *Pittsburgh, etc., R. Co. v. Nuzum*, 60 Ind. 533.

19. *Atchison, etc., R. Co. v. Cameron*, 66 Fed. 709, 14 C. C. A. 358.

20. *St. Louis, etc., R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 2 L. R. A., N. S., 110, 122 Am. St. Rep. 631, reversing 86 S. W. 71. See *Southern R. Co. v. Nowlin*, 156 Ala. 222, 47 So. 180.

Plaintiff, desiring to make a journey with his wife, who was in delicate health, inquired of defendant's ticket agent as to the best route, and was directed to take the route they traveled, for which the agent sold plaintiff tickets. They were out four days and three nights and made four changes, during one of which the wife was injured while alighting from a car. There was another route over which he could have gone and reached the destination in much less time and with less changes. Held, that plaintiff

was entitled to recover against defendant compensation for any injury resulting to his wife from any negligence of defendant on its own line, and on account of her having to make a greater number of changes of trains than she would have otherwise been compelled to have made, and for any injury she sustained in necessarily being on the way longer than if she had taken the other route, excluding any delays that may have occurred from a failure of the trains over other railroads to be run on schedule time. *St. Louis, etc., R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 2 L. R. A., N. S., 110, 112 Am. St. Rep. 631, reversing 86 S. W. 71.

21. *Mace v. Southern R. Co.*, 66 S. E. 342, 151 N. C. 404, 24 L. R. A., N. S., 1178.

22. **Representations as to stop over.**—*New York, etc., R. Co. v. Winter*, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356.

23. **Representations as to time of arrival at destination.**—*Turner v. Great Northern R. Co.*, 46 Pac. 243, 15 Wash. 213, 55 Am. St. Rep. 883.

transport the purchaser to his destination before the close of navigation.²⁴

Guaranteeing Connection at Certain Point.—The passenger and ticket agent of a carrier having authority to make all usual and ordinary contracts of carriage may contract to carry one promptly to a certain place on the regular train to arrive there at a certain time, guaranteeing connection at an intermediate station.²⁵ But it is held that where, on sale of a ticket, the agent stated that the train would make close connections at a certain point, it is not a guaranty of such connection.²⁶

Mistake of Agent in Dating Ticket.—As between a person who buys a ticket bearing a date prior to the purchase and the company, he is entitled to passage on the date of purchase, the ticket being limited to one day from date of sale.²⁷ And where the ticket agent in selling a mileage book good for one year only, stamps upon it as the date of issue a date one year before the date of issue, the holder is entitled to ride upon such book.²⁸

Failure or Refusal to Stamp Ticket.—See post, "Requirement of Identification, Signature and Stamping," § 2225.

Refusal to Sell Ticket.—See post, "Sale of Tickets," § 2212.

Failure to Furnish Proper Tickets.—It is a carrier's ticket agent's duty, and therefore within the scope of his authority, to correctly inform passengers regarding their tickets, and to provide them, on payment of their fares, with proper tickets, and a passenger may rely on the agent's assurances as to the sufficiency of a ticket; the carrier being liable for errors of such agent resulting in injury to the passenger.²⁹ So, where one called and paid for first-class tickets for himself and family, but the company's agent, through mistake, gave him second-class tickets, and he and family were compelled to ride in second-class cars, he is entitled to recover damages; and his right of action is not affected by the conductor's offer to let him remain if he would pay one cent a mile in addition to what he had paid for his tickets, or by the rule of defendant that the conductor could only look to the ticket, and had no right to inquire if plaintiff was entitled to a first-class passage.³⁰ Where a railroad agent at the regular ticket office sells a ticket good only on a special train which is in charge of a third person, whose name is signed to the ticket, but of whose contract with the carrier the purchaser is ignorant, such sale constitutes a contract of transportation binding on the carrier.³¹

Liability for Ejecting Passenger Having Wrong Ticket through Fault of Agent.—See post, "Ejection of Passengers," chapter 25.

Right of Purchaser to Assume That Ticket Complies with Actual Contract.—A passenger may, in the absence of actual notice to the contrary, assume that the carrier has furnished him with a ticket correctly stating the terms

24. *Dresser v. Canadian Pac. R. Co.*, 53 C. C. A. 559, 116 Fed. 281.

25. **Guaranteeing connection at certain point.**—*Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A., N. S., 229.

26. *Latour v. Southern Railway*, 51 S. E. 265, 71 S. C. 532.

27. *Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022.

28. *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022.

29. **Failure to furnish proper tickets.**—*Smith v. Southern Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708. See *Virginia, etc., R. Co. v. Hill*, 105 Va.

729, 54 S. E. 872, 6 L. R. A., N. S., 899.

Ticket to wrong place.—Where an agent, through his own fault, sells a passenger a ticket to the wrong place, and the passenger, on discovering the mistake, uses due care in selecting a route from the place of discovery to the desired destination, the company is liable for damages, though he selects a route which causes him more discomfort than another, which he might have selected, would have caused him. *Texas, etc., R. Co. v. Armstrong* (Tex. Civ. App.), 41 S. W. 833.

30. *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766.

31. *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88.

of the contract actually made,³² and is not bound to inspect the ticket to see that the carrier has performed its duty.³³

Authority to Waive Conditions in Tickets.—See post, "Authority of Agent," § 2229.

§ 2211. Of Conductor.—The act of a conductor in requiring the fare of a passenger failing to comply with an unreasonable time limitation binds the company,³⁴ as does the representation of a street-railroad conductor to a prospective passenger regarding the rate of fare.³⁵ But one who, with full knowledge of the circumstances, contracts with a conductor for transportation on a special train made up to go to and return from a wreck on the line, and who pays fare for his passage in going, has no right of action against the company for its breach of contract to furnish return transportation.³⁶

Agreement to Stop at Certain Station.—It is held that where a conductor was in charge of a train, and had apparent authority to contract with a passenger to stop at a certain station, and he had frequently made and carried out such contracts, his agreement with the passenger to stop at such station is binding, although contrary to rules of the company, which are unknown to the passenger.³⁷

Allowing Stop Over.—The conductor of a railroad train has no authority to bind the company, by allowing a stop over, so as to make the company liable, where a connecting road ejected the passenger because the ticket provided for a continuous trip on the two roads.³⁸

Authority to Waive Condition in Tickets.—See post, "Authority of Agent," § 2229.

§ 2212. Sale of Tickets.—Ticket Purchased from Other than Authorized Agent.—One purchasing a railroad ticket of a person who at most occupied to the railroad company the relation of special agent, does so at his peril.³⁹

Delivery to Purchaser.—It is the duty of a ticket agent to exercise reasonable care in delivering a ticket to a purchaser, and if the latter, after applying for his ticket and putting down money for it, is called away, it would be no delivery to put the ticket on the counter in his absence, if it did not in fact come into his possession.⁴⁰

Selling on Credit.—The fact that, at the time of the purchase of the ticket, the passenger does not pay for it, but arranges with the agent to pay for it afterwards, does not make the ticket invalid.⁴¹ A railroad ticket agent, with authority to sell tickets and to stamp and deliver them on receipt of the price, can not bind the company, without its knowledge or consent, by stamping the tickets and delivering them to a third person to be sold by him, and to be paid for when sold.⁴²

32. Right of purchaser to assume that ticket complies with actual contract.—*Gulf, etc., R. Co. v. Copeland*, 42 S. W. 239, 17 Tex. Civ. App. 55; *Texas, etc., R. Co. v. Wynn*, 97 S. W. 506, 44 Tex. Civ. App. 29; *Georgia R., etc., Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747.

33. *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239.

34. Act of conductor.—*Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

35. Representation as to fare.—*Wright v. Glens Fall, etc., R. Co.*, 48 N. Y. S. 1026, 24 App. Div. 617.

36. Contract for transportation going to a wreck.—*Du Bose v. Louisville, etc., R. Co.*, 121 Ga. 308, 48 S. E. 913.

37. Agreement to stop at certain station.—*Texas, etc., R. Co. v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.

38. Allowing stop over.—*International, etc., R. Co. v. Best*, 93 Tex. 344, 55 S. W. 315.

39. Ticket purchased from other than authorized agent.—*Houston, etc., R. Co. v. Ford*, 53 Tex. 364.

40. Delivery to purchaser.—*Quigley v. Central Pac. R. Co.*, Fed. Cas. No. 11,510, 5 Sawy. 107.

41. Selling on credit.—*Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

42. Authority of agent.—*Frank v. Ingalls*, 41 O. St. 560.

Order of Sale.—A common carrier must serve the public without discrimination, and sell its tickets and accommodations in order of application.⁴³ A carrier so discriminating is liable for such breach of duty, and also for the indignity, vexation, and disgrace, if any, resulting therefrom to a passenger.⁴⁴

Liability for Money Deposited with Agent for Purchase of Ticket.—Where one pays the price of an emigrant ticket to a ticket agent of a railroad company, as directed by another agent, who informed plaintiff that the former agent would send the money to him, and that he would forward the ticket as directed, and the former agent absconded, retaining the money, the company was liable for the price of the ticket, it appearing that other agents of the company had furnished similar tickets under similar circumstances.⁴⁵

On Street Cars.—The rights and franchises of a street railway company are not destroyed or unreasonably impaired by an ordinance requiring it to sell tickets to persons applying therefor, upon all of its cars.⁴⁶ Where a franchise granted by a township required the road to sell "family tickets" entitling the purchaser or any member of his family to a certain number of rides from any point in a certain city and vice versa, the placing of such tickets on sale in a store in the city was not a compliance with the franchise, the passengers having a right to purchase such tickets on the cars.⁴⁷ A franchise to a street railroad company by a township, providing for the sale of trip tickets on cars of the company at a reduced rate between a village in the township and a city without the township, requires such tickets to be sold on cars at any point on the line, and does not limit such sale to the line within the township granting the franchise.⁴⁸

Refusal to Sell Ticket.—Where the agent of a railroad company wrongfully refuses to sell a ticket to one applying therefor, the company is liable for the resulting damages.⁴⁹ Where defendant's ticket agent was asked to sell plaintiff a ticket on the next local train, and the demand was refused on the ground that a ticket could not be sold until a through train, which the agent erroneously stated was ahead of the local, had passed, it was immaterial to the rights of the plaintiff to recover for damages suffered in consequence of the refusal whether it was the negligence of the ticket agent, or whether he was misled by the negligence of some other agent.⁵⁰ Where a statute provides that

43. **Order of sale.**—*Patterson v. Old Dominion Steamship Co.*, 53 S. E. 224, 140 N. C. 412, 5 L. R. A., N. S., 1012, 111 Am. St. Rep. 848.

44. **Liability for discrimination.**—*Patterson v. Old Dominion Steamship Co.*, 53 S. E. 224, 140 N. C. 412, 5 L. R. A., N. S., 1012, 111 Am. St. Rep. 848.

45. **Liability for money deposited with agent for purchase of ticket.**—*International, etc., R. Co. v. Johnson*, 1 Texas App. Civ. Cas., § 354.

46. **Ordinance requiring sale on street cars.**—*Detroit v. Fort Wayne, etc., R. Co.*, 95 Mich. 456, citing *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570.

47. **Franchise requiring sale on cars.**—*West Bloomfield Tp. v. Detroit United Railway*, 109 N. W. 258, 146 Mich. 198.

48. *Rice v. Detroit, etc., R. Co.*, 81 N. W. 927, 122 Mich. 677, 48 L. R. A. 84.

49. **Refusal to sell ticket.**—Where plaintiff, having only sufficient money to pay her fare to her destination, applied at the ticket office at the station and was told to wait twenty minutes before arrival of the train before purchasing a

ticket, and she waited, and the station agent did not return, so as to sell her the ticket, and she decided not to attempt to take the train and run the chance of the conductor's not charging the usual conductor's fare, which she was unable to pay, and was thereby compelled to remain over night, the carrier was liable for the resulting damages. *Southern R. Co. v. Johnson*, 70 S. E. 69, 8 Ga. App. 654.

50. **Refusal to sell ticket on next train.**—*Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690, holding that the burden was on defendant, to show that it gave plaintiff correct information in time to enable him to take the local.

A subsequent announcement by the agent in the station that the local had arrived will not excuse the misinformation which had been given, when not brought to the knowledge of the plaintiff. *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690.

Question for jury.—In an action against a carrier for damages occasioned by defendant's refusal to sell plaintiff a ticket on the next train to plaintiff's station

railroad companies, on application, shall issue mileage books entitling the holder to the same rights and privileges "to which the highest class ticket issued by such corporation will entitle him," a railroad can not refuse to sell a person a mileage book, on the ground that he intends to tender its coupons in exchange for a ticket to a point without the state.⁵¹

Selling without Authority.—In some jurisdictions statutes have been passed making it an offense to sell railroad tickets without authority.⁵²

§§ 2213-2217. Nature and Effect of Ticket in General—§ 2213. In General.—Whether Ticket a Contract.—It is generally held that an ordinary ticket issued to a passenger by a common carrier does not constitute the contract between the parties but is merely a receipt, token or voucher evidencing the payment of the passage money and showing that the holder is entitled to be carried from one point to another. It is nothing more than an evidence of the contract of carriage.⁵³ But a ticket may, under express agreement, con-

after the demand, evidence examined, and whether defendant was guilty of negligence held a question for the jury. *Coleman v. Southern R. Co.*, 50 S. E. 690, 138 N. C. 351.

51. Refusal to sell mileage book as required by statute.—Laws 1895, c. 1027, § 1. *Dillon v. Erie R. Co.*, 43 N. Y. S. 320, 19 Misc. Rep. 116.

52. Selling without authority—Statutory provisions.—*Indiana.*—Act March 9, 1875. *State v. Fry*, 81 Ind. 7, holding special tickets exempt from the operation of the statute.

North Carolina.—Acts 1891, c. 290, § 1. *State v. Ray*, 109 N. C. 736, 14 S. E. 83, 14 L. R. A. 529; *State v. Clark*, 109 N. C. 739, 14 S. E. 84, holding that a person who is not a dealer in railroad tickets, and who sells a single ticket, is not guilty under the statute.

Oregon.—Laws 1905, p. 422, requiring railroads to provide agents authorized to sell tickets with a certificate of authority, and making it unlawful for a person not possessed of such a certificate from a railroad to sell tickets or operate a ticket office, prohibits the ticket brokerage business, and restricts the sale of railroad tickets by others than duly constituted agents of the railroads issuing the same. *State v. Thompson*, 84 Pac. 476, 47 Ore. 492, 4 L. R. A., N. S., 480; *State v. Bolam*, 84 Pac. 479, 47 Ore. 639.

53. Whether ticket a contract.—*California.*—*Justis v. Atchison*, etc., R. Co., 12 Cal. App. 639, 108 Pac. 328.

Georgia.—*Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209; *Georgia R. Co. v. Olds*, 77 Ga. 673; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146. Compare *Southern R. Co. v. Flanagan*, 10 Ga. App. 745, 74 S. E. 85.

Kentucky.—*Illinois Cent. R. Co. v. Fleming*, 148 Ky. 473, 146 S. W. 1110.

Missouri.—*Cornell v. Chicago*, etc., R. Co., 143 Mo. App. 598, 128 S. W. 1021; *Truel v. Missouri*, etc., R. Co. (Mo. App.),

128 S. W. 223; *Boling v. St. Louis*, etc., R. Co., 189 Mo. 219, 88 S. W. 35; *Logan v. Hannibal*, etc., R. Co., 77 Mo. 663.

New Hampshire.—*Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester*, etc., Railroad, 52 N. H. 596, 13 Am. Rep. 97.

New Jersey.—*Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 27 Atl. 914, 39 Am. St. Rep. 654, 22 L. R. A. 251.

New York.—*Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Hibbard v. New York*, etc., R. Co., 15 N. Y. 455; *Williams v. Vanderbilt*, 28 N. Y. 217, 34 Am. Dec. 333; *Pier v. Finch* (N. Y.), 24 Barb. 514.

Ohio.—*Baltimore*, etc., R. Co. *v. Campbell*, 36 O. St. 647, 38 Am. Rep. 617; *Frank v. Ingalls*, 41 O. St. 560; *Lake Shore*, etc., R. Co. *v. Mortal*, 18 O. C. C. 562, 8 O. C. D. 154; *Hatten v. Railroad Co.*, 39 O. St. 375; *Cleveland*, etc., R. Co. *v. Bartram*, 11 O. St. 457.

Pennsylvania.—*Dietrich v. Pennsylvania R. Co.*, 71 Pa. 432, 10 Am. Rep. 711.

Tennessee.—*O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614; *Cincinnati*, etc., R. Co. *v. Harris*, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A., N. S., 779; *Watson v. Louisville*, etc., R. Co., 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454; *Louisville*, etc., R. Co. *v. Fleming*, 82 Tenn. (14 Lea) 128.

Utah.—*McCollum v. Southern Pac. Co.*, 31 Utah 494, 88 Pac. 663.

"The ticket is a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place thereby designated. The relative duties and rights of the parties as to the time and manner of the performance of the contract is, for the most part, implied." *Cleveland*, etc., R. Co. *v. Bartram*, 11 O. St. 457.

"The ordinary card ticket for which full fare is paid is generally regarded as

stitute a contract between the parties;⁵⁴ and where the ticket purports on its face to express the contract between the parties, and its conditions and restrictions, at variance with the conditions of a contract the law would impose, are supported by a consideration, as, for example, a reduced rate, the ticket itself constitutes the contract of transportation.⁵⁵ Some cases give to a ticket a more extensive signification than a mere receipt or voucher, and hold that the ticket is evidence of the terms and regulations upon which the company agrees to carry; and, when the passenger has accepted the ticket, he is bound by its terms as much as if he had, by formal agreement, entered into such contract with the company.⁵⁶ It is also held that a passenger's ticket is both a receipt and a contract—the acknowledgment of the receipt of the passenger's fare and the obligation to carry him for the purposes and upon the terms specified.⁵⁷

Parol Evidence to Vary Ticket.—It is held that a passenger ticket is not within the rule excluding parol evidence to vary a written agreement; and does not prevent an inquiry into the actual contract between the passenger and the carrier.⁵⁸ It is seldom, if ever, that the ticket embodies all the elements of the

a mere token or check, the purpose of which is to indicate the route over which the passenger must travel." *Sanden v. Northern Pac. R. Co.*, 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711.

"The ticket is but an evidence of the contract, made out and furnished by the carrier; and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance." *O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639, quoted in *Georgia R., etc., Co. v. Baker*, 120 Ga. 562, 54 S. E. 639, 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246.

It is held that a railroad ticket paid for at the full or regular ordinary rate is not a contract within itself, but a mere token or evidence of a contract which the law creates and which lies behind the ticket. *Boling v. St. Louis, etc., R. Co.*, 189 Mo. 219, 88 S. W. 35; *Truel v. Missouri, etc., R. Co.* (Mo. App.), 123 S. W. 223; *Cincinnati, etc., R. Co. v. Harris*, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A., N. S., 779; *Watson v. Louisville, etc., R. Co.*, 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454.

A ticket is evidence of the purchaser's right to ride a certain distance, and it is as much evidence of his right to ride as a deed is evidence of one's right to possession of the land therein described. *Moore v. Central, etc., R. Co.*, 1 Ga. App. 514, 58 S. E. 63. See *International, etc., R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722.

Direction to agent.—A ticket may be regarded as the carrier's written direction by one agent to another agent concerning the particular transportation. *O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

54. Ticket may constitute contract.—*Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146. See post, "Con-

ditions and Limitations in Tickets," §§ 2218-2230.

55. *Boling v. St. Louis, etc., R. Co.*, 189 Mo. 219, 88 S. W. 35; *Leyser v. Chicago, etc., R. Co.*, 138 Mo. App. 34, 119 S. W. 1068; *Truel v. Missouri, etc., R. Co.* (Mo. App.), 128 S. W. 223.

56. *Calloway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; *Louisville, etc., R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491.

57. Ticket both receipt and contract.—*Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. St. Rep. 620. See *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85.

58. Parol evidence to vary ticket.—*Williams v. Vanderbilt*, 28 N. Y. 217, 34 Am. Dec. 333; *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239; *Gulf, etc., R. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028; *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.

It is not considered that in receiving evidence to show the real contract of carriage the terms of a written contract expressed by the ticket are varied, when by mistake or otherwise it does not show that the passenger is entitled to be carried as contracted for. *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

Where a ticket agent, who has authority to sell both limited and unlimited tickets over a connecting line, gives a passenger a ticket which he takes without reading, and which recites on its face that it is limited, evidence that the passenger contracted for a ticket which would allow him stop-over privileges is admissible, though the ticket also recites that no agent has authority to change the conditions thereof. *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

"When a ticket does not purport to

contract. The running of the train, as well as all reasonable rules prescribing the manner and facilitating the business of carrying passengers, certainly, so far as known, become a part of the contract, and may be proved by either party, though not indorsed upon the ticket.⁵⁹ But when a ticket sets out the terms of a special contract, it is to be looked to as the evidence of the contract, and is conclusive as to its terms.⁶⁰ So where a railroad excursion ticket contains a special contract it is conclusive, and advertisements of the tour are inadmissible in evidence to vary its terms.⁶¹ And a railroad ticket containing a condition that it shall not be good for return passage, unless the ticket holder identifies himself to the satisfaction of the company's agent and unless signed and stamped by such agent, is a written contract, which can not be altered or varied by parol evidence.⁶² But a purchaser may show that the real contract was different from the one signed, if he signed the ticket by reason of some fraud or unfair means of deception practiced by the carrier's agent.⁶³ In Maine by statute a ticket itself is the only competent evidence of the contract between the carrier and the passenger.⁶⁴

Conclusiveness of Ticket as between Passenger and Conductor.—See post, "Ejection of Passengers," chapter 25.

Undertaking to Carry Passenger to Destination and Let Him Off There.—The sale of a ticket to a passenger amounts to a contract to carry him to his destination and let him off at that place, though it be merely a flag station.⁶⁵ But the passenger acquires only the right to be carried according to the custom of the road. He has the right to go to the place named in his ticket on any train that usually carries passengers to that place, but he can not insist on being carried out of the customary course of the road.⁶⁶

be a complete agreement between the carrier and the passenger, suppletory evidence is admissible to show that there was a further contract than is indicated by the ticket." *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

Statements at time of purchase of ticket.—Parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket, at the time of such purchase, is admissible, as going to make up the contract of carriage and forming a part of it. *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356.

59. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220.

60. **Where ticket sets out special contract.**—*Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313; *Missouri, etc., R. Co. v. Murphy* (Tex. Civ. App.), 35 S. W. 66.

Where a passenger presents to a conductor a round-trip ticket, which by its terms expired more than 24 hours previous thereto, and is ejected for failure to pay fare, he can not, in an action against the railroad company for damages, show that it was agreed between him and defendant's agent, when he purchased the ticket, that if, on the return trip, he boarded one of defendant's trains at a distant city, before the ticket expired, the ticket would be good to the station where it was purchased. *Gulf, etc., R. Co. v. Daniels* (Tex. Civ. App.), 29 S. W. 426.

61. *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

62. *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

63. **Fraud by carrier's agent.**—*Mexican Cent. R. Co. v. Goodman* (Tex. Civ. App.), 43 S. W. 580, citing *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

64. *Crabtree v. Washington County R. Co.*, 101 Me. 485, 64 Atl. 842, holding that the use of a railway ticket is in no way modified by any provisions in posters or advertisements issued by defendant carrier that were not "provided on the ticket" as required by Rev. St., c. 52, § 2, though the passenger had knowledge of such provisions.

"Prior to the enactment of the statute, the ticket did not necessarily bear evidence, upon its face of all the terms of the contract. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Crosby v. Maine Cent. R. Co.*, 69 Me. 418." *Crabtree v. Washington County R. Co.*, 101 Me. 485, 64 Atl. 842.

65. **Undertaking to carry passenger to destination and let him off there.**—*Missouri, etc., R. Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447; *San Antonio, etc., R. Co. v. Dykes* (Tex. Civ. App.), 45 S. W. 758.

66. **Carriage according to custom of road.**—*Beauchamp v. I. & G. N. R. Co.*, 56 Tex. 239. See *McRae v. Wilmington, etc., R. Co.*, 88 N. C. 526, 43 Am. Rep. 745.

Contract with Person Presenting Himself for Carriage.—It is held that where a railway company sells an ordinary ticket, the law implies a contract of carriage with the person who presents himself for carriage, without reference to who may have actually paid for the ticket.⁶⁷ So the purchase of an ordinary railway ticket by a husband for his wife, though he pays for it, does not constitute a contract between the husband and the company for the safe transportation of the wife.⁶⁸

Ticket as Property of Passenger.—When a ticket is honestly obtained by purchase and payment therefor, it is the property until delivered by him in exchange for transportation. If it be a coupon ticket and any of the coupons be negligently, improperly, or wrongfully detached by the carrier, the purchaser has, none the less, a property right in such detached coupon, for purposes of evidence.⁶⁹

Family Ticket.—A railroad ticket which, on its face, purports to be for the exclusive use of a man and family, authorizes a son, who is residing with the father as a member of his family, to ride upon the road, notwithstanding he may be over twenty-one years of age.⁷⁰

Half-Rate Ticket.—A regulation by a railroad company forbidding conductors from passing any one on half-fare tickets, unless those exhibiting them should carry a permit from the proper officer of the road to travel in that manner, is reasonable.⁷¹

Cancellation for Fraud.—A ticket issued through fraudulent representations that the one to whom it was issued was the editor of a newspaper in which the railroad company advertised, could be taken up and canceled by the company.⁷²

§ 2214. Construction.—A contract of a carrier with a passenger by a ticket is subject to and governed by the same rules of construction that are applicable to other contracts between individuals.⁷³ The carrier will be presumed to have intended that the ticket shall bear the construction which the law places upon it, in the absence of any special understanding or agreement between the carrier and the passenger.⁷⁴ Where the ticket is of doubtful import or ambiguous, it is to be construed most strongly against the carrier.⁷⁵

§§ 2215-2217. Transferability—§ 2215. In Absence of Restrictions.—In the absence of constitutional or statutory prohibition, or a stipula-

67. **Contract with person presenting himself for carriage.**—*Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.

68. *Georgia, etc., R. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942.

69. **Ticket as property of passenger.**—*Moore v. Central, etc., R. Co.*, 1 Ga. App. 514, 58 S. E. 63.

70. **Family ticket.**—*Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584.

71. **Half-rate ticket.**—*Goetz v. Hannibal, etc., R. Co.*, 50 Mo. 472.

72. **Cancellation for fraud.**—*Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539.

73. **Rules of construction.**—*Ellsworth v. Pennsylvania Co.*, 2 O. C. C., N. S., 483, 15-25 O. C. C. 797.

74. *Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152.

75. **Where ticket of doubtful import or ambiguous.**—*Georgia, R., etc., Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368; *Ann*

Arbor R. Co. v. Amos, 85 O. St. 300, 97 N. E. 978; *Cleveland, etc., R. Co. v. Kinsley*, 60 N. E. 169, 27 Ind. App. 135, 87 Am. St. Rep. 245.

Illustration.—A railroad ticket entitling a designated person to a stated number of single continuous trips, for each of which a separate coupon is attached, "between" two specified stations, and stipulating that "passage shall be taken only on such trains as stop at the above-named stations," and also that "this ticket shall be good only for continuous trips between" these stations, confers upon that person, upon surrendering one of the coupons, the right to ride from an intermediate station to either of the two stations mentioned in the ticket, or from either of those stations, to the intermediate station, provided he boards a passenger train which, upon its regular schedule, stops, not only at the two specified stations, but at the intermediate station also. *Georgia R., etc., Co. v. Clarke*, 25 S. E. 368, 97 Ga. 706.

tion to the contrary on the face thereof, a railroad passenger ticket is transferable, and entitles the holder thereof to the rights of the original purchaser.⁷⁶ A round-trip excursion ticket used by the purchaser in going to the station named therein, and then sold and transferred, no restrictions appearing on the ticket, is valid in the hands of the holder, and entitles him to a return passage, subject to the prescribed limitations as to time, etc.⁷⁷ And it is held that such ticket is good in the hands of one who purchased it from the original holder or from an intermediary, when the purchase is made without knowledge of an undisclosed rule or regulation of the company prohibiting such transfer.⁷⁸

Transfer Subject to Equities.—It is held that where a railroad ticket is sold to a bona fide purchaser it is transferred subject to all the equities that could have been set up against it in the hands of the original purchaser.⁷⁹ So a railroad passenger is not entitled to use a ticket fraudulently obtained from the company, though he had no knowledge of the fraud and purchased for a valuable consideration.⁸⁰

A coupon ticket over different roads issued by one company as principal as to its own lines, and as agent as to the lines of the other roads, not limited to a continuous passage, but made subject to the stop-over regulations of the different roads, and containing no provision against its transfer, but merely purporting to be sold at a reduced rate, is a severable contract, as between the different roads, assignable at the end of any division.⁸¹

§§ 2216-2217. Stipulation against Transfer—§ 2216. In General.—The carrier may stipulate that the ticket shall not be transferable and in such a case the assignee thereof will have no right to travel on it.⁸² A non-

76. Transferability of ticket.—*Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152; *International, etc., R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

Texas statute.—*Batts' Ann. Civ. St. tit. 94, c. 12a*, attempts to regulate the sale of railroad tickets, and under certain circumstances prohibits anyone save a duly appointed agent from making such sales; but provides that it "shall not apply to any person holding a ticket on which it is not printed that it is a penal offense for him or her to sell, barter, or transfer the ticket for consideration." Held, that a ticket not having the printed notice is assignable. *International, etc., R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

77. Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. 312.

78. Knecht v. Cleveland, etc., R. Co. (O.), 6 N. P. N. S., 13.

79. Transfer subject to equities.—*Levinson v. Texas, etc., R. Co.*, 17 Tex. Civ. App. 617, 43 S. W. 901.

80. Fraudulent ticket in hands of bona fide purchaser.—*Frank v. Ingalls*, 41 O. St. 560.

81. Coupon ticket over different roads.—*Nichols v. Southern Pac. Co.*, 23 Ore. 123, 31 Pac. 296, 37 Am. St. Rep. 664, 18 L. R. A. 55.

82. Stipulation against transfer.—*Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671; *Davis v. South Carolina, etc., R. Co.*,

107 Ga. 420, 33 S. E. 437; *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 15 N. W. 225, 45 Am. Rep. 100. See *Drummond v. Southern Pac. Co.*, 7 Utah 118, 25 Pac. 733.

Consideration of reduced rate.—A carrier may sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to the condition contained therein, that the ticket shall not be transferred. *Delaware, etc., R. Co. v. Frank*, 110 Fed. 689; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452, dismissed in 196 U. S. 644, 25 S. Ct. 797, 49 L. Ed. 632; *Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693; citing *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, 32 L. Ed. 249, 8 S. Ct. 1324; *Harris v. Delaware, etc., R. Co.*, 77 N. J. L. 278, 72 Atl. 50; *Baltimore, etc., R. Co. v. Evans*, 82 N. E. 773, 169 Ind. 410, 14 L. R. A. N. S., 368.

The condition of nontransferability and forfeiture embodied therein is not only binding upon the original purchaser, but upon anyone who acquires such a ticket and attempts to use the same in violation of its terms. *Louisville, etc., R. Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192, affirmed in *Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693.

The interstate commerce act expressly recognized the power of carriers engaged in interstate commerce to issue nontransferable reduced rate excursion

transferable passenger ticket is not property in the hands of the purchaser in the sense that it can be sold and transferred.⁸³ It limits the benefit of the contract between the carrier and the purchaser.⁸⁴ And it may well be questioned whether the purchaser of a nontransferable ticket sold at a reduced rate acquires anything more than a limited and qualified ownership thereof, and whether the carrier does not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein which a court of equity would protect.⁸⁵ Where a mileage book provided that it was to be used only by the person to whom it was issued, "whose signature appears on the last page," and that it was "subject to the conditions named in the contract, and made a part hereof," one of which was that it was not transferable, and that it might be taken up if presented by any other than the original holder, "whose signature is hereon," the fact that the original purchaser never signed the book did not render it assignable.⁸⁶

Stipulation against Transfer Not Effective.—A round-trip ticket, providing that it should be used only by the original holder, whose signature it bears, but not signed by any one, sold with the express understanding that it shall be used by one person in going to, and by another in returning from, the place of destination, is not void when presented by the latter on such return

tickets. *Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693.

Under the provisions of § 22 of the act to regulate commerce, 24 Stat. 387, 25 Stat. 862, it is the duty of the railroad company to prevent the wrongful use of nontransferable reduced rate excursion tickets and the obtaining of a preference thereby by anyone other than the original purchaser. *Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693, affirming 144 Fed. 34, 75 C. C. A. 192.

Not illegal.—An agreement between carriers and associations and citizens of a city, binding the carriers to make special low rates to and from the city for certain occasions and sell nontransferable excursion tickets therefor, does not contravene the state or federal anti-trust laws, the purpose of the carriers in making the tickets nontransferable not being illegal, but to maintain the legal rate as to persons not purchasing excursion tickets. *Lytle v. Galveston, etc., R. Co.*, 100 Tex. 292, 99 S. W. 396.

Illustrations.—Where a ticket broker in Atlanta sells a ticket from Chicago to Jacksonville, which had been placed by a Georgia railroad in the hands of an Illinois railroad company for sale, such ticket having the coupons for the railroads between Chicago and Atlanta detached, and containing a special contract requiring the signature of the original purchaser and limiting its use to him, the fact that the ticket bears the signature of an agent of the Illinois company preceded by the word "witness," the signature being placed upon the ticket in the same manner as it would have been had this agent as a witness actually attested the signature of the purchaser of the ticket in Chicago, does not authorize

a purchaser from the broker in Atlanta to assume that the sale to him by the broker was regular and authorized and he does not occupy the position of a bona fide original purchaser. *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671.

A ticket was purchased from Baltimore to San Francisco at reduced rates. The contract contained the limitation that such ticket was not transferable, and was signed by the purchaser. At Omaha the contract was taken up, and an exchange check was issued to the purchaser, which purported upon its face to call for "one continuous emigrant passage" from Omaha to San Francisco. The purchaser traveled on such check to a station in the state of Nevada, and there sold the check, and the transferee attempted to ride on the ticket upon the same train. Held, that the contract was not to carry one person from Omaha to an intermediate station and a second person to another station, but only a contract to carry the same person through the entire route, and that the transferee was not entitled to ride on such check. *Cody v. Central Pac. R. Co.*, Fed. Cas. No. 2,940, 4 Sawy. 114.

83. *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461.

84. *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452, dismissed in 25 S. Ct. 797, 196 U. S. 644, 49 L. Ed. 632; *Delaware, etc., R. Co. v. Frank*, 110 Fed. 689.

85. Interest of carrier.—*Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693; *Board v. Christie Grain, etc., Co.*, 198 U. S. 236, 49 L. Ed. 1031, 25 S. Ct. 637.

86. *Rahilly v. St. Paul, etc., R. Co.*, 68 N. W. 853, 66 Minn. 153.

passage, after having been used by the former for the first part of the journey.⁸⁷

Special Authority to Sell Ticket.—When a ticket has been delivered by a railroad company for passage over its lines to a newspaper, with power in the latter to sell and transfer the same, but its validity has on its face been expressly limited to the first purchaser, the effect of the transaction is to constitute the newspaper the special agent of the company to dispose of the ticket on the terms named.⁸⁸

Actionable Wrong.—The use of a ticket containing a stipulation against transfer by one to whom it has been transferred is an actionable wrong.⁸⁹ And carrying on the business of purchasing and selling nontransferable reduced rate railroad tickets for profit to the injury of the railroad company issuing them is an actionable wrong, although actual malice in the sense of personal ill-will may not exist.⁹⁰

Forfeiture of Ticket for Violation of Provision against Transfer.—See post, "Forfeiture of Tickets," § 2228.

§ 2217. Injunction against Sale of Nontransferable Tickets.—Where a railroad has sold tickets at a reduced rate for a particular occasion, good for a return trip, but nontransferable, and has so advised the public, the company has the right to enjoin dealing in the return tickets.⁹¹ Injunctive relief against ticket brokers dealing in nontransferable reduced-rate excursion tickets will not be denied on the ground that an adequate remedy at law exists, where such brokers admit past dealings, and avow their purpose to continue the practice, and where the number of such tickets issued is large, the risk to be incurred by the steps necessary to prevent their wrongful use is considerable, and numerous suits will be necessitated if redress is sought at law.⁹² It is held that injunctive relief against ticket brokers unlawfully dealing in nontransferable reduced-rate excursion tickets may extend to the restraining of like dealings as to similar tickets which may be issued in the future,⁹³ but there is a contrary holding.⁹⁴

§§ 2218-2230. Conditions and Limitations in Tickets—§ 2218. In General.—Where a ticket is sold by a carrier at less than the regular rate of transportation, the carrier may impose reasonable conditions as to its use.⁹⁵ But no condition is binding upon a passenger unless it is just and reasonable.⁹⁶ A provision in a railroad ticket that, in case of an error on the part of the carrier's agent, or a question of doubt between the holder and the conductor, the passenger should pay the conductor's claim, take his receipt, and report to the general passenger agent, is unreasonable and void.⁹⁷ It is also held that

87. Stipulation against transfer not effective.—*Jevons v. Union Pac. R. Co.*, 70 Kan. 491, 78 Pac. 817.

88. Special authority to sell ticket.—*Davis v. South Carolina, etc., R. Co.*, 33 S. E. 437, 107 Ga. 420.

89. Actionable wrong.—*Delaware, etc., R. Co. v. Frank*, 110 Fed. 689.

90. Bitterman v. Louisville, etc., R. Co., 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693, affirming 144 Fed. 34, 75 C. C. A. 192. See *Delaware, etc., R. Co. v. Frank*, 110 Fed. 689.

91. Injunction against sale of nontransferable tickets.—*Lytle v. Galveston, etc., R. Co.* (Tex. Civ. App.), 100 S. W. 199; *S. C.*, 100 Tex. 292, 99 S. W. 396; *Kinner v. Lake Shore, etc., R. Co.*, 69 O. St. 339, 69 N. E. 614.

92. Bitterman v. Louisville, etc., R. Co., 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91,

12 Am. & Eng. Ann. Cas. 693.

93. Extent of injunctive relief.—*Bitterman v. Louisville, etc., R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693.

94. Lytle v. Galveston, etc., R. Co. (Tex. Civ. App.), 100 S. W. 199.

95. Power of carrier to impose.—*Southern R. Co. v. DeSaussure*, 116 Ga. 53, 42 S. E. 479; *Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

Necessity for notice and acceptance of conditions.—See post, "Notice and Acceptance of Conditions," § 2227.

96. Condition must be reasonable.—*Cherry v. Chicago, etc., R. Co.*, 191 Mo. 489, 90 S. W. 381, 109 Am. St. Rep. 830, 2 L. R. A., N. S., 695.

97. Cherry v. Chicago, etc., R. Co., 90 S. W. 381, 191 Mo. 489, 2 L. R. A., N. S., 695, 109 Am. St. Rep. 830.

such a provision is mere advice and not part of the ticket, but if regarded as a part of the contract of carriage, would be unreasonable and void.⁹⁸

Stipulation as to Mutilation.—To mutilate a railroad ticket, within the reasonable meaning of a stipulation on its face that it shall not be good for passage if mutilated in any way, it must be deprived of some essential part; and a ticket is valid, though torn in two pieces, where both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, that together they form the entire ticket, and that no fraud has been perpetrated on the railroad company.⁹⁹

Stipulation as to When Mileage Book Good for Passage.—In the absence of legal prohibition a railroad company may sell at a reduced rate a mileage book, which stipulates that it shall not be good for passage on trains except from non-agency stations, or from agency stations not kept open for the sale of tickets, unless it is first exchanged for a ticket.¹ An interchangeable mileage ticket, which so stipulates, is a part of the contract evidenced by the ticket, and warrants the tender on trains of coupons from a station where there are no agents, or where the agents are not on duty, or for any other valid reason it is impracticable for the passenger to have his mileage exchanged for a ticket.² A railroad company operating two roads forming a continuous line may sell a mileage ticket authorizing the purchaser to travel a certain number of miles on each road and when the purchaser has traveled on one road the number of miles allotted thereto the ticket gives him no claim to be carried any more on that road.³

Subsequent Limitations.—The contract between a passenger and a carrier is made when the former has bought his ticket, received and paid for it, and neither party can after that change its terms or impose new conditions upon its enforcement without the consent of the other.⁴

Statutory Provisions.—Where a statute provides that railroad companies, on application, shall issue mileage books, which shall entitle the holder to the same rights and privileges "to which the highest class ticket issued by such corporation will entitle him," it is the duty of a railroad company to issue the book without other conditions than those prescribed by the statute.⁵

98. *Illinois Cent. R. Co. v. Gortikov*, 90 Miss. 787, 45 So. 363, 14 L. R. A., N. S., 464.

99. **Stipulation as to mutilation.**—*Young v. Central, etc., R. Co.*, 120 Ga. 25, 47 S. E. 556, 65 L. R. A. 436, 102 Am. St. Rep. 68.

1. **Stipulation as to when mileage book good for passage.**—*Perry v. Atlantic, etc., R. Co.*, 9 Ga. App. 260, 70 S. E. 1122.

2. *Des Portes v. Southern Railway*, 87 S. C. 160, 69 S. E. 148. See *Harvey v. Atlantic, etc., R. Co.*, 153 N. C. 567, 69 S. E. 627.

Where the holder of such a ticket failed to make any attempt to exchange coupons for a ticket at an agency station where the train stopped several minutes, though he knew that the train would stop for several minutes, he could not tender coupons from the ticket, because it was not "impracticable" for him to make the exchange; "impracticable" being defined as incapable of being effected from lack of adequate means. *Des Portes v. Southern Railway*, 69 S. E. 148, 87 S. C. 160.

3. *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79.

4. **Subsequent limitations.**—*Kent v. Baltimore, etc., R. Co.*, 45 O. St. 284, 12 N. E. 798, 4 Am. St. Rep. 539; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457.

Where by statute a common carrier can not limit its liability by any notice on tickets sold, a railroad company can not, after selling a return ticket, exact, as a condition of return on the ticket, that the passenger shall sign it before a given agent, who shall stamp it, though the ticket was sold at a reduced price, and recited such condition on its face. *Phillips v. Georgia R., etc., Co.*, 93 Ga. 356, 20 S. E. 247.

5. **Statutory provisions.**—*New York Law 1895*, p. 961, c. 1027, as amended by *Law 1896*, p. 758, c. 835, *Law 1897*, p. 622, c. 484, and *Laws 1898*, p. 1326, c. 577; *Horton v. Erie R. Co.*, 72 N. Y. S. 1018, 65 App. Div. 587.

Where a company issued a mileage book to plaintiff, which contained certain restrictions as to its use, not provided by the statute, the plaintiff was not bound to insist upon the issuance of a mileage book in strict accordance with the statute, and sue for the statutory penalty if it was refused, on penalty, if

§ 2219. Stipulation as to Continuous Passage.—In the absence of any agreement to the contrary, the purchaser of a full fare railroad ticket, though entitled to a passage unlimited as to time, is entitled to but a continuous passage; and he has no right to stop over at an intermediate station, and afterwards demand the completion of the contract on a later train.⁶ It follows as of course that a stipulation in a ticket that the passage shall be made in one continuous trip is binding.⁷ And a regulation by a railroad that passengers shall

she accepted the ticket as issued, of becoming bound by its limitations, but the company having received the full price of the mileage book as fixed by statute, there was no consideration for any agreement by plaintiff to limit its use further than prescribed by the statute, and plaintiff was not bound by the additional limitation. *Parish v. Ulster, etc., R. Co.*, 192 N. Y. 353, 85 N. E. 153, reversing 98 N. Y. S. 1109, 113 App. Div. 894.

Where a railroad company pursuant to such statute issues a mileage book and attaches a contract that it shall be accepted only for journeys wholly within the state, such contract is without consideration and void. *Horton v. Erie R. Co.*, 72 N. Y. S. 1018, 65 App. Div. 587.

Under such statute the company can not prescribe as a condition that, if presented by one other than the person named therein, the book shall be taken up. *Watson v. New York, etc., R. Co.*, 54 N. Y. S. 201, 24 Misc. Rep. 628.

6. Right of stop over.—*Massachusetts.*—*Dixon v. New England Railroad*, 179 Mass. 242, 60 N. E. 581.

Minnesota.—*Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349.

New Jersey.—*Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 27 Atl. 914, 39 Am. St. Rep. 654, 22 L. R. A. 251.

Ohio.—*Ellsworth v. Pennsylvania Co.*, 2 O. C. C. N. S., 483, 15-25 O. C. D. 797; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457.

Tennessee.—*Louisville, etc., R. Co. v. Klyman*, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755.

Illustration.—Plaintiff bought an excursion ticket from R. to M. and return, "via B. Branch," "not good to stop off en route." The road from R. to B., where it was necessary to change trains, was the main line; and from B. to M., the B. Branch. On his return from M., he would, if trains were on schedule time, have had to wait in the B. station a half hour for a train to R. A half mile from B., however, his train had to wait to let a belated train pass. Plaintiff there left his train, and walked to B., getting there in time to board the belated train. Held, that his ticket was not good on this train, it not being a connecting train. *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 27 Atl. 914, 39 Am. St. Rep. 654, 22 L. R. A. 251.

Two carriers using same line.—Plaintiff purchased from defendant railroad

company a ticket for a trip from A. to S. and return. The railroad between those points was used by defendant and another company, each operating his own trains, and plaintiff's ticket was good on a train of either company. On his return he entered a train of the other company, which ran only to M., a point intermediate between S. and A. The conductor of this train accepted the "return" part of his ticket, punched it, and returned it to him. Held, that plaintiff had no right to complete his journey to A. on the same ticket on a train of defendant. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349.

Rule requiring indorsement of ticket.—A railroad, having several divisions, issued passenger tickets on which each division was indicated. Each conductor tore off the mark for his division, and, if the passenger wished to stop over and use his ticket on another train, it was necessary to have it indorsed. A mark on a ticket was torn off, and the passenger, without having the ticket indorsed, stopped over, and took another train, and was ejected. Held, in an action by him against the conductor, he would be presumed to have purchased the ticket in reference to the regulations, and his ignorance thereof would not avail him. *Beebe v. Ayres (N. Y.)*, 28 Barb. 275.

7. Stipulation as to continuous passage.—*Barker v. Coffin (N. Y.)*, 31 Barb. 556; *Ellsworth v. Pennsylvania Co.*, 2 O. C. C. N. S., 483, 15-25 O. C. D. 797; *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

"Good for this day and train only."—A railroad passenger who buys a through ticket having printed upon its face the condition, "Good for this day and train only," is not entitled to stop at an intermediate station and proceed in another train. *Shedd v. Troy, etc., R. Co.*, 40 Vt. 88.

Rev. St. c. 52, § 2, provides that no railroad company shall limit the right of a ticket holder to a train, but such holder may travel on any train, whether regular or express, and may stop at any of the stations along the line at which such trains stop, and such ticket shall be good for six years, provided that railroad companies may sell excursion, return, or special tickets at less than the regular rates, to be used as provided by the ticket. Defendant sold plaintiff an excursion ticket to M. and return for

not stop over on the route without obtaining stop-over checks is valid; and an individual check, given by a conductor on collecting a ticket, is not evidence of the right to continue the ride between points indicated on another train where the passenger has stopped over at an intermediate station.⁸ A ticket sold at a reduced rate which provided for a continuous trip, and that it was subject to exchange at any point on the route for a continuous passage check, was not changed by the issuance of such a check which indicated the same class of passage and time limit as the ticket, but provided that if it showed a 30-day limit, stop-over privileges might be had on application to the conductor, for the check in no wise altered any of the terms of the original contract.⁹ It has been held that a stipulation in a ticket, that it shall be valid returning until the date punched on the margin, is not affected by a provision that the ticket issued on an exchange order from an intermediate station to destination and return shall be good for a continuous passage only.¹⁰ Where a ticket provides for a continuous passage the holder is not entitled as a matter of right to stop over at some intermediate point, and if he voluntarily leaves the train and breaks the journey without the assent of the carrier, after the intermission which he has thus without the consent of the carrier created by discontinuing his journey, he can not again resume it under the same contract.¹¹ It is held that the purchaser of a limited through ticket for continuous passage is under obligation to inform himself by what train he can make the continuous passage contemplated within the time limited by the ticket and he has no right to take a train running only to an intermediate point and take passage therefrom on another train that could take him to his destination, even though the latter train was the one he should have taken in the first instance.¹² The continuity of the passage must be broken by the holder of the ticket, and this without the assent or fault of the carrier.¹³ Cases may arise in which by accident, misfortune, fault of the carrier, or the misconduct of the employees of a carrier of passengers, continuous transit may be interrupted without fault on part of the passenger, and in such cases the passenger may be entitled to resume his journey, and to be transported as though no interruption had occurred.¹⁴ So a passenger who is informed that no stop-

reduced rate which was to be good only on continuous trains. Plaintiff rode to M., and on the morning of the next day boarded a regular train to return, and the conductor refused the ticket, and plaintiff was ejected. Held, that under the statute the only limitation as to the use of the ticket "provided on the ticket" was that it should be good on continuous trains, and not good to stop off, and plaintiff could ride on any regular train from M. to E. within six years, provided he made a continuous passage. *Crabtree v. Washington County R. Co.*, 64 Atl. 842, 101 Me. 485.

8. *Breen v. Texas, etc., R. Co.*, 50 Tex. 43.

9. *Sanden v. Northern Pac. R. Co.*, 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711.

10. A limited ticket provided that it must be used for a continuous passage "going," commencing date of sale as stamped on back, and provided that before returning the passenger must have his return ticket validated at the starting point, and it would then be valid for passage to arrive at original starting point not later than the extreme limit indicated by punch mark on the margin.

The ticket was issued from Fresno, Cal., to Philadelphia, limited to August 11, 1900, and contained a further provision that the ticket issued on exchange order from Eastern Gateway to Philadelphia and return will be good for continuous passage to leave Philadelphia not later than June 26, 1900. Held that, as a continuous trip returning would not take from June 26th to August 11th, the holder of the ticket did not forfeit his entire ticket by not pursuing a continuous journey returning. *Cherry v. Chicago, etc., R. Co.*, 90 S. W. 381, 191 Mo. 489, 2 L. R. A., N. S., 695, 109 Am. St. Rep. 830.

11. *Hatten v. Railroad Co.*, 39 O. St. 375; *Ellsworth v. Pennsylvania Co.*, 2 O. C. C., N. S., 483, 15-25 O. C. D. 797; *Riley v. Wrightsville, etc., R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A., N. S., 379, 18 Am. & Eng. Ann. Cas. 208. See *Walker v. Wabash, etc., R. Co.*, 15 Mo. App. 333.

12. *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

13. *Ellsworth v. Pennsylvania Co.*, 2 O. C. C., N. S., 483, 15-25 O. C. D. 797.

14. *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

over ticket is necessary, and who stops off at a station, has a right to continue his journey on his original ticket, in accordance with the advice given by the agent.¹⁵ The general rule appears to be that if a continuous passage necessitates a change of trains it must be continued on the next available train.¹⁶

Coupon Tickets.—Where a system of railways, though owned by one company or operated under one management, is divided into separate divisions, a valid ticket having attached to its coupons for each of such divisions (in the absence of any specific contract, or express restriction upon the ticket to the contrary) entitles the person having the right to use the ticket to break his journey and “stop over” at the end of each division, and then resume it again upon the next coupon of the same ticket, provided this is done within the final limit fixed by the ticket.¹⁷ And such is the rule as to coupon tickets over the lines of different companies.¹⁸

§§ 2220-2221. Limitation as to Time for Which Valid—§ 2220. In Absence of Limitation.—When a carrier issues to a person for full fare a ticket to a point on its road, and there is no express contract as to when the ticket shall be used, the carrier is bound to carry the person at any time before the right of the purchaser would be lost under the law by lapse of time.¹⁹ It is also held that the purchaser of such ticket is entitled to a passage, unlimited as to time, on any train which, under the usual schedules of the road, stops at the point of his destination.²⁰ It has been held that where a passenger purchases tickets, printed on the same slip, for transportation from one city to another, but over two roads, one ticket being good to the terminus of one road and the other good from that point to the terminus of the second road, in the absence of restrictions printed on the tickets, the second ticket was good for the rest of the journey, although he remained at the point of junction two months.²¹

§ 2221. Limitations as to Time.—Power of Carrier to Impose.—In the absence of statutory restrictions,²² carriers of passengers may limit the time within which tickets may be used,²³ and such a regulation is reasonable and

15. *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356.

16. **Where change of trains necessary.**—*Ellsworth v. Pennsylvania Co.*, 2 O. C. C., N. S., 483, 15-25 O. C. C. 797, citing *Louisville, etc., R. Co. v. Klyman*, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755.

17. **Coupon tickets.**—*Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152.

18. **Coupon tickets over connecting lines.**—*Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152. See post, “Connecting Carriers,” Part V.

19. **Time limitation in absence of express provision.**—*Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209; *Freeman v. Atchison, etc., R. Co.*, 71 Kan. 327, 80 Pac. 592; *Cassiano v. Galveston, etc., R. Co. (Tex. Civ. App.)*, 82 S. W. 806, affirmed in 98 Tex. 611, no op. holding that one boarding a train and claiming a right of passage by virtue only of such a ticket, fourteen years after its issue, is a trespasser, and may be ejected.

20. *Louisville, etc., R. Co. v. Turner*, 47 S. W. 223, 100 Tenn. 213, 43 L. R. A. 140. See *Pennsylvania R. Co. v. Spicker*,

105 Pa. 142, holding that a round-trip ticket is good until used, in the absence of a stipulation to the contrary in the ticket, or notice to the buyer at the time of the purchase.

21. *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332.

22. **Right of carrier to impose limitation.**—*Freeman v. Atchison, etc., R. Co.*, 71 Kan. 327, 80 Pac. 592.

23. *Georgia.*—*Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209; *Central, etc., R. Co. v. Ricks*, 109 Ga. 339, 34 S. E. 570; *Lewis v. Western, etc., R. Co.*, 93 Ga. 225, 18 S. E. 650; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146.

Illinois.—*Burns v. Chicago, B. & Q. Ry. Co.*, 153 Ill. App. 319.

Kansas.—*Freeman v. Atchison, etc., R. Co.*, 71 Kan. 327, 80 Pac. 592. (Tickets of any class.)

Mississippi.—*Illinois Cent. R. Co. v. Marlett*, 75 Miss. 956, 23 So. 583.

Missouri.—*Boling v. St. Louis, etc., R. Co.*, 189 Mo. 219, 88 S. W. 35.

New Hampshire.—*Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199.

New York.—*Barker v. Coffin (N. Y.)*, 31 Barb. 556.

Oklahoma.—*St. Louis, etc., R. Co. v.*

valid.²⁴

Limitation Must Be Reasonable.—The time limited on a railroad ticket within which it must be used, in order to be binding, must be reasonable.²⁵ The

Johnson, 25 Okla. 833, 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165, 108 Pac. 378.

Texas.—Texas, etc., R. Co. v. Powell, 13 Tex. Civ. App. 212, 35 S. W. 841, see 89 Tex. 663; Gulf, etc., R. Co. v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

Illustrations.—On a first-class local ticket purchased for passage from one station to another over a railroad on which there was a daily passenger service in each direction was a printed condition, "One continuous passage, commencing within one day from the date on back hereof," and the date was on the back in perforated characters. Held, that the condition was a part of the contract and binding on the purchaser. *Freeman v. Atchison, etc., R. Co.*, 80 Pac. 592, 71 Kan. 327.

The condition in a railroad ticket sold at a reduced rate that it will not be good for return passage unless the holder identifies himself as the original purchaser to the ticket agent at destination on any day within the limit of twenty-one days from date of sale, and that it will then be good for continuous return passage, which shall be commenced on date of execution, as punched in the right-hand margin, is binding, so that the purchaser having, on arriving at her destination, two days after purchase of the ticket, been identified by the ticket agent at that place, who then attested her signature and dated it as of that date, the ticket is not good for a return passage commencing several days thereafter, though within the limit of twenty-one days. *Boling v. St. Louis, etc., R. Co.*, 88 S. W. 35, 189 Mo. 219.

Consideration of reduced fare.—A railroad company, may in consideration of a reduced fare, limit the time in which a ticket may be used and provide that, if it be not used within the terms of such limitation, it shall be void. *Pennington v. Illinois Cent. R. Co.*, 97 N. E. 289, 252 Ill. 584, 37 L. R. A., N. S., 983, reversing judgment 160 Ill. App. 128; *Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

Provision as to extension of time.—A provision on a railroad ticket that it shall be good for one day only, unless the holder shall deposit the return half thereof with the company's agent before expiration, and have it extended, is reasonable. *Missouri, etc., R. Co. v. Murphy* (Tex. Civ. App.), 35 S. W. 66.

Provision for redemption of ticket.—A railroad company may limit the use of a ticket sold by its agents to one day from date of sale, where it provides for its redemption if the passenger was unable to

commence his journey when expected. *Illinois Cent. R. Co. v. Marlett*, 23 So. 583, 75 Miss. 956.

A regulation limiting the period of transportation, when it embraces a provision for refunding the purchase price of the ticket, or any unused part thereof, if not used within the limited period, is, as a matter of law, held to be reasonable. *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209.

Limitations of one day have been held valid. *Coburn v. Morgan's, etc., R. Co.*, 105 La. 398, 29 So. 882, 83 Am. St. Rep. 242; *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136, 80 N. W. 223; *St. Louis, etc., R. Co. v. Johnson*, 25 Okla. 833, 108 Pac. 378, 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165; *Texas, etc., R. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841.

Limitation of five days.—A limitation in a lay-over ticket that it shall be used within five days from its date is valid. *Wentz v. Erie R. Co.* (N. Y.), 3 Hun 241, 5 Thomp. & C. 556.

After identification.—July 8th plaintiff purchased a ticket from defendant to Toronto and return, good for thirty days. On it was written, "Limited to August 8th," and a printed condition was that, before returning, plaintiff should identify himself to an agent at Toronto, and that the ticket should be good only fifteen days thereafter. Plaintiff so identified himself on July 14th, and on August 3d, on tendering the ticket for his fare, was ejected from the train. Held, that defendant is not liable. *Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47, 3 So. 387.

24. *Burn v. Chicago, B. & Q. Ry. Co.*, 153 Ill. App. 319.

25. **Limitation must be reasonable.**—*Freeman v. Atchison, etc., R. Co.*, 71 Kan. 327, 80 Pac. 592; *Gulf, etc., R. Co. v. Wright*, 10 Tex. Civ. App. 179, 30 S. W. 294; *Brian v. Oregon, etc., R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A., N. S., 459, 20 Am. & Eng. Ann. Cas. 311.

Unreasonable limitation.—A passenger, paying \$50 for a mileage book, containing 2,000 miles of transportation, which is not transferrable, and which is by mistake of the carrier's agent punched to expire on the day of its issue, is not bound by the contract as written until it is reformed in a court of equity. The price charged being unreasonable and extortionate for the transportation he could use in one day, the limitation to one day is void on its face. *Krueger v. Chicago, etc., R. Co.*, 71 N. W. 683, 68 Minn. 445, 64 Am. St. Rep. 487.

time limit must allow sufficient time for a person using ordinary diligence to accomplish the trip.²⁶ Whether the time in which a ticket is to be used is reasonable is a question for the jury and is ascertained from all the facts and circumstances existing at the time the contract was made and the time the ticket should be used.²⁷

Effect of Expiration of Time Limit.—A ticket limited as to time can not be used after the expiration of such time.²⁸ A buyer of a railroad ticket, entitling him to ride a certain number of times during a certain month, is not entitled to ride in any subsequent month, though he fails to ride the number of times specified in the ticket, where the price per mile paid by him is less than the usual rate.²⁹ The fact that a railroad which sold limited return-trip tickets failed, owing to a strike, to carry the passengers on the return trip within the period prescribed by the ticket, and thereby put them to the trouble, inconvenience, and expense of returning by other means, while it might give rise to liability for damages proximately caused by its failure to perform its contract according to its terms, did not give the passengers the right to enforce a passage under the original contract, and on another journey taken by them within a reasonable time subsequent to the time specified in the contract.³⁰

Fraudulent concealment by a carrier of the fact that it might not be able to carry a passenger on his return trip within the time prescribed in a ticket which is sold to him does not give the passenger a right to use the ticket at a time subsequent to that limited in the contract, and thereby make a new and different contract.³¹

Tickets Over Connecting Lines—Fault of Carrier.—A ticket issued, not as a coupon ticket, but as the joint contract of several connecting lines, entitles the purchaser to transportation by each of the said carriers, notwithstanding that the delay of one of them may have occasioned the expiration of the ticket before

26. *Gulf, etc., R. Co. v. Wright*, 10 Tex. Civ. App. 179, 30 S. W. 294; S. C., 2 Tex. Civ. App. 463, 21 S. W. 399.

A passenger purchasing a limited ticket for a specified trip at a reduced rate is entitled to assume that the limitation is reasonable and that sufficient time is given to make the trip contemplated. *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

A railway offering excursion tickets good for a limited time to induce purchasers to visit a distant place for a specific purpose should allow a reasonable time to accomplish the purpose. *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400, affirmed in 93 Tex. 674, no op.

27. **Reasonableness of time question for jury.**—*Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

28. **Effect of expiration of time limit.**—*Iowa.*—*Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136, 80 N. W. 223.

Massachusetts.—*Boston, etc., R. Co. v. Proctor (Mass.)*, 1 Allen 267, 79 Am. Dec. 729.

New York.—*Barker v. Coffin (N. Y.)*, 31 Barb. 556; *Boice v. Hudson River R. Co. (N. Y.)*, 61 Barb. 611; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Auerbach v. New York, etc., R. Co.*, 60 How. Prac. 382.

Texas.—*Texas, etc., R. Co. v. McDon-*

ald, 2 Texas App. Civ. Cas., § 163; *Gulf, etc., R. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54.

West Virginia.—*Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415, 19 S. E. 563.

Plaintiff, who purchased a ticket which specified that it was to be used within three days and was good for a continuous trip only, proceeded a part of the distance on his journey, and left the cars, remained six or seven days, and, upon resuming his journey, refused to pay fare. Held, that the company was not liable for the ejection of plaintiff. *Barker v. Coffin (N. Y.)*, 31 Barb. 556.

A first-class ticket, marked, "Not good after date of sale," does not entitle the purchaser to passage, over the railroad issuing it, a year after its date. *Trezona v. Chicago, etc., R. Co.*, 77 N. W. 486, 107 Iowa 22, 43 L. R. A. 136.

An excursion ticket purchased at a reduced rate can not be used after the time limit has expired. *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95; *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

29. *Powell v. Pittsburg, etc., R. Co.*, 25 O. St. 70, affirming 5 O. Dec. 89.

30. *Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

31. **Fraudulent concealment.**—*Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

its presentation to all.³² But where the ticket is in coupon form and each coupon is the separate contract of the line to which it relates, it need not be accepted if presented after the time limited, though the delay in presenting the ticket is due to the fault of one of the connecting lines.³³ Where a limited ticket over connecting lines expires on Sunday, and the last line runs no train on that day, it is bound to carry the passenger on the next day.³⁴

Construction of Particular Tickets.—Where a limited ticket is issued “not good for passage after” a certain number of days from its date, the passenger need not have completed his journey by that date. It is sufficient that he has commenced it.³⁵ But it has been held that a provision in a ticket that it “shall be good only three days after” a certain time, means that the journey is to be completed within three days, and not merely commenced within that time.³⁶ A ticket containing a stipulation that it is “good for a continuous passage on and from the date stamped on the back” is limited to use upon the day it was dated, and such further time as is necessary to complete the continuous passage.³⁷ A ticket with the words, “Good for this day only,” upon its face, and the date indorsed thereon, will not entitle the holder to passage on any day subsequent.³⁸ The words, “good for this trip only,” on a railroad ticket, must be construed to refer to the journey only, and not to the time of making it; and, if the ticket has not been used, it entitles to a passage between the places designated on a day subsequent to the date of the ticket.³⁹ A ticket issued the 6th of a certain month and limited to two days, is good until midnight of the 8th of such month.⁴⁰ A ticket purchased by plaintiff, stating upon its face that it was good for “one passage * * * if presented on date of sale shown on back,” is limited as to time, although the perforated date of sale was not shown in such language as to be intelligible to the plaintiff.⁴¹

Special Statutory Limitation.—In an action for railroad fares, where defendant's ticket has been refused on the ground that the time for which it was valid had expired, it is no defense that he purchased it in another state, by whose laws it had not yet expired, where such laws have been construed by the court of last resort of that state to apply to transportation within its boundaries only.⁴²

Extension of Time.—The written extension of the time to return on an

22. Tickets over connecting lines—Fault of carrier.—Gulf, etc., R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471. See Stevens v. Wichita Valley R. Co., 45 Tex. Civ. App. 196, 100 S. W. 807; Watkins v. Pennsylvania R. Co., 10 Mackey (21 D. C.) 1, 52 Am. & Eng. R. Cas. 159.

33. Gulf, etc., R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471. See Pennsylvania Co. v. Hine, 41 O. St. 276.

34. Expiration on Sunday.—Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584.

35. Construction of particular tickets. *California.*—Lundy v. Central Pac. R. Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100.

Kentucky.—Louisville, etc., R. Co. v. Stephen, 13 Ky. L. Rep. 687.

Missouri.—Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463.

New York.—Auerbach v. New York, etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290.

Texas.—See Rutherford v. St. Louis, etc., R. Co., 28 Tex. Civ. App. 625, 67 S. W. 161.

36. Gulf, etc., R. Co. v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399. See Gulf, etc., R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

37. Texas, etc., R. Co. v. Powell, 13 Tex. Civ. App. 212, 35 S. W. 841; Demille v. Texas, etc., R. Co., 91 Tex. 215, 42 S. W. 540, affirming Texas, etc., R. Co. v. Demille (Tex. Civ. App.), 41 S. W. 147.

38. Boice v. Hudson R. Co. (N. Y.), 61 Barb. 611.

39. Pier v. Finch (N. Y.), 24 Barb. 514.

40. Georgia, etc., R. Co. v. Bigelow, 68 Ga. 219.

41. Pennington v. Illinois Cent. R. Co., 252 Ill. 584, 97 N. E. 289, 37 L. R. A., N. S., 983.

42. Special statutory limitation.—Boston, etc., R. Co. v. Trafton, 151 Mass. 229, 23 N. E. 829.

excursion ticket, indorsed before it expired, will be given effect unless it is established that the extension was subject to certain conditions or contingencies.⁴³ Where a railroad sold special excursion tickets limited to three days, which could not be used within the prescribed time, owing to a strike and interruption of train service, an extension of the time limit for six days from a date one week subsequent to the time of expiration was a reasonable period of extension; nor was it rendered unreasonable, as to a particular passenger, by reason of his having no occasion to use his ticket until a later date.⁴⁴

The burden of showing an express limitation of the time for which the use of a ticket is limited is on the carrier.⁴⁵

Evidence in Actions for Refusal of Tickets on Ground of Expiration.—In an action against a railway company for refusing an excursion ticket presented by a passenger, on the ground that it had expired, testimony as to the difference between the excursion rate and the regular fare should be excluded as immaterial.⁴⁶ Testimony by plaintiff as to statements made by defendant's ticket agent when the ticket was purchased as to the movements of trains over the route covered by the ticket, and the advice of the agent to purchase over those lines, was admissible, without the facts being pleaded, to show whether defendant had the opportunity to know if the time agreed on in which the ticket should be used was unreasonable, and diligence on the part of the purchaser.⁴⁷

§ 2222. Limitation of Use of Ticket to Particular Train.—A carrier is entitled to limit the use of an excursion ticket sold at a reduced rate to any particular train or trains.⁴⁸ Where the ticket contains no express restriction as to the train or trains on which it will be accepted for passage, the holder thereof has the right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on the ticket to his destination as indicated by the ticket, on any train of the company carrying passengers to that point.⁴⁹ If a passenger purchasing an excursion ticket which does not indicate on what train it is to be used is not told by the agent that he can return on a fast train and knows that the fast train does not usually stop at his destination, he will have no absolute right to return on that train, provided there is another on which he can secure transportation before his ticket expires.⁵⁰ But where a round-trip ticket is sold, good only for one day, it is good for a return trip on the only train returning that day, though such train is not scheduled to stop at the station of purchase.⁵¹

§ 2223. Prohibition of Transfer.—See ante, "Stipulation against Transfer," §§ 2216-2217.

43. **Extension of time.**—*Randall v. New Orleans, etc., R. Co.*, 45 La. Ann. 778, 13 So. 166.

44. **Reasonable extension of time.**—*Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

45. **Burden of showing limitation.**—*Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146.

46. **Evidence in actions for refusal of tickets on ground of expiration.**—*Rutherford v. St. Louis, etc., R. Co.*, 28 Tex. Civ. App. 625, 67 S. W. 161.

47. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

48. **Limitation of use of ticket to particular train.**—*Central R., etc., Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Atkinson v. Southern R. Co.*, 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223; *England v. In-*

ternational, etc., R. Co., 73 S. W. 24, 32 Tex. Civ. App. 86.

A regulation of a railroad company that persons purchasing tickets for an excursion train should return by that train, and no other is reasonable. And the holder of a special excursion railway ticket for a round trip, surrendering it, and receiving instead a regular ticket substituted by the company for its own convenience, must still return upon the excursion train. *McRae v. Wilmington, etc., R. Co.*, 88 N. C. 526, 43 Am. Rep. 745.

49. **Notice of limitation.**—*Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85.

50. *Central R., etc., Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315.

51. *Illinois Cent. R. Co. v. Harris*, 81 Miss. 208, 32 So. 309, 59 L. R. A. 742, 95 Am. St. Rep. 466.

§ 2224. Prohibition as to Detachment of Coupons.—Where a commutation coupon book provides that the coupons must be detached by the conductor, and will not be accepted if otherwise detached, a passenger who detaches the coupons is not entitled to travel thereon.⁵² If, while detaching the coupons, his attention be called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupon to the conductor, in which event it would be the duty of the latter, if he saw the coupons detached or could readily ascertain by inspection that they had been detached from the ticket, to accept them. But the conductor would not be bound to receive the detached coupons without seeing the ticket.⁵³ The holder of a mileage book has no right to dictate to the conductor from what part of the book coupons shall be detached, the determination of that question being for the conductor alone.⁵⁴

Where Ticket Inadvertently Detached.—A condition, "Void if detached," etc., in railway coupon tickets, must be reasonably construed to avoid injustice to either party, and the holder can not be denied passage merely because the ticket had been inadvertently detached, if both book and ticket are presented, and it can be seen by inspection that they correspond.⁵⁵

§ 2225. Requirement of Identification, Signature and Stamping.—It is generally held that conditions in a railroad round-trip ticket sold at a reduced rate that it shall not be good for return passage unless the return part be signed or stamped by a particular agent of the company,⁵⁶ or signed by the

52. Detaching coupons.—*Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250; *Louisville, etc., R. Co. v. Harris*, 77 Tenn. (9 Lea) 180; *Houston, etc., R. Co. v. Ford*, 53 Tex. 364. See *Walker v. Dry Dock, etc., R. Co.* (N. Y.), 33 How. Prac. 327.

Defendant, while riding in a car of plaintiff, tendered in payment of his fare a coupon taken from a ticket book which contained similar coupons, on each of which were printed the words, "Not good if detached," and on the cover of the book, "Coupons are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket." Defendant refused to exhibit his ticket book or pay his fare in any other manner than as aforesaid. In a suit for the fare he offered to prove the custom of passengers to pay their passage with detached coupons, without showing their books. Held, that the contract of which the book and coupons were evidence was a reasonable one; that there was no evidence that the plaintiff had rescinded or waived any of its terms or conditions; and that plaintiff was entitled to judgment. *Boston, etc., R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293.

53. *Louisville, etc., R. Co. v. Harris*, 77 Tenn. (9 Lea) 180.

54. *Eaton v. McIntire*, 88 Me. 578, 34 Atl. 525.

55. Where ticket inadvertently detached.—*Fairfield v. Louisville, etc., R. Co.*, 94 Miss. 887, 48 So. 513; *Wightman v. Chicago, etc., R. Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778.

A ticket for a continuous ride over the

whole length of a street railway and a connecting line was of a peculiar color and print, and was composed of two coupons, the upper of which was for use on the connecting line, and gave the names of its termini below, and the names of both lines above. Held, that a conductor of the connecting line was bound to accept for passage an upper fragment of the upper coupon, which gave the names of the lines, on the assumption that the conductor of the other line carelessly tore off the part giving the termini, in taking the lower coupon. *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937.

56. Condition as to signing and stamping by agent.—*United States.*—*Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290, 10 S. Ct. 50; *Pennsylvania R. Co. v. Wabash, etc., R. Co.*, 157 U. S. 225, 39 L. Ed. 682, 15 S. Ct. 576; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, 32 L. Ed. 249, 8 S. Ct. 1324.

Michigan.—*Edwards v. Lake Shore, etc., R. Co.*, 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527.

Pennsylvania.—*Bowers v. Pittsburgh, etc., Railroad*, 158 Pa. 302, 27 Atl. 893.

Tennessee.—*Watson v. Louisville, etc., R. Co.*, 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454.

Texas.—*Houston, etc., R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894; *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

A conditional round-trip ticket had the words "Charleston, S. C., and Return" written in ink across the printed matter. Held not to make a new contract, or render the one in print, requiring the

purchaser in the presence of the agent and witnessed by him,⁵⁷ or the passenger identifies himself as the original purchaser to the satisfaction of such agent,⁵⁸ are reasonable and binding on the passenger and he is not entitled to ride on the ticket without having complied with such conditions. And it may be provided that the holder of a ticket, at the request of the conductor, shall sign his name

ticket to be validated in Charleston, ambiguous. *Sellers v. Atlantic, etc., R. Co.*, 57 S. E. 1102, 77 S. C. 361.

Ticket over connecting lines.—Defendant sold plaintiff a ticket to a point beyond its own line providing that in selling the ticket defendant acted only as agent of the carrier beyond its own line, and was not responsible beyond that point; that the ticket was not good for a return passage, unless the holder identified himself at the office of the second carrier, and unless the ticket was properly stamped, etc.; that plaintiff should identify himself whenever required by conductors or other agents of the road; and that no agent had authority to alter the terms of the contract. Plaintiff presented himself for identification at the required place and at a proper time before the departure of a train, but no agent was present to perform the services or stamp the ticket. After reaching defendant's road, plaintiff was ejected because his ticket was not properly stamped, although he offered to identify himself to the conductor. Held, that defendant was under no obligations to accept the ticket until plaintiff had it properly stamped. *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, 8 S. Ct. 1324, 32 L. Ed. 249.

57. Signing in presence of agent.—*Southern R. Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166; *Edwards v. Lake Shore, etc., R. Co.*, 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527; *Louisville, etc., R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491.

Illustration.—A round-trip ticket, sold at a reduced rate, contained a condition that it was not valid for return unless signed by the purchaser on the day of the return, in the presence of defendant's agent, and witnessed by him; and on the face thereof was a notice to the purchaser to the effect that the return part of the ticket must be stamped, and the purchaser's signature witnessed by such agent, before it would be honored for passage. It appeared that, though defendant kept its office and station open, and its agent on duty, from 7 a. m. to 7 p. m., it maintained no night office at the place to which the ticket in question read; that the purchaser did not apply at defendant's office to have the ticket stamped and his signature witnessed by the agent until after the office was closed for the day; and that on the return trip he tendered for his passage the ticket unsigned and unstamped,

which was refused by the conductor. Held, that such ticket gave the purchaser no right to a return passage until he had complied with such agreement. *Louisville, etc., R. Co. v. Wright*, 47 N. E. 491, 18 Ind. App. 125.

58. Georgia.—*Wenz v. Savannah, etc., R. Co.*, 108 Ga. 290, 33 S. E. 970; *Moses v. East Tennessee, etc., Railroad*, 73 Ga. 356; *Central, etc., R. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

Indiana.—*Pittsburgh, etc., R. Co. v. Coll*, 37 Ind. App. 232, 76 N. E. 816.

Kentucky.—*Baltimore, etc., R. Co. v. Hudson*, 117 Ky. 995, 25 Ky. L. Rep. 2154, 80 S. W. 454.

Louisiana.—*Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47, 3 So. 387.

Texas.—*Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

Signing or other proofs.—A condition on a return excursion ticket sold by a railroad company at a reduced fare requiring the holder to identify herself as the original purchaser by writing her signature on the back thereof, and, if this is not satisfactory to the validating agent, to produce other proofs of her identity, is reasonable and valid. *Dangerfield v. Atchison, etc., R. Co.*, 61 Pac. 405, 62 Kan. 85; *Baltimore, etc., R. Co. v. Hudson*, 80 S. W. 454, 117 Ky. 995, 25 Ky. L. Rep. 2154; *Watson v. Louisville, etc., R. Co.*, 56 S. W. 1024, 104 Tenn. (20 Pickle) 194, 49 L. R. A. 454; *Reed v. Texas, etc., R. Co.* (Tex. Civ. App.), 50 S. W. 432.

Ticket purchased under assumed name.—The purchaser of a round trip, not transferable, railroad ticket, it not entitled to return passage thereon, where he purchased and accepted the ticket at one-half the regular fare, upon the condition, among others indorsed thereon, that the ticket should not be good for return passage until he should identify himself before a specified agent of the company as the original purchaser, by signing his name on the back of the ticket, and by other means, if required, where he signed the acceptance of the ticket, before an agent of the company to whom his true name was unknown, as "H. Thomas," and was refused certificate of identification by the other specified agent of the company upon this signature, because his true name was known to that agent as "H. Thomas Sinnott." *Sinnott v. Louisville, etc., R. Co.*, 104 Tenn. (20 Pickle) 233, 56 S. W. 836.

thereto or otherwise identify himself as the original purchaser.⁵⁹ A round-trip ticket, stipulating that the original purchaser shall identify himself to the validating agent at destination, and that the original purchaser agrees to sign his name to identify himself when called on to do so by any conductor or agent, does not require the passenger to sign as a part of the process of validating the ticket unless called on to do so by the validating agent, though a blank space is left for his signature.⁶⁰

Sufficiency of Identification.—It is held that where a purchaser of a reduced-rate excursion ticket signs a special contract thereon, by which he agrees that it shall not be good for the return passage unless he identifies himself as the original purchaser to the satisfaction of the agent in the place to which he is going, it is incumbent on the holder, as a condition to having his return passage validated, to furnish such proof of his identity, and of the fact that he was the original purchaser, as would be sufficient to satisfy a reasonable man, and the mere writing of the holder's name is not, of itself, necessarily sufficient.⁶¹ It is held that where a ticket contains such a contract the agent is not required to accept the holder's verbal assurance of his identity, nor to institute other inquiries with a view of satisfying himself on such subject.⁶² Where a ticket contained a condition that before return the purchaser should "satisfy" the agent who was directed to stamp the ticket that he was the person to whom it was issued, it was the duty of the agent to judge of the sufficiency of identification, and it need not be left to the jury whether he was or was not satisfied with the proof of identity offered by the holder.⁶³ It is held that where a ticket provided that the holder should, at the request of the conductor, sign his name thereto, and otherwise identify himself as the original purchaser, a conductor who refuses the holder's offer to identify himself by signing the ticket can not require him to otherwise identify himself.⁶⁴

Effect of Wrong of Agent.—If the purchaser of a round-trip ticket, after paying for and receiving it, performs all the stipulations of the contract on his part, the company is bound to honor the ticket when presented, notwithstanding any mistake or omission by its agents in signing or stamping it.⁶⁵ And a pas-

59. **Identification to conductor.**—Pittsburgh, etc., R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816; Norfolk, etc., R. Co. v. Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884. See *Moses v. East Tennessee, etc., Railroad*, 73 Ga. 356; Illinois Cent. R. Co. v. Williams, 147 Ky. 52, 143 S. W. 760.

60. Illinois Cent. R. Co. v. Williams, 147 Ky. 52, 143 S. W. 760.

61. **Sufficiency of identification.**—Central, etc., R. Co. v. Cannon, 106 Ga. 828, 32 S. E. 874, holding that it was error to instruct that, if the proof furnished to the validating agent by the holder as to his identity was satisfactory to the jury, he was entitled to have the ticket validated. See *Marlow v. Southern Pac. Co.*, 151 Cal. 383, 90 Pac. 928; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Southern R. Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166; *Southern R. Co. v. Cassell*, 122 Ky. 317, 28 Ky. L. Rep. 1230, 92 S. W. 281.

In *Southern R. Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166, it was held that the contract necessarily implied that it was incumbent upon the purchaser to use reasonable means of identifying himself as such to the agent.

Insufficient identification.—Where the

purchaser of a round-trip excursion ticket, on buying it, "printed" his name thereon, thus rendering it impossible to identify himself as the original purchaser by reproducing his signature, the burden was on him to find other means of satisfactory identification, and it was not satisfactory proof, under all circumstances, to the agent at his destination, to prove by witnesses that the holder's name was the same as that printed on the ticket, to show that he was the original purchaser. And the fact that he produced evidence sufficient to show that he "was the man he represented himself to be," was insufficient to identify him as the original purchaser of the ticket. *Central, etc., R. Co. v. Cannon*, 32 S. E. 874, 106 Ga. 828.

62. **Verbal assurance of identity.**—Baltimore, etc., R. Co. v. Hudson, 80 S. W. 454, 117 Ky. 995, 25 Ky. L. Rep. 2154.

63. *Bethea v. Northeastern R. Co.*, 26 S. C. 91, 1 S. E. 372.

64. **Identification to conductor.**—Norfolk, etc., R. Co. v. Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

65. **Mistake or omission of agent.**—*Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. See Illinois Cent. R. Co. v. Williams, 147 Ky. 52, 143 S. W. 760.

senger's right to return transportation is not affected by the arbitrary refusal of the carrier's agent to stamp and validate the return portion of the ticket when requested to do so.⁶⁶ Where a passenger presented the return ticket to the agent for the purpose of identification, at the same time requesting a sleeping-car ticket, and the agent took the coupon to the rear of his office, and, returning with it, handed it to the passenger, folded up with the sleeping-car ticket, the fact that the agent had omitted to stamp the coupon did not excuse the company from liability for ejecting the passenger from the train on presentation of the coupon unstamped, the passenger not having learned of the agent's omission till he had taken the train.⁶⁷

Effect of Erroneous Statements of Agent.—Where a round-trip ticket stipulates that, to be good for return, the return coupon must be signed and stamped by company's agent, and the passenger knows of this, and the signing and stamping was not done, and he did not ask that it be, he can not complain of refusal to accept it for passage, though the agent at ticket office to whom he showed it said at the time that it was all right.⁶⁸ And the purchaser of a railroad ticket, knowing it was conditioned that he should sign his name thereto when requested by the conductor, who refused to sign is not entitled to ride thereon, although the agent sold him the ticket after he refused to sign it.⁶⁹

Absence of Person Authorized to Stamp Ticket.—It is held that where a railroad round-trip ticket provides that it shall not be good for return passage unless it be signed and stamped by an agent of the company at the point of destination, it is incumbent upon the company to have present, a reasonable time before the arrival of trains on which the ticket would be good for passage on any day upon which the purchaser might see fit to use it, an agent authorized to sign and stamp the ticket in the manner therein provided.⁷⁰ But it has been held that where a passenger was sold an excursion ticket which was required to be stamped for return passage by the secretary of a camp meeting association, and the passenger was unable to comply with the requirement because the camp meeting had closed, and the secretary had gone away, he was not entitled to ride upon the unstamped ticket.⁷¹

Commutation or Mileage Ticket.—Where a commutation ticket entitled any member of a firm to travel thereon, on certain terms, among which was a condition requiring them to sign their names on the back, and another providing that the ticket should be good only for the persons named thereon, it was not good for a member of the firm who had not indorsed it.⁷² Acceptance of a mileage ticket which provides that "the purchaser agrees to sign his name in presence of conductor each time before detachment is made," and that, "unless

66. **Refusal to validate ticket.**—Pittsburgh, etc., R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816; Ft. Worth, etc., R. Co. v. Jones, 38 Tex. Civ. App. 192, 85 S. W. 37.

Evidence in an action against a carrier for refusal to validate return ticket, good only when validated, examined, and held to support a finding that the carrier improperly refused to validate the ticket, authorizing a verdict for the passenger. Baltimore, etc., R. Co. v. Hudson, 92 S. W. 947, 29 Ky. L. Rep. 298.

In an action against a carrier for refusal to validate the return portion of a ticket, good only when validated, it was not error to permit plaintiff to testify with respect to her consulting a lawyer and detailing the circumstances under which she made the effort to do so after the carrier's agent had refused to validate the ticket. Baltimore, etc., R. Co.

v. Hudson, 92 S. W. 947, 29 Ky. L. Rep. 298.

67. Northern Pac. R. Co. v. Pauson, 17 C. C. A. 287, 70 Fed. 585, 30 L. R. A. 730, cited with approval in Illinois Cent. R. Co. v. Williams, 147 Ky. 52, 143 S. W. 760.

68. **Effect of erroneous statements of agent.**—Houston, etc., R. Co. v. Arey, 44 S. W. 894, 18 Tex. Civ. App. 457.

69. Ketcheson v. Southern Pac. Co., 19 Tex. Civ. App. 288, 46 S. W. 907, affirmed in 93 Tex. 712, no op.

70. **Absence of person authorized to stamp ticket.**—Southern R. Co. v. Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536.

71. Western Maryland R. Co. v. Stockdale, 83 Md. 245, 34 Atl. 880.

72. **Commutation ticket.**—Granier v. Louisiana, etc., R. Co., 42 La. Ann. 880, 8 So. 614.

the proper signature is given, this ticket is forfeited," does not constitute an agreement that the conductor may decide for the holder, as well as for the company, whether the holder is the purchaser named in the ticket.⁷³

§ 2226. Limitation of Liability.—See post, "Rights, Duties and Liabilities of Carrier during Transportation," chapter 23.

§ 2227. Notice and Acceptance of Conditions.—Acceptance of Ticket as Evidencing Acquiescence in Conditions.—It is held that the purchaser of an ordinary railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon in the absence of actual knowledge of them,⁷⁴ or unless the circumstances are such that it is negligence for him not to discover them.⁷⁵ And it is held that where a passenger pays full fare for a general ticket he is not bound by time limitations stamped or printed thereon unless his attention is called to them at the time he purchases the ticket and he assents thereto;⁷⁶ and the posting of notices in the waiting rooms and ticket offices⁷⁷ and on the cars,⁷⁸ is not sufficient to charge him with notice thereof. But it is also held that a passenger who accepts a ticket on which reasonable conditions are stated is bound thereby whether he reads it or not;⁷⁹ and the binding force of the conditions is not affected by the failure

^{73.} Pittsburgh, etc., R. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822.

^{74.} Acceptance as evidencing acquiescence in conditions.—Kent v. Baltimore, etc., R. Co., 45 O. St. 284, 12 N. E. 798; Lake Shore, etc., R. Co. v. Mortal, 18 O. C. C. 562, 8 O. C. D. 134; Sanden v. Northern Pac. R. Co., 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711.

Condition as to stamping.—A provision printed upon the face of a first-class return-trip railroad ticket, to the effect that it will not be valid for the return journey unless stamped by the agent of the company at the place from which the return journey is authorized, forms no part of the contract between such purchaser as a passenger and such company as a carrier, and does not qualify the usual rights and obligations of either, if such purchaser does not assent to such conditions before or at the time he purchases such ticket; and his mere acceptance of the ticket is not such assent. Lake Shore, etc., R. Co. v. Mortal, 18 O. C. C. 562, 8 O. C. D. 134.

Where a passenger is unable to read, and no explanation is made by the agent of a railroad company selling a ticket, he is not bound by the special terms and conditions printed on such ticket. Mauritz v. New York, etc., R. Co., 23 Fed. 765.

^{75.} Aplington v. Pullman Co., 97 N. Y. S. 329, 110 App. Div. 250, 17 N. Y. Ann. Cas. 455.

When a passenger is riding upon a regular passenger train, has paid the usual fare, and holds a ticket which he has a right to suppose is in the common form of a ticket, a mere token that he is entitled to be carried, he might not unreasonably act upon the presumption that the ticket was what the circumstances require it to be, if nothing appeared which was likely to repel the presump-

tion, even if on closer inspection a condition might be found in it. Harmon v. Jensen, 100 C. C. A. 115, 176 Fed. 519, 20 Am. & Eng. Ann. Cas. 1224.

^{76.} Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Railroad v. Turner, 100 Tenn. (16 Pickle) 213, 47 S. W. 223, 43 L. R. A. 140, cited in Watson v. Louisville, etc., R. Co., 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454; Dagnall v. Southern R. Co., 69 S. C. 110, 48 S. E. 97. See Norman v. Southern R. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809.

^{77.} Georgia R. Co. v. Baldoni, 115 Ga. 1013, 42 S. E. 364; Norman v. Southern R. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809; Louisville, etc., R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

^{78.} Louisville, etc., R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

^{79.} Freeman v. Atchison, etc., R. Co., 71 Kan. 327, 80 Pac. 592; French v. Merchants', etc., Transp. Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A., N. S., 1006.

Where a passenger's ticket contained on its face nearly two quarto pages of printed provisions, the holder of the ticket was bound to have it read to her, if she could not read it herself, and the fact that her eyesight was defective and that she claimed that she could see only "large objects" was insufficient to excuse her from acquainting herself with the contents of the ticket. French v. Merchants', etc., Transp. Co., 85 N. E. 424, 199 Mass. 433, 19 L. R. A., N. S., 1006.

Time limitation.—The purchaser must take notice of the time limitation printed or stamped on the face of the ticket. Coburn v. Morgan's, etc., R. Co., 29 So. 882, 105 La. 398, 83 Am. St. Rep. 242; Missouri etc., R. Co. v. Murphy (Tex. Civ.

of the passenger to sign the ticket.⁸⁰ And it is held that a passenger is bound by contract stipulations so plainly printed on the face of its ticket that it would be carelessness on his part not to read them, whether he did read them or not; but he is not bound if they did not so appear, unless by some means the provisions had been brought to his attention.⁸¹ When a contract for transportation contains a limitation on the back, in order to bind the holder thereof it must be shown that he read or knew of such limitation at the time he accepted the contract.⁸²

Where Passenger Signs Ticket.—It is held that one signing a ticket issued to him by a railroad company, is, in the absence of fraud, misrepresentation, or mistake, conclusively presumed to have known and assented to all of its conditions and stipulations.⁸³ He is bound by the conditions whether he read them or not;⁸⁴ and though his attention was not called to them.⁸⁵

Ticket Sold at Reduced Rate.—It is held that when a passenger buys a railroad ticket at a reduced rate he is chargeable with such reasonable conditions as are printed thereon,⁸⁶ whether he has read them or not,⁸⁷ or signed the ticket,⁸⁸ and although he may not be able to read or write and its contents

App.), 35 S. W. 66. See *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136, 80 N. W. 223; *Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

80. *Freeman v. Atchison, etc., R. Co.*, 71 Kan. 327, 80 Pac. 592.

Where defendant's agent sold plaintiff a ticket over connecting lines, which contained a provision on its face that the defendant acted only as agent, and was not responsible beyond its own line, and the condition was not signed by plaintiff, his acceptance and use of the ticket estopped him from taking advantage of his omission to sign. *St. Clair v. Kansas City, etc., R. Co.*, 28 So. 957, 77 Miss. 789.

81. *Louisville, etc., R. Co. v. Nicolai*, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. Rep. 206.

82. *San Antonio, etc., R. Co. v. Newman*, 17 Tex. Civ. App. 606, 43 S. W. 915. See *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

83. **Where passenger signs ticket.**—*Smith v. Southern Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708. See *Watson v. New York, etc., R. Co.*, 54 N. Y. S. 201, 24 Misc. Rep. 628.

84. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 S. Ct. 50, 33 L. Ed. 290; *Daniels v. Florida, etc., R. Co.*, 62 S. C. 1, 39 S. E. 762.

85. *Daniels v. Florida, etc., R. Co.*, 62 S. C. 1, 39 S. E. 762; *Bethea v. Northeastern R. Co.*, 26 S. C. 91, 1 S. E. 372 (stipulations in small type).

86. **When ticket sold at reduced rate.**—*Watson v. Louisville, etc., R. Co.*, 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454; *Railroad v. Turner*, 100 Tenn. (16 Pickle) 213, 47 S. W. 223, 43 L. R. A. 140; *Sanden v. Northern Pac. R. Co.*, 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711. See *Gulf, etc., R.*

Co. v. Riney, 41 Tex. Civ. App. 398, 92 S. W. 54.

A railroad passenger who buys a through ticket having printed upon its face the condition, "Good for this day and train only," is not entitled to stop at an intermediate station and proceed in another train, although such condition was not brought to his notice until the refusal of the ticket by the conductor; the passenger being aware when buying the ticket that the price of it was less than the price of separate tickets, one from the point of starting to such intermediate station and another from such intermediate station to his final destination. *Shedd v. Troy, etc., R. Co.*, 40 Vt. 88.

87. *New York, etc., R. Co. v. Bennett*, 50 Fed. 496, 1 C. C. A. 544; *Sanden v. Northern Pac. R. Co.*, 115 Pac. 408, 43 Mont. 209, 34 L. R. A., N. S., 711.

The fact that one buying what she knew was a special-rate railroad ticket did not read it does not relieve her of the effect of a stipulation, plainly printed on its face, that return passage should be commenced on the date that she was identified, and the ticket was stamped and punched for return passage. *Boling v. St. Louis, etc., R. Co.*, 88 S. W. 35, 189 Mo. 219.

88. *Drummond v. Southern Pac. Co.*, 7 Utah 118, 25 Pac. 733.

In the absence of deception on the part of the carrier in selling a round-trip ticket at a reduced rate containing a condition that it shall not be good for a return passage unless the ticket holder shall identify himself as the original purchaser to the satisfaction of the carrier's agent at the point of destination, and unless the ticket is signed and stamped by said agent, the assent of the ticket holder to the condition will be conclusively presumed, although he may not have signed the ticket. *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

are not explained to him.⁸⁹ But the contrary has been held.⁹⁰

§ 2228. Forfeiture of Tickets.—Stipulation as to Forfeiture.—A stipulation in a ticket that if offered by any other than the person to whom issued, it will be forfeited is valid, and the carrier may take it up when presented by a transferee.⁹¹ The right to take up a ticket containing such a stipulation is not limited to the occasion when presented by a person other than the person to whom issued, but the ticket may be taken up when subsequently presented by the rightful holder.⁹² But a ticket can be forfeited for violation of its terms only where such terms have been violated with the permission or connivance of the owner.⁹³ So where one bought a mileage ticket with the funds of a scalper, and, after using a part of it, deposited it as owner with the scalper as security for the balance owing him on the ticket, and did not authorize the scalper to permit others to ride on it, the ticket is not forfeited in the hands of the owner by the acts of the scalper in allowing a third person to ride on it.⁹⁴

Ticket Purchased in Assumed Name.—Where a railroad company sells a mileage ticket providing that it shall not be good for the passage of any one other than the original purchaser, whose name and description appear upon the cover of the ticket, if it appears that the purchaser explained to the agent of the company that he was purchasing the ticket in an assumed name, and the agent assented thereto, the company will be bound by such assent, and will be liable for the act of its conductor in taking up the ticket when presented by the purchaser.⁹⁵

Waiver of Right of Forfeiture.—A carrier did not waive its right to exact a forfeiture of a ticket because of previous improper use by the purchaser of the ticket, though it had subsequently honored the ticket for transportation, in the absence of proof that in so doing it had knowledge or notice of the forfeiture.⁹⁶

Remedies in Enforcement of Forfeiture.—If any person buys a special nontransferable ticket, and sells it to a third person, to be used by him, the

89. *Watson v. Louisville, etc., R. Co.*, 104 Tenn. (20 Pickle) 194, 56 S. W. 1024, 49 L. R. A. 454; *Railroad v. Turner*, 100 Tenn. (16 Pickle) 213, 47 S. W. 223, 43 L. R. A. 140.

90. The fact that a ticket is an ordinary holiday ticket, sold at a reduced rate, which facts are known to the purchaser, does not imply his assent to conditions therein contained requiring the return coupon to be stamped by the agent before it shall be good for passage. *Lake Shore, etc., R. Co. v. Mortal*, 18 O. C. C. 562, 8 O. C. D. 134, citing *Kent v. Baltimore, etc., R. Co.*, 45 O. St. 284, 12 N. E. 798, 4 Am. St. Rep. 539.

91. **Stipulation as to forfeiture.**—*Indiana*.—*Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

New Hampshire.—*Eastman v. Maine Cent. Railroad*, 70 N. H. 240, 46 Atl. 54.

New Jersey.—*Harris v. Delaware, etc., R. Co.*, 77 N. J. L. 278, 72 Atl. 50.

Texas.—*Levinson v. Texas, etc., R. Co.*, 17 Tex. Civ. App. 617, 43 S. W. 901; *S. C.*, 43 S. W. 1032.

The phrase "person to whom it is issued," as used in a commutation ticket containing a stipulation that if it should be offered by any other than the person to whom it is issued it would be forfeited

and taken up by the conductor, is synonymous with "person named on its face." *Colton v. Delaware, etc., R. Co.*, 80 N. J. L. 592, 77 Atl. 1020.

Plaintiff, through her son, bought a monthly commutation ticket stipulating that if it should be offered by any other than the person to whom issued it should be forfeited. The ticket by mistake was made out in the name of Mr. C. instead of Mrs. C., and the ticket, being presented by plaintiff, was forfeited by defendant's conductor. Held, that the name on the ticket was, as between her and the conductor, conclusive evidence of the person to whom it was issued, and she could not maintain an action for conversion thereof. *Colton v. Delaware, etc., R. Co.*, 80 N. J. L. 592, 77 Atl. 1020.

92. *Freidenreich v. Baltimore, etc., R. Co.*, 53 Md. 201; *Harris v. Delaware, etc., R. Co.*, 77 N. J. L. 278, 72 Atl. 50.

93. *Harris v. Delaware, etc., R. Co.*, 77 N. J. L. 278, 72 Atl. 50.

94. *Mueller v. Chicago, etc., R. Co.*, 75 Minn. 109, 77 N. W. 566.

95. **Ticket purchased in assumed name.**—*Chicago, etc., R. Co. v. Pendergast*, 75 Ill. App. 133.

96. **Waiver of right of forfeiture.**—*Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

railroad can invoke the aid of equity to cancel the contract because of the fraud thus perpetrated; or, if the ticket is used by another, it can sue for damages for the breach of the contract.⁹⁷

§§ 2229-2230. Waiver of Conditions—§ 2229. Authority of Agent.

—The conditions of a railway ticket may be waived by an authorized agent.⁹⁸ An agent who sold a ticket has no implied authority, after the ticket has expired by its own limitation, to waive such limitation and make a new contract with reference to its use which will be binding on the carrier.⁹⁹ Authority granted an agent to sell tickets which are not transferable and which require that they shall be signed by the original purchaser does not warrant the inference that the agent was authorized to dispense with the signing and issue the tickets with the understanding that they should be transferable.¹ Verbal declarations of an agent made subsequent to the sale of a ticket will not bind the carrier, unless it is proved that the agent had authority from the company to make an oral contract varying the one indicated by the ticket.² A condition in a special contract ticket that it should be used before a certain date and that there should be no stop over can not be waived after the ticket was exchanged for a continuous passage check, which on its face showed that the limit was too short for the conductor to allow a stop over, by either the conductor or a station agent along the line.³

Express Notice of Lack of Authority.—An agent or servant of the carrier can not waive the conditions of a ticket which is accepted by the purchaser on condition that no employee can change its stipulations.⁴

97. Remedies in enforcement of forfeiture.—*Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; dismissed in 196 U. S. 644, 49 L. Ed. 632, 25 S. Ct. 797.

98. Waiver by authorized agent.—*Randall v. New Orleans, etc., R. Co.*, 45 La. Ann. 778, 13 So. 166 (condition as to time for which valid); *Gulf, etc., R. Co. v. Kuenhle*, 4 Texas App. Civ. Cas., § 249, 16 S. W. 177 (requiring identification of holder as original purchaser). See, generally, "Acts and Statements of Agents or Employees," §§ 2210-2211.

Evidence to show person authorized agent.—It appeared that plaintiffs purchased limit tickets to O. P., and return; that such tickets for the return trip were not signed and stamped, in accordance with their conditions, at O. P., by the company's agent there, but by a person at N. Held, that evidence that such person was an authorized agent of defendant was admissible to show a waiver of such condition. *Taylor v. Seaboard, etc., R. Co.*, 99 N. C. 185, 5 S. E. 750, 6 Am. St. Rep. 509.

Unauthorized agent.—Full fare may be collected of a passenger attempting to ride on a scalper's ticket conditioned to be void if presented by any other than the original holder, notwithstanding the passenger purchased it on the assurance of an unauthorized agent of the company that it would be honored. *Drummond v. Southern Pac. Co.*, 7 Utah 118, 25 Pac. 733.

A statement by a railroad employee, two days after the sale of a ticket, that it would be good as soon as trains began

to run, was not a waiver of the time limit on the ticket, where the employee making the statement was not the one who sold the ticket, and he was not shown to have any authority to make the waiver. *Elliott v. Southern Pac. Co.*, 79 Pac. 420, 145 Cal. 441, 68 L. R. A. 393.

99. Pennington v. Illinois Cent. R. Co., 252 Ill. 584, 97 N. E. 289, 37 L. R. A., N. S., 983, reversing 160 Ill. App. 128.

1. Comer v. Foley, 98 Ga. 678, 25 S. E. 671.

2. Boice v. Hudson R. Co. (N. Y.), 61 Barb. 611. (Ticket agent.)

3. Sanden v. Northern Pac. R. Co., 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711.

4. Express notice of lack of authority.—*United States*. — *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290, 10 S. Ct. 50.

Georgia.—*Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163.

Montana.—*Sanden v. Northern Pac. R. Co.*, 43 Mont. 209, 115 Pac. 408, 34 L. R. A., N. S., 711.

South Carolina.—See *Smith v. Southern Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708, where the rule was held not to apply because of other provisions in the ticket.

Texas.—*Reed v. Texas, etc., R. Co. (Tex. Civ. App.)*, 50 S. W. 432; *Ketcheson v. Southern Pac. Co.*, 19 Tex. Civ. App. 288, 46 S. W. 907.

Illustration.—A railroad ticket, signed by the purchaser, restricted his right to a continuous trip, going or returning, and expressly provided that no agent or employee had power to modify the con-

§ 2230. What Amounts to Waiver.—Conductor Taking Wrong Coupon.—Where the coupons of a round-trip ticket which provided that the going coupon would be void if detached were accidentally detached, and the passenger presented both ends, and the conductor by mistake took the returning coupon, it was held that this was a waiver of the condition on the going coupon in regard to detachment.⁵

Allowing Passenger to Remain on Train.—The act of a conductor in permitting a passenger holding a ticket for continuous passage to remain on the train which went only a part of the distance did not entitle the passenger to passage on another train for the remainder of the distance.⁶

Checking Baggage.—A limitation of the time within which a ticket must be used is not waived by the checking of the holder's baggage by a baggageman after the expiration of such time.⁷

The issue of an advertisement by a railroad company that passengers "with tickets" might ride on certain freight trains does not entitle the purchaser of a mileage ticket which had indorsed upon it an express condition that it should not be good for passage on freight trains, to ride on one of such freight trains.⁸

Failure to Enforce Conditions.—It is generally held that the failure of the carrier to enforce conditions in other instances will not entitle the holder of a ticket to passage thereon when its conditions have been violated.⁹ So the mere fact that a person has been several times permitted to ride in a passenger

tract. A conductor on the road informed the passenger that he could stop off at an intermediate point, and wrote on the ticket to that effect. On resuming his journey, the passenger was ejected because of the fact that the trip was not continuous. Held, that the railroad company is not liable. *International, etc., R. Co. v. Best*, 55 S. W. 315, 93 Tex. 344.

Where the ticket expressly provided that no employee of defendant is authorized to waive any conditions of the contract, the action of defendant's baggageman in punching plaintiff's ticket and checking his baggage, and of the gateman in admitting him to the train, does not estop defendant to deny plaintiff's right to be carried on his return trip without compliance with an express provision of the ticket that it shall be stamped and signed by defendant's agent at the place of destination, before it will be received for return passage. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 S. Ct. 50, 33 L. Ed. 290.

Where a ticket agent, has authority to sell both limited and unlimited tickets over a connecting line, and gives a passenger a ticket which he takes without reading, and which recites on its face that it is limited, evidence that the passenger contracted for a ticket which would allow him stop-over privileges is admissible, though the ticket also recites that no agent has authority to change the conditions thereof. *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

5. Conductor taking wrong coupon.—*Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439.

6. Allowing passenger to remain on train.—*Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

7. Checking baggage.—*Wentz v. Erie Co. (N. Y.)*, 3 Hun 241, 5 Thomp. & C. 556.

8. Issue of advertisement.—*Dunlap v. Northern Pac. R. Co.*, 35 Minn. 203, 28 N. W. 240.

9. Failure to enforce condition—Illustration.—That a railroad ticket purported to be for a ride from Portland to Boston does not entitle its holder to ride from Boston to Portland, though he has on previous occasions allowed to ride the reverse way to his ticket. *Keeley v. Boston, etc., R. Co.*, 67 Me. 163, 24 Am. Rep. 19.

The fact that upon former occasions the gate keeper had informed one that his ticket entitled him to ride on a certain train, and that the conductor had accepted coupons therefrom for passage thereon, constitutes at most a waiver of the conditions of the ticket as to those particular trips. *New York, etc., R. Co. v. Feely*, 163 Mass. 205, 40 N. E. 20.

That other persons were allowed to ride on the return portion of unstamped tickets, which were sold on condition that they should not be good for return trip, until stamped, does not entitle the holder of a similar unstamped return ticket to passage thereon, unless he knew of such other instances, and they were so frequent as to mislead people into the belief that the condition had been abandoned. *Watson v. Louisville, etc., R. Co.*, 56 S. W. 1024, 104 Tenn (20 Pickle) 194, 49 L. R. A. 454.

train on a ticket only authorizing him to accompany stock shipments does not permit him to continue to ride on such passenger trains.¹⁰ And the use of an expired ticket a number of times will not estop the company to take it up and demand fare of the passenger.¹¹ Nor will the fact that one of two tickets, containing stipulations that they were to be used within a certain time, was accepted by the carrier as good, though not used within the time specified, constitute a waiver by the company of the stipulation contained in the other ticket.¹² And an indorsement upon the ticket, by a conductor, showing it had been used to an intermediate station, before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter, with an indorsement showing it, is not such a waiver of the condition as allows a further use of the ticket.¹³ But it has been held that when a railway company delivered a ticket to a purchaser who was ignorant of a condition that he should sign it, and honored it on several trips without first requiring him to sign it, the company thereby waived the requirement.¹⁴ And a practice on the part of a carrier of receiving as fare coupons detached from a commutation ticket is evidence of waiver of a condition that the coupons must be detached by the conductor on presentation.¹⁵ The usual rule that if a continuous passage necessitates a change of trains, the journey must be continued on the next available train will yield to an agreement to the contrary, or that which infers consent or amounts to consent, that the contract be modified in that respect, as by the acts or conduct of the company or its agents.¹⁶

Failure to Notice Violation of Condition.—A condition in a railway ticket is not waived because other agents of the company have failed to notice its violation.¹⁷ So the condition of a ticket that it could only be used by the original purchaser is not waived because the conductor to whom it was first presented did not discover that the holder was a transferee.¹⁸

§§ 2231-2233. Exhibition and Surrender of Tickets.—§ 2231. **Exhibition of Ticket.**—A rule which requires the production of a ticket as evidence of one's right to passage is reasonable.¹⁹ So a railway company may make and enforce regulations requiring passengers to exhibit their tickets to the gatekeeper at the depot,²⁰ or to the proper persons before boarding trains.²¹

10. *Thorp v. Concord R. Co.*, 61 Vt. 378, 17 Atl. 791.

11. *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45.

12. *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136, 80 N. W. 223.

13. *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101.

14. *Kent v. Baltimore, etc., R. Co.*, 45 O. St. 284, 12 N. E. 798.

15. *Thompson v. Truesdale*, 61 Minn. 129, 63 N. W. 259, 52 Am. St. Rep. 579.

16. *Ellsworth v. Pennsylvania Co.*, 2 O. C. C., N. S., 483, 15-25 O. C. C. 797.

17. **Failure to notice violation of condition.**—The condition of a "special excursion ticket," that for the return journey it should be stamped, by the ticket agent, was not waived by the carrier, either by the fact that the gateman permitted the passenger to pass through the gate without examining and punching the ticket, or by the fact that the sleeping-car conductor failed to notice that the ticket was unstamped, where the regular passenger conductor noticed that the ticket was unstamped as soon as he received it, and so informed the passenger.

Bowers v. Pittsburg, etc., Railroad, 158 Pa. 302, 27 Atl. 893.

18. *Dangerfield v. Atchison, etc., R. Co.*, 62 Kan. 85, 61 Pac. 405.

19. **Exhibition of ticket.**—*Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354. See *Woods v. Metropolitan St. R. Co.*, 43 Mo. 125.

20. **Gate-keeper.**—*Watkins v. Pennsylvania R. Co.*, 10 Mackey (21 D. C.) 1, 52 Am. & Eng. R. Cas. 159; *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907.

21. **Before boarding trains.**—*Arkansas.*—See *St. Louis, etc., R. Co. v. Hammett*, 98 Ark. 418, 136 S. W. 191, 40 R. R. R. 702, 63 Am. & Eng. R. Cas., N. S., 702. *Illinois.*—*Chicago, etc., R. Co. v. Bonger*, 1 Ill. App. 472; *Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579.

Indiana.—*Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68.

Maryland.—*Baltimore, etc., R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422.

New York.—*Avery v. New York, etc.,*

And, if such is the regulation of the railroad company, one may be required to exhibit a passenger ticket before he can be permitted to remain in a depot of the company.²² A passenger upon a railroad train must show his ticket, or "conductor's check" given in the ticket's place, when called upon by the conductor.²³

Commutation Ticket.—A common carrier has a right to require the holder of a commutation or season ticket to exhibit his pass whenever thereto requested, and, in default of a compliance with this regulation, has the further right to exact the regular fare for the trip, without liability to repay it to the passenger.²⁴

§ 2232. Surrender of Ticket.—Reasonable regulations requiring passengers to surrender their tickets to conductors upon demand, before their arrival at their destination, may be enforced.²⁵ A regulation requiring a way passenger over a railroad to give up his ticket immediately after leaving the last principal stopping place, and before his arrival, is reasonable.²⁶ So is a regulation that a monthly commutation ticket shall be surrendered by the passenger to the conductor on the last trip taken during the period for which it is issued.²⁷ The fact that a passenger has brought a ticket, and was not asked for it during the passage, warrants a finding that he knew he was to give it up before leaving. A railroad company may regulate by reasonable rules special tickets, and a passenger having a mileage ticket providing for exchange tickets can not demand a passage on presentation of the mileage ticket book, unless accompanied with the exchange ticket, as provided by the rule under which the mileage ticket was sold.²⁸

Right to Check.—A custom of the conductor to take up fares and give checks to the passengers soon after their entrance into the cars is a reasonable custom and a passenger who refuses to surrender his ticket, and leaves the car without giving up his ticket or paying his fare, is liable to the company in an action to recover the amount of his fare.²⁹ But a railroad passenger can not be required to surrender his ticket to the conductor, on entering a car, without receiving a check therefor.³⁰

Duty of Passenger to Surrender Ticket.—It is the duty of a passenger who has purchased a ticket to a flag station, on discovering that he has been overlooked by the conductor, to call the latter's attention to the fact, and surrender the ticket, in order that the conductor may know the passenger's destination, and have the train stopped for him to alight.³¹

Ticket Surrendered to Porter.—A passenger by delivering a ticket to the porter on the train who is receiving tickets in the course of his duty discharges himself thereby from all liability to the company for the carriage to which the ticket relates, just as if the ticket had been surrendered directly to the conductor or any other agent or officer authorized to receive it in behalf of the company.³²

R. Co., 121 N. Y. 31, 24 N. E. 20; *Hibbard v. New York, etc.*, R. Co. 15 N. Y. 455.

Texas.—*International, etc., R. Co. v. Goldstein*, 2 Texas App. Civ. Cas., § 274, holding such a regulation not in conflict with section 9, Act April 10, 1883 (Gen. Laws 18th Leg., p. 7).

22. *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337.

23. *Price v. Chesapeake, etc., R. Co.*, 46 W. Va. 538, 33 S. E. 255.

24. **Commutation ticket.**—*Bennett v. Railroad Co. (Pa.)*, 7 Phila. 11.

25. **Surrender of tickets.**—*Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Vedder v. Fellows*, 20 N. Y. 126; *Crawford v. Cincinnati, etc.,*

R. Co., 26 O. St. 580; *Louisville, etc., R. Co. v. Fleming*, 82 Tenn. (14 Lea) 128.

26. *Vedder v. Fellows*, 20 N. Y. 126; *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11.

27. *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66.

28. *Robb v. Pittsburgh, etc., R. Co.*, 14 Pa. Super. Ct. 282.

29. **Right to check.**—*Northern R. Co. v. Page (N. Y.)*, 22 Barb. 130.

30. *State v. Thompson*, 20 N. H. 250.

31. **Duty of passenger to surrender ticket.**—*Central, etc., R. Co. v. Dorsey*, 32 S. E. 873, 106 Ga. 826.

32. **Ticket surrender to porter.**—*Rucker v. State*, 95 Ga. 465, 20 S. E. 269.

Detaching Coupons.—See ante, "Prohibition as to Detachment of Coupons," § 2224.

§ 2233. **Where Ticket Lost or Wrongfully Taken Up.**—A passenger is not relieved from exhibiting or surrendering his ticket by the fact that he has lost it,³³ or left it at home.³⁴ There is a conflict of authority as to whether a passenger is relieved from this obligation where his ticket has been taken up by one conductor who fails to furnish him evidence of his right to transportation.³⁵ And it is held that the conductor is not bound to investigate the excuse of the passenger for the nonproduction of his ticket and determine whether it is made in good faith or not.³⁶ There is no distinction, so far as it effects the relative rights of the parties, whether a ticket be lost or mislaid before or after going on the train.³⁷

Right to Detain Passenger.—Where a passenger attempts to land without showing a ticket, alleging that he has lost it, those in charge have a right to detain him a reasonable time to inquire on the spot into the circumstances of the case.³⁸

§ 2234. **Redemption of Tickets and Repayment of Charges.—Redemption of Tickets.**—The purchaser of a railroad ticket, who does not use it during its life, is not, as a matter of law, entitled to recover its value.³⁹ Where a passenger obtains a commutation ticket, with the condition that the railroad company shall not be required to refund because of its nonuser, and he loses the ticket, he can not compel the railroad company to issue a duplicate or refund the amount paid for the ticket; nor can he recover damages against the company for failure to transport him without paying fare.⁴⁰ In some jurisdictions carriers are required by statute to redeem unused tickets.⁴¹ A stat-

33. **Where ticket lost.**—*Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11; *Cresson v. Philadelphia, etc., R. Co.* (Pa.), 11 Phila. 597; *Louisville, etc., R. Co. v. Fleming*, 82 Tenn. (14 Lea) 128.

Commutation ticket.—Where a railroad company sells a commutation ticket at a price below the regular fare, by which the purchaser is entitled to a given number of trips between places named in the ticket, on condition that no rebate shall be allowed on account of the non-use of the ticket for any reason, and that the ticket shall be presented to the conductor on each trip, the presentation of the ticket is a condition precedent to the right of the person to be transported, and in case of its loss, so that it can not be presented, there is no obligation on the part of the company to transport the purchaser, except on payment of the regular fare. *Southern R. Co. v. De Saussure*, 42 S. E. 479, 116 Ga. 53. To the same effect, see *Ripley v. New Jersey R., etc., Co.*, 31 N. J. L. 388; *Crawford v. Cincinnati, etc., R. Co.*, 26 O. St. 580.

34. *Downs v. New York, etc., R. Co.*, 36 Conn. 287, 4 Am. Rep. 77.

35. **Where ticket wrongfully taken up.**—In *Shelton v. Lake Shore, etc., R. Co.*, 29 O. St. 214, it is held that the passenger is not relieved from the obligation. See, also, *Boggett v. Baltimore, etc., R. Co.* (D. C.), 3 App. Cas. 522; *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Lovings v. Norfolk R. Co.*, 47 W. Va. 582, 35 S. E. 962.

For the contrary holding, see *Schofield v. Pennsylvania R. Co.* (C. C. A.), 112 Fed. Rep. 856; *Georgia, etc., R. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061; *Pittsburg, C. & St. L. Ry. Co. v. Hennigh*, 39 Ind. 509; *Sloan v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320; *Palmer v. Charlotte, C. & A. R. Co.*, 3 S. C. (3 Rich.) 580; *Appleby v. St. Paul City Ry. Co.*, 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308.

And it is held that a passenger is relieved from the obligation where he has purchased a through ticket, and surrendered it to the first conductor on his demand, if the second conductor is satisfied of this upon the evidence exhibited by the passenger. *East Tennessee, etc., R. Co. v. King*, 88 Ga. 443, 14 S. E. 708.

36. *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11. See post, "Ejection of Passengers," chapter 25.

37. *Louisville, etc., R. Co. v. Fleming*, 82 Tenn. (14 Lea) 128.

38. **Right to detain passenger.**—*Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66.

39. **Redemption of tickets.**—*Trezona v. Chicago, etc., R. Co.*, 77 N. W. 486, 107 Iowa 22, 43 L. R. A. 136.

40. *Southern R. Co. v. De Saussure*, 116 Ga. 53, 42 S. E. 479.

41. **Statutory provisions for redemption.**—*Iowa.*—Code Supp. 1902, §§ 2128a, 2128b, 2128c. *Cook v. Chicago, etc., R. Co.*, 136 Iowa 497, 113 N. W. 1097.

Pennsylvania.—Where a person holding

utory obligation to redeem a ticket at its full price if not used enters into the contract of carriage made by the carrier with a passenger.⁴² Under a statute requiring redemption of unused railroad tickets at the place of purchase, it was no defense that the person in charge of the office of purchase directed plaintiff to apply for redemption at a freight depot, the location of which did not appear.⁴³

Wrongful Confiscation of Ticket.—Where a passenger's ticket has been taken from him, and not returned, he may buy another ticket, and sue the carrier for its price.⁴⁴ Where a railway company had no right to forfeit a passenger's mileage book, taken up and retained by a conductor, the passenger could recover the value of the book, with interest from the date of the taking.⁴⁵

§§ 2235-2238. Special Contracts for Transportation—§ 2235. In General.—Validity of Contract.—Where a carrier agreed to a proposition for the issuance of 60-day convention excursion tickets, and permitted such tickets to be issued by agents to the public generally, it could not refuse to accept a ticket so issued because it had not filed its acceptance thereof with the Interstate Commerce Commission, as required by law.⁴⁶

Consideration—Contract Limiting Liability.—Where a contract for an ocean voyage provided that, if plaintiff chose not to embark, the money should be refunded, was exchanged for another, assigning plaintiff to a particular ship, and providing for her board on the voyage, but exempting the carrier from liabilities for injuries, it was held that the old contract was cancelled on good consideration, and the new one determined the rights of the parties.⁴⁷

Who Entitled to Transportation—"Bona Fide Employees."—Where a contract for the shipment of cattle provided for the carriage of a person in

a monthly commutation railroad ticket does not use the whole of it, and seeks to recover for the unused portion, the special contract evidenced thereby is rescinded; and, the usual fare for the number of times that he used the ticket having exceeded the price of the ticket, he was entitled to recover nothing, whether Act May 6, 1863 (P. L. 582), requiring railroad companies to redeem unused tickets, applied to the case or not. *Smith v. Philadelphia, etc., R. Co.*, 11 Pa. Co. Ct. Rep. 555.

Texas.—Under Rev. St., art. 4560d. providing that if no part of a railroad passenger ticket be used the holder shall be entitled to receive the full amount paid therefor, and if only part is used he shall be entitled to the remainder of the price after deducting the tariff rate between the points for which part of the ticket was actually used, the words "tariff rate" mean the regular rate, which is to be deducted from the price of an excursion ticket sold at reduced rates and only partially used. *Ft. Worth, etc., R. Co. v. Cushman*, 50 S. W. 1009, 92 Tex. 623.

Such statute applies only to tickets issued by railroads in the state for passage from and to points within the state. *Missouri, etc., R. Co. v. Fookes* (Tex. Civ. App.), 40 S. W. 858.

A railroad company is not bound to redeem a passenger ticket once used by the purchaser over the trip for which it

was bought, under Act 1893, providing for the redemption of tickets and parts of tickets unused. *Levinson v. Texas, etc., R. Co.*, 43 S. W. 901, 17 Tex. Civ. App. 617.

Rev. St. 1895, art. 4560d, providing for the redemption of unused tickets and for the fining of one selling an unused railroad ticket, "provided that the provisions of this chapter shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense" to sell the same, and that any railroad company which shall refuse to redeem any ticket shall forfeit not less than \$100, does not authorize such forfeiture by a railroad company where said printed notice is not on the ticket. *Donalson v. Gulf, etc., R. Co.* (Tex. Civ. App.), 45 S. W. 391.

^{42.} *Burn v. Chicago, etc., R. Co.*, 153 Ill. App. 319.

^{43.} *Shaw v. Chicago, etc., R. Co.* (Iowa), 113 N. W. 478.

^{44.} *Confiscation of ticket.*—*Stewart v. Baltimore, etc., R. Co.*, 88 N. Y. S. 377.

^{45.} *Smith v. Southern Railway*, 88 S. C. 541, 71 S. E. 47.

^{46.} *Validity of contract.*—*Cherry v. Chicago, etc., R. Co.*, 90 S. W. 381, 191 Mo. 489, 2 L. R. A., N. S., 695, 109 Am. St. Rep. 830.

^{47.} *Contract limiting liability—Consideration.*—*O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

charge of the stock, and on the back of the contract it was provided that agents would permit only the names of "bona fide employees" accompanying the stock to be entered on the waybill, so as to secure carriage for such person, the phrase "bona fide employees" meant persons actually in charge of the stock, and one came within such description, though he had never been employed before the occasion, and though there had been no agreement for his compensation in money by the shipper.⁴⁸

Provision as to What Law Governs.—Provision, in a contract for transportation of a person to accompany a shipment of horses, that questions arising under it be determined by the laws of a certain state, does not indicate an intention that the contract on the other side of the paper, for shipment of the horses, be governed by such laws.⁴⁹

Conclusiveness of Contract.—Where a written contract for the transportation of troops did not expressly provide for their subsistence, a subsequent oral agreement fixing a price therefor was independent of such contract and parol evidence was admissible to prove it.⁵⁰

Statement as Constituting Contract.—A statement by the superintendent of a company, who was on the car, after arriving at a certain place that he would tell the conductor on the car bound for another place to pick plaintiff up, did not constitute a contract to carry plaintiff to such place without additional fare, at least in the absence of evidence of any custom to so transfer passengers without the payment of additional fare.⁵¹

Contract to Transport within Certain Time.—A ticket agent selling tickets to a theatrical troupe, with knowledge that they were engaged to give a performance at their place of destination, thereby makes a special contract of carriage, and the railroad company is bound to use diligence to transport the troupe to meet their engagement.⁵²

Contract by Husband for Transportation of Wife.—While a husband may contract for the safe carriage of his wife by a railway company, the law will not imply such a contract from the mere purchase of an ordinary ticket by the husband, which only raises an implied contract for safe carriage with the wife alone.⁵³

§ 2236. **Contract for Free Carriage.**—Where plaintiff had a contract right of free carriage, as a reasonable regulation, to prevent imposition, defendant might very properly have provided plaintiff with a pass, and required him to exhibit it to conductors; but, if defendant issued no passes, then it was its duty to inform the conductors of plaintiff's rights, and instruct them to regard them.⁵⁴

§ 2237. **Contracts Relating to Excursions.**—**Contract to Convey Excursionists.**—One who has sold a large number of excursion tickets to a third person is entitled to damages for the failure of the railway company to comply with its contract to convey an unlimited number of excursionists for a certain

48. **Construction of "bona fide employees."**—*Weaver v. Ann Arbor R. Co.*, 139 Mich. 590, 102 N. W. 1037.

49. **Provision as to what law governs.**—*Brockway v. American Exp. Co.*, 171 Mass. 158, 50 N. E. 626.

50. **Conclusiveness of contract.**—*Van Studdiford v. Hazlett*, 56 Mo. 322.

51. **Statement as constituting contract.**—*Braymer v. Seattle, etc., R. Co.*, 35 Wash. 346, 77 Pac. 495.

A further statement by the superintendent, made the next day, that he had intended to tell the conductor to pick plaintiff up, but had forgotten to do so, showed, at most, no more than an in-

tention to authorize gratuitous carriage of plaintiff to such place. *Braymer v. Seattle, etc., R. Co.*, 77 Pac. 495, 35 Wash. 346.

52. **Contract to transport within certain time.**—*Missouri Pac. R. Co. v. Curtis*, 3 Texas App. Civ. Cas., § 311. See *Chappell v. Western Railway*, 8 Ga. App. 787, 70 S. E. 208.

53. **Contract by husband for transportation of wife.**—*Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.

54. **Contract for free carriage.**—*Grimes v. Minneapolis, etc., R. Co.*, 37 Minn. 66, 33 N. W. 33.

fare.⁵⁵ The company can not limit its liability in damages pro tanto, for a breach of the contract, by an offer to carry a limited number of passengers at the rate agreed on, especially when such offer is accompanied with a condition that all other rights under the contract be relinquished.⁵⁶

Contract to Furnish Cars for Excursion.—Where a railroad company contracted to furnish six passenger cars for an excursion at a stipulated price per car, and a request was made for but four cars, the company was not liable for failing to furnish the four cars requested, since it had a right to perform the contract as an entirety, and could not be in default for refusing to perform it in installments.⁵⁷

§ 2238. Ratification of Contract and Waiver of Conditions.—Ratification of Contract.—A carrier, after acting upon a special contract for transportation with knowledge of the fact that it had been made by a clerk assuming to act as general passenger agent, can not deny his authority.⁵⁸

Waiver of Conditions.—Authority must be shown to authorize a waiver of a provision in a special contract for transportation but railway conductors, being placed in charge of trains with apparent authority to control their movements and operation, may make reasonable arrangements as to passengers transported on a special contract under their direction.⁵⁹ A waiver of a provision of a contract of shipment requiring one in charge of a car of horses to ride in the caboose is sufficiently shown by testimony that four successive conductors in charge of the train did not object to his riding in the car, and at least three knew that he was so riding, when there is no showing of want of the conductor's authority to permit him to ride in the car.⁶⁰

§ 2239. Transportation by Connecting Carriers.—See post, "Connecting Carriers," Part V.

§§ 2240-2241. Passes—§ 2240. In General.—Whether Pass Gratuitous.—There is no consideration for a pass given by a carrier to one in view only of the fact that he was a member of the city police force.⁶¹ But where the

55. Contract to convey excursionists.—Houston, etc., R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659. See S. C., 63 Tex. 381, 51 Am. Rep. 642.

Measure and elements of damages.—An approximate basis for damages would be the profit above the contract price which the party contracting with the company could have realized on delivery of the tickets negotiated by him and contracted for by others, and which he would have realized but for the repudiation by the company of its contract. To this might be added the difference in expenses incurred by such party in transporting excursionists whom he had agreed to take on the faith of the contract and the amount he would have expended had the contract been observed. But conjectural profits not based on actual agreements with those desiring to make the excursion and with no definite knowledge of how many tickets could have been sold under the original contract or for what profit could form no legal basis for a recovery. Houston, etc., R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642.

Such damages as were incidental to and caused by the breach of contract and which might be reasonably supposed to

have entered into the contemplation of the parties at the time of the making of the contract are recoverable. Houston, etc., R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642.

Evidence in action for damages.—It is proper for plaintiff to prove that he sold witness a large number of tickets at an advanced price. Houston, etc., R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659.

56. Houston, etc., R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659.

57. Contract to furnish cars for excursion.—Illinois Cent. R. Co. v. Demars, 44 Ill. 292.

58. Ratification of contract.—Southern R. Co. v. Marshall, 64 S. W. 418, 111 Ky. 560, 23 Ky. L. Rep. 813.

59. Waiver of conditions.—Chicago, etc., R. Co. v. Burns (Tex. Civ. App.), 104 S. W. 1081, affirmed in 101 Tex. 329, 107 S. W. 49.

60. Waiver shown.—Chicago, etc., R. Co. v. Burns (Tex. Civ. App.), 104 S. W. 1081, affirmed in 101 Tex. 329, 107 S. W. 49.

61. Consideration.—Marshall v. Nashville R., etc., Co., 101 S. W. 419, 118 Tenn. 254, 9 L. R. A., N. S., 1246, 12 Am. & Eng. Ann. Cas. 675.

lessee of a railroad agreed by the lease "to transport the stockholders of the lessor to and from their annual and special meetings free of charge," and at the time of the lease it was not prohibited by law or contrary to public policy, it became a binding part of the contract; and, though the lessee agreed to carry the stockholders "free of charge," it did not undertake to do so as a pure gratuity but for a sufficient consideration.⁶²

Assent to Conditions.—A person accepting and traveling upon a free railroad pass with certain conditions upon it must be deemed to have accepted it on such conditions, whether he reads and signs them or not.⁶³

Construction of Contracts to Furnish Passes.—Where a railway company contracted with a firm to furnish a pass "entitling either member of the firm, but only one on any train, to seat on its passenger trains," only one member of the firm was entitled to be carried at a time.⁶⁴ Where, as part of the consideration for the grant of right of way to a railroad company, the latter agreed to and did give to the grantor and his family residing at the homestead free passes, the right to use the road free is appurtenant to the occupying of the homestead, and when one of the family ceases to occupy the homestead and be a part of the grantor's family, his right to use the road free ceases also.⁶⁵ The agreement of a contract for furnishing ties for a railroad, part to be delivered in and part out of a state, in effect before, and therefore unaffected by, an anti-pass law, that as part consideration for furnishing them the railroad shall furnish transportation over its line to the employees of the tie company while performing the contract, is not impaired by the provision that the transportation shall not be furnished if the agreement to do so shall be held invalid under the law of any state.⁶⁶

Necessity for Application for Renewal.—Where a railway company by contract issued an annual pass, and on its expiration a renewal was applied for but there was no application for another renewal, it was held a question for the jury whether it was the duty of the company to issue a renewal without application.⁶⁷

Lines Subsequently Constructed or Leased.—An agreement by a railroad company, in consideration of the grant to it of the right to use water from certain land, that the owner of the land should be entitled forever thereafter to travel without charge upon the trains of the company, did not give him a right to free transportation over lines subsequently constructed or leased by it.⁶⁸

Effect of Consolidation.—The fact that a pass over one line of road, on account of right of way, is honored for years over a connecting line, does not bind a consolidated company, which buys both roads, to recognize the pass beyond the limits prescribed.⁶⁹

Limitation of Liability for Injuries to Persons Riding on Pass.—See post, "Rights, Duties and Liabilities of Carrier during Transportation," chapter 23.

Statutory Regulation.—In most jurisdictions the giving of free passes by railroads is prohibited or regulated by statutory or constitutional provisions.⁷⁰

62. *Emerson v. Boston, etc., Railroad*, 75 N. H. 427, 75 Atl. 529, 27 L. R. A., N. S., 331.

63. **Assent to conditions.**—*Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640.

64. **Construction of contracts to furnish passes.**—*Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 8 S. E. 787.

65. **Termination of right to free carriage.**—*Mitchell v. Cincinnati, etc., R. Co.*, 5 O. Dec. 488, 6 Am. L. Rec. 265, 2 Wkly. L. Bull. 240.

66. *St. Louis, etc., R. Co v. Mitchell-*

Crittenden Tie Co. (Tex. Civ. App.), 148 S. W. 1191.

67. **Necessity for application for renewal.**—*Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 8 S. E. 787.

68. **Lines subsequently constructed or leased.**—*Western Maryland R. Co. v. Lynch*, 82 Md. 233, 34 Atl. 40.

69. **Effect of consolidation.**—*Wallace v. Ann Arbor, etc., R. Co.*, 80 N. W. 572, 121 Mich. 588.

70. **Statutory regulation.**—See, generally, ante, "Preferences and Discriminations," §§ 96-108.

Such statutory provisions are held not to be retrospective in their operation.⁷¹

§ 2241. Revocation.—A pass for life issued by a railroad company, without consideration, is a mere revocable license;⁷² and a permit issued by a carrier, without consideration, authorizing its train operatives to carry the holder on freight trains, is a mere license, revocable at any time the holder is not actually a passenger under it.⁷³ A pass issued on a false representation that the person to whom it was issued was connected with a newspaper can be cancelled.⁷⁴

After Transportation Begun.—A railroad company, giving a free pass to a laborer agreeing to work for it at the end of his journey, is estopped to deny the validity of the pass after the laborer has entered the train to go on the journey, without any knowledge that the pass has been revoked.⁷⁵ But where a pass issued by a railroad company to a prospective employee contains a stipulation reserving the right to cancel the pass at any time, it may be cancelled and taken up by one of the companies' conductors while the holder is en route on the trip for which the pass was issued.⁷⁶

What Amounts to Revocation.—Where a railroad company, which had issued a pass for life without consideration, afterwards leased its road to another company, it was a revocation of the pass.⁷⁷

§§ 2242-2250. Transfers—§ 2242. Power of Municipality as to Transfers.—Power to Require Issue of Transfers.—The power of a municipality to fix the maximum rate of fare to be charged by a street railway company includes the power to provide for transfers where passengers are carried over two or more lines operated by one company.⁷⁸

Ordinance Forbidding Unauthorized Persons to Give, Sell or Issue Transfers.—It is held that a city ordinance forbidding any person, except the conductor or agent of the street car line, to give, sell or issue any transfer check issued for passage on any street car line, is constitutional and valid.⁷⁹

§ 2243. Duty of Carrier to Give and Honor Transfers.—Refusal to Give Transfer a Refusal to Carry.—Where a person entered a street car to go to a designated place and paid the fare, and the company was obliged to carry

71. Statutes not retrospective.—*United States*.—Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), cited in *Louisville, etc., R. Co. v. Mottley*, 133 Ky. 652, 118 S. W. 982.

Kentucky.—A contract made before the enactment of such statute, by which an interstate common carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages, was valid, though annual passes were issued under the contract after the statute was enacted. *Louisville, etc., R. Co. v. Mottley*, 133 Ky. 652, 118 S. W. 982.

New Hampshire.—Laws 1909, c. 126, § 2. *Emerson v. Boston, etc., Railroad*, 75 N. H. 427, 75 Atl. 529, 27 L. R. A., N. S., 331.

Texas.—The anti-pass act (Acts March 26, 1907; Laws 1907, p. 93, c. 42), prohibiting carriers from carrying persons free of charge, is prospective in its operation, and does not operate to destroy or impair the obligations of contracts lawfully made prior to its passage. *Gulf, etc., R. Co. v. Wells-Fargo Exp. Co.* (Tex. Civ. App.), 108 S. W. 174, affirmed

in 110 S. W. 41; *St. Louis, etc., R. Co. v. Mitchell-Crittenden Tie Co.* (Tex. Civ. App.), 148 S. W. 1191.

72. Revocation.—*Turner v. Richmond, etc., R. Co.*, 70 N. C. 1. See *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170.

73. Reed v. Chicago, etc., R. Co., 84 Neb. 8, 120 N. W. 442.

74. Pass issued on false representation.—*Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539.

75. After transportation begun.—*St. Louis, etc., R. Co. v. Tucker*, 3 Texas App. Civ. Cas., § 322.

76. Reservation of right to cancel.—*St. Louis, etc., R. Co. v. Hill* (Tex. Civ. App.), 103 S. W. 227.

77. What amounts to revocation.—*Turner v. Richmond, etc., R. Co.*, 70 N. C. 1.

78. Power to require issue of transfer.—*Chicago Union Tract. Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470. See ante, "Transfers to Connecting Lines of Same Companies," § 89.

79. Ordinance forbidding unauthorized persons to give, sell or issue transfers.—*Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55.

her to the designated place and give her a transfer to enable her so to do, the refusal to give a transfer was a refusal to carry her to her destination.⁸⁰

Effect of Custom.—Although a street railway company may not be required by law to carry a passenger on any other line than the one over which the car originally boarded runs, still if such company holds out that it will, when fare is paid on the first car, issue a transfer giving the right to ride on the other cars of its lines, a request for a transfer is an acceptance of the offer, and the delivery of the transfer completes a contract under which the passenger is entitled to demand the right to ride on both the original car and the transfer car; the amount paid being a consideration for the right to ride on each car.⁸¹ Where, though a passenger knew he could have traveled to his destination by pursuing a route over which defendant street railway company issued transfers, he had frequently traveled over the route selected, and had always theretofore been given a transfer, and there was no evidence that any notice of the discontinuance of transfers was given to him when he boarded the car, or until no alternative continuous route was available, defendant was liable for refusal to issue a transfer to him as theretofore.⁸²

Violation of Rule of Carrier.—A rule forbidding passengers riding on the front platform of a street car is reasonable, and where a passenger refused to obey the same, he thereby lost his rights as a passenger, and was not entitled to a transfer, so that on entering a second car he was not entitled to ride without paying a second fare.⁸³

Conditions in Grant of Franchise and Agreements with Municipalities.—See ante, "Conditions and Agreements Construed," § 93. Where a contract between a street railway company and a city provided that the "present rates of fare" may be changed from time to time with consent of both parties, and the "present rates of fare" were five cents for a continuous ride, or a sale of tickets at the rate of six for twenty-five cents, and free transfers at certain places, both on the cash fares and the tickets, it was held that the contract was not violated by a rule of the company by which transfers were issued only to persons paying a cash fare, and not to those paying fare by tickets.⁸⁴ Where by a city ordinance granting franchises to a street railway, a passenger who had paid one fare on any line operated by the company was entitled to a transfer check entitling him to a continuous passage over any connecting or crossing line, it was held that where such a passenger accepted a transfer for one of several or continuous or crossing lines, plainly marked or designated, he would be limited to the line so selected, but where the route designated was not so limited, but was equally applicable to several lines, he would be entitled to be transported over either.⁸⁵ It is held that an assignee of a street railway franchise, a condition of which required its holder to issue transfers to other lines in the city operated by it or its assignees, which assigned its right to another, and ceased operating cars under the franchise, could not be compelled to interchange transfers with its assignee from and to its remaining lines operating under other franchises.⁸⁶

80. Refusal to give transfer a refusal to carry.—*South Covington, etc., R. Co. v. Quinn*, 33 Ky. L. Rep. 534, 30 R. R. R. 508, 53 Am. & Eng. R. Cas., N. S., 508, 110 S. W. 404.

81. Custom to issue transfers not required by law.—*Georgia R., etc., Co. v. Baker*, 54 S. E. 639, 120 Ga. 562, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246, 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789. See *Arnold v. Rhode Island Co.*, 28 R. I. 118, 163, 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

82. *Freeman v. New York City R. Co.*, 92 N. Y. S. 47.

83. Violation of rule of carriers.—*Kirk v. Seattle Elect. Co.*, 58 Wash. 283, 108 Pac. 604.

84. Transfers issued only to payers of cash fares.—*Philadelphia v. Philadelphia Rapid Transit Co.*, 224 Pa. 544, 34 R. R. R. 590, 57 Am. & Eng. R. Cas., N. S., 590, 73 Atl. 923.

85. *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347.

86. Duty of assignee of franchise to interchange transfers.—*Reynolds v. Pacific Elect. R. Co.*, 146 Cal. 261, 17 R. R. R. 658, 40 Am. & Eng. R. Cas., N. S., 658, 80 Pac. 77.

Penalty for Refusal to Give Transfer.—See ante, "Refusal to Give a Transfer," § 200.

Mandamus.—A passenger entitled to a street car transfer can have the street railway company compel by mandamus to give him one.⁸⁷

Statutory Provisions.—Under a statute providing that commutation checks on street railways shall not entitle the holder "to a passage over the same route on which the check was issued, or a route parallel thereto, and between and including two common points," such checks can not be used to return to the starting point, even if by another road, where the road from which the check was obtained returns to substantially the same point, although by a circuitous route.⁸⁸

In New York by statute a street railway company is required to carry a passenger on a continuous trip between any two points on the roads over which it has the right to run cars for a single fare and to give him a transfer entitling him to "a continuous trip" to any point on the road.⁸⁹ The word "continuous,"

87. Mandamus to compel furnishing of transfer.—*Richmond R., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

88. Statutory provisions.—Mass. Pub. St., c. 113, § 47. *Cronin v. Highland St. R. Co.*, 144 Mass. 249, 10 N. E. 833.

89. New York statute.—Railroad Law, Laws 1890, p. 1114, c. 565, § 104, as amended by Laws 1892, p. 1406, c. 676, § 104. *Wells v. New York City R. Co.*, 107 N. Y. S. 430, 122 App. Div. 488; *Kelly v. New York City R. Co.*, 192 N. Y. 97, 84 N. E. 569, 30 R. R. 368, 53 Am. & Eng. R. Cas., N. S., 368.

The terms "connecting branch" and "main line of road and any branch or extension" as used in Railroad Law, Laws 1892, p. 1405, c. 676, § 101, providing that no corporation constructing and operating a railroad under the provisions of the article shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof within the limits of any incorporated city, and that not more than one fare shall be charged within the limits of any such city for passage over the main line of road and any branch or extension thereof, etc., contemplate an original or main line which by an off-shoot and tributary line has been extended, the two constituting a single continuous and connected line of road, and not two originally separate lines not constructed with reference to one another, which have become related simply because they have been taken into a general railroad system; and hence, where a street car line did not of itself directly connect with another line upon which a passenger took passage and paid his original fare, but had to be reached by passage over a third line, the latter was not a "connecting branch" of the first line, and he was not entitled to ride on it without payment of additional fare. Judgment 106 N. Y. S. 378, 121 App. Div. 582, affirmed.

Bull v. New York City R. Co., 85 N. E. 385, 192 N. Y. 961, 19 L. R. A., N. S., 778.

Statute not applicable to different lines of same company.—Railroad Law (Laws 1890, p. 1114, c. 565), § 104, provides that any street surface railroad corporation which acquires the use of the roads of other companies by a contract shall carry between any two points on the railroads, or portions thereof, embraced in such contract, any passenger desiring to make one continuous trip between any such points for a single fare, and on demand, without extra fare, shall give to each passenger paying a fare a transfer entitling him to one continuous trip to any point or portion of any railroad embraced in such contract, etc. Held to relate only to a continuous trip made by change from the line of one of such companies to that of another, both lines being operated by one company under a lease or other contract, and does not apply to different lines owned by the same company. *King v. Nassau Elect. R. Co.*, 112 N. Y. S. 589, 128 App. Div. 130; *O'Connor v. Brooklyn Heights R. Co.*, 108 N. Y. S. 471, 123 App. Div. 784.

Statute providing for continuous ride on same car.—Railroad Law (Laws 1890, p. 1113, c. 565), § 101, provides that no corporations operating a street surface railroad under such act, or under Laws 1884, p. 309, c. 252, shall charge more than five cents for one continuous ride from any point on its road, or on any line or branch operated by it or under its control, to any other point thereof or any connecting branch thereof, within the limits of any incorporated village or city. Held, that such section does not provide for a change by a passenger from one line to another, but only for a continuous ride on the same car. *King v. Nassau Elect. R. Co.*, 112 N. Y. S. 589, 128 App. Div. 130; *O'Connor v. Brooklyn Heights R. Co.*, 108 N. Y. S. 471, 123 App. Div. 784.

Lines crossing each other at right angles.—Railroad Law, Laws 1890, p. 1113, c. 565, § 101, cl. 2, provides that not

as used in the statute, must be construed to mean direct, whenever it can be so applied;⁹⁰ and a passenger has the right to take the nearest and most convenient route.⁹¹ But a street railway company may adopt regulations requiring passengers making use of transfers to use the same only in the same general direction of their initial trip; a trip conveying the idea of transportation in one direction, and a continuous trip, like a continuous line, extending in the same general direction.⁹² One who, taking a street car to go home, while in conversation with a friend, is taken beyond the point at which he would have transferred by the usual route to reach his home, and, seeking to reach his home by transferring from line to line, is finally refused a transfer, is not making a "continuous trip," within the statute.⁹³ A division of the transfer directing that it be tendered "at the intersection of the issuing line" means any point on the issuing line where a passenger can continue his direct journey by taking another car, and the fact that the point is at an intersection of tracks merely, and not an intersection of lines, is immaterial; as is also the fact that it is not customary to give transfers at the point in question.⁹⁴

§ 2244. Right of Carrier to Require Transfers.—A street railway has a right to require passengers to procure transfer checks and tender them to the conductors of transfer cars, and such reasonable requirement must be complied with in order to entitle passengers to transportation.⁹⁵ And a conductor

more than one fare shall be charged by a street surface railroad within the limits of any city or village in which it is operated for passage over the main line of road and any branch or extension thereof, if the right to construct such branch or extension shall have been acquired under the provisions of the chapter or article. Held that, under such section, the car receiving a passenger on a main line of road is required to carry him over a branch or extension line, and vice versa, without the payment of another fare; or, if no cars continue from the main line over the branch or extension, or vice versa, then the passenger must be sent to the connecting car at the point of continuation or connection of the main line and branch line and carried forward without payment of another fare, but that such provision had no relation to lines crossing each other at right angles, unless the carrier operated them as lessee or under some contract so as to bring them within the regulations prescribed by § 104. *O'Connor v. Brooklyn Heights R. Co.*, 108 N. Y. S. 471, 123 App. Div. 784.

90. *Charbonneau v. Nassau Elect. R. Co.*, 108 N. Y. S. 105, 123 App. Div. 531.

91. Nearest and most convenient route.—*Charbonneau v. Nassau Elect. R. Co.*, 108 N. Y. S. 105, 123 App. Div. 531, holding that where a passenger on a street car passing along a certain street called for and received a transfer to a second line, he had a right to take a car on that line at the point where it started from the street along which the first line continued, when by so doing he could reach his destination more conveniently than by continuing on the first line to a point where it crossed the second line, and it was unlawful to refuse him passage without the payment of a second fare.

92. *Kelly v. New York City R. Co.*, 192 N. Y. 97, 30 R. R. R. 368, 53 Am. & Eng. R. Cas., N. S., 368, 84 N. E. 569, affirming 104 N. Y. S. 561, 119 App. Div. 223, which reverses 102 N. Y. S. 742, 52 Misc. Rep. 585. But see *Wells v. New York City R. Co.*, 107 N. Y. S. 430, 122 App. Div. 488, holding that a passenger starting north and then transferring west was entitled to transfer south, and was not limited to a transfer in the same general direction in which he started.

93. *Hunt v. Brooklyn Heights R. Co.*, 101 N. Y. S. 209, 115 App. Div. 673.

94. *Charbonneau v. Nassau Elect. R. Co.*, 108 N. Y. S. 105, 123 App. Div. 531.

95. Right of carrier to require transfers.—*Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75; *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930; *Crowley v. Fitchburg, etc., R. Co.*, 185 Mass. 279, 10 R. R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 70 N. E. 56; *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 48 S. E. 339, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421; *People v. Detroit United Railway*, 154 Mich. 514, 118 N. W. 9, 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158.

A rule of a street railway corporation operating several lines over different streets of a city to furnish transfers, which it is required by law to give, only at the end of one of its lines, for passage to a suburb by another line, which, on the way to such suburb, passes over a portion of the same route, does not appear to be unreasonable, and a passenger is bound by it. *Commonwealth v. Jones*, 174 Mass. 401, 54 N. E. 869.

When the charter provides for a passage over two lines for one fare, a regulation of the company requiring a trans-

of one car need not accept their statement that they have paid fare to the conductor of another car.⁹⁶ It is held that when, after the passenger had given his check to the conductor, the car was taken off and, by direction of the driver of the car, the passenger took the next passing car, he was entitled to carriage, though he had no transfer check.⁹⁷ But one receiving a transfer check, entitling him, under a statute, to a passage on the same day upon another street railway "between any two points therein," without paying more than a sum named "for both of the passages aforesaid," is not entitled, after surrendering the check in the second car, at the request of the conductor to a passage in a third car proceeding further upon the same line, although he is told by the conductor of the second car that he may ride on the third car without further payment of fare.⁹⁸ Where a street-railway company establishes, by practice, a right in its passengers to change from one car to another without a transfer ticket, it can not change such practice without notice to the passengers.⁹⁹

§ 2245. Rules of Carrier.—A street railroad company may make reasonable rules as to the issuance and use of transfers,¹ and a passenger must comply therewith except in the case of an emergency.² Rules requiring the hour to be punched on transfers,³ and that passengers should be required to give the destination line which asking for transfers,⁴ are reasonable and proper. A street railway company may, pursuant to its rules, refuse a transfer ticket mutilated after coming into the possession of the passenger receiving it, but can not refuse a ticket mutilated before given him.⁵

Place of Demanding Transfer.—Under a statute imposing a penalty for failure of street railroad companies to give transfers, a regulation fixing one point in each trip at which a passenger wishing a transfer must demand it is

fer check is not unreasonable. *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75.

Rule requiring production of undetached coupon ticket at certain point.—In *De Lucas v. New Orleans, etc.*, R. Co., 38 La. Ann. 930, it is held that a rule of a street railway company, under a contract with a city requiring it to carry passengers over two sections of its line for one fare, requiring the passenger to show an undetached coupon ticket as a voucher of his right to continue beyond a given point, is reasonable in law.

Failure to give transfer—Explanation shouted by one conductor to other.—In *Crowley v. Fitchburg, etc.*, R. Co., 185 Mass. 279, 10 R. R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 70 N. E. 56, it appeared that the rules of defendant street railway required that a passenger, on transferring from one line to another, should produce a transfer or pay his fare on the second line. Plaintiff, on leaving a car in order to transfer to another line, was not given a transfer by the conductor of the car he was leaving but such conductor shouted to the other conductor that plaintiff had paid his fare, and that he should be passed. It was held the conductor had no right to disregard such rule, and had a right to demand fare of plaintiff.

96. Assertion of payment of fare.—*Ma-honey v. Detroit City Railway*, 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. Rep. 528; *People v. Detroit United*

Railway, 154 Mich. 514, 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158, 118 N. W. 9.

97. Transfer car taken off—Next passing car taken.—*Appleby v. St. Paul City R. Co.*, 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308.

98. *Mass. St. 1871, c. 381, § 36. Wakefield v. South Boston R. Co.*, 117 Mass. 544.

99. Custom to change without transfer.—*Consolidated Tract. Co. v. Taborn*, 58 N. J. L. 1, 32 Atl. 685, 2 Am. & Eng. R. Cas., N. S., 124.

1. Right to make reasonable rules.—*McGowan v. New York City R. Co.*, 99 N. Y. S. 835.

2. Duty of passenger to comply with rules.—*Bingemann v. International R. Co.* (Eq. Term), 135 N. Y. S. 743.

3. Requiring hour to be punched on transfer.—*Weber v. Rochester, etc.*, R. Co., 129 N. Y. S. 304, 145 App. Div. 84.

4. Requiring passenger to give destination line.—*Crandall v. International R. Co.*, 117 N. Y. S. 1055, 133 App. Div. 857, holding that such rule does not infringe a passenger's right under an agreement to give passengers a continuous trip between any two points in the city by the most direct route for a single fare, which agreement was not to be construed as entitling a passenger to a return trip or a round trip.

5. Mutilated transfer.—*Koch v. New York City R. Co.*, 95 N. Y. S. 559.

reasonable and valid.⁶

Time of Demanding Transfer.—A rule requiring a passenger to demand a transfer when he pays his fare is reasonable and enforceable.⁷ Such a rule does not infringe a passenger's right under an agreement to give passengers a continuous trip between any two points in the city by the most direct route for a single fare, which agreement was not to be construed as entitling a passenger to a return or round trip.⁸ It is not essential that the act of paying fare and the demand should occur at the same second of time; and hence, where a conductor did not regard such a demand, on a second demand made within a minute the passenger was entitled to a transfer.⁹ The rule is sufficiently complied with where, at the time a passenger gave his transfer to the conductor, he held out his hand to receive another, but the conductor muttered something, not heard by the passenger, and passed on through the car, and, on his return, the passenger orally demanded a transfer, which was refused.¹⁰

Necessity for Notice.—A rule of a street railroad company as to the issuance or use of transfers is not binding on the passengers where no reasonable notice of its existence is given the public.¹¹ Where a city railroad company posted conspicuously, and advertised in such manner as to bring to the notice of the public generally, a rule requiring passengers to demand transfers at the time of paying fare, it is immaterial whether a particular passenger had knowledge of the rule.¹²

§ 2246. Conditions in Transfers.—Duty of Passenger to Comply with Conditions.—Where a passenger on a street railway car, after paying his fare, accepts a transfer, it is his duty to comply with the conditions of the transfer, if they are reasonable.¹³

Condition Requiring Application at Carrier's Office.—A condition on a transfer issued by a street railway that "the holder, by accepting agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void.¹⁴

Condition as to Examination of Transfer.—A condition printed on a street-railroad transfer, which provides that a part of the conditions on which it is given and accepted are that passengers shall examine date, time, and directions, and see that the same are correct, is not reasonable, and will not be enforced,

6. **Place of demanding transfer.**—Railroad Law, § 105 (Laws 1890, p. 1114, c. 565). *Ketchum v. New York City R. Co.*, 103 N. Y. S. 486, 118 App. Div. 248; *Harkow v. New York City R. Co.*, 106 N. Y. S. 1129, 121 App. Div. 906.

7. **Time of demanding transfer.**—*Ketchum v. New York City R. Co.*, 103 N. Y. S. 486, 118 App. Div. 248; *Harkow v. New York City R. Co.*, 106 N. Y. S. 1129, 121 App. Div. 906; *Crandall v. International R. Co.*, 117 N. Y. S. 1055, 133 App. Div. 857; *Wasserman v. New York City R. Co.* (App. Term), 104 N. Y. S. 398; *Fischer v. New York City R. Co.*, 104 N. Y. S. 400, 54 Misc. Rep. 267.

8. *Crandall v. International R. Co.*, 117 N. Y. S. 1055, 133 App. Div. 857.

9. *Wasserman v. New York City R. Co.* (App. Term), 104 N. Y. S. 398.

10. *Sullivan v. Brooklyn Heights R. Co.*, 106 N. Y. S. 378, 121 App. Div. 527.

11. **Necessity for notice of rule.**—*McGowan v. New York City R. Co.*, 99 N. Y. S. 835.

In De Board v. Camden Interstate R. Co., 62 W. Va. 41, 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84, 57 S. E. 279,

it is held that a street railway ticket or transfer check, in the hands of the purchaser thereof for use on the car lines of the company issuing it, constitutes the complete evidence of the contract between the purchaser and the carrier, and the privileges evidenced by its terms are not subject to limitation by a mere rule of the company as to place where it must be used, knowledge of which the purchaser did not have, and could not conveniently have ascertained.

12. *Ketchum v. New York City R. Co.*, 103 N. Y. S. 486, 118 App. Div. 248; *Harkow v. New York City R. Co.*, 121 App. Div. 906, 106 N. Y. S. 1129.

13. **Duty of passenger to comply with conditions.**—*Shortsleeves v. Capital Tract. Co.*, 28 App. D. C. 365, 8 L. R. A., N. S., 287.

14. **Requiring application at carrier's office.**—*Georgia R., etc., Co. v. Baker*, 120 Ga. 562, 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 54 S. E. 639, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246; *O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

when the system of figures and punches used to indicate time of transfer are so complicated as to be not easily understood by persons of ordinary intelligence.¹⁵

Limitation as to Time for Which Valid.—Where a street railroad company voluntarily permits passengers to transfer from one car to another without payment of additional fare, it is reasonable to require as a condition to the exercise of the right that the passenger shall tender to the conductor of the second car a printed check used within a time indicated, provided a car on which the passenger can be transported passes within the time so limited; and if, without fault of the company, the transfer is not used within that time, it will be void and the conductor is justified in refusing it.¹⁶ In such case it is held that there is nothing unreasonable in a requirement that a street railway transfer from one route to another shall not be honored unless used within fifteen minutes after its delivery to the passenger.¹⁷ But a rule that the transfer shall be void if not used within ten minutes, regardless of whether the condition of the cars which the carrier supplies during that period is such as to afford the passenger suitable accommodations, is arbitrary and illegal, and the acceptance of such a transfer ticket does not modify the original contract of carriage or waive any right acquired under it by the passenger.¹⁸ Where a street car transfer expires before the passenger, who is without fault in the premises, has an opportunity to use it, he is entitled to ride on the first car of the transfer line passing the transfer point, and may recover against the carrier if his transfer is dishonored because not used within its time limit.¹⁹

Voluntary Attempt to Walk to Transfer Point in Time.—No recovery can be had where the initial car does not reach the transfer point until after the time indicated by the punch marks on the passenger's transfer check, and the passenger voluntarily leaves such car before it reaches such point, and makes an unsuccessful attempt to walk to the transfer point before the time limit expires. In such a case it is the duty of the passenger to remain on the car, and give its conductor an opportunity to make arrangements for his transportation on the transfer car, and this is true though it is the custom of the company not to issue new transfer checks where the initial car is delayed.²⁰

§§ 2247-2250. Wrong or Defective Transfer—§ 2247. Liability of Carrier.—On demand by a passenger, it is the duty of the conductor to give a proper transfer such as should be accepted by the conductor of the car to which the passenger is transferred.²¹ And a conductor's failure to issue a serviceable transfer, when bound to do so, makes the company liable for injuries suffered

15. Condition as to examination of transfer.—*O'Rourke v. Street R. Co.*, 52 S. W. 872, 103 Tenn. (19 Pickle) 124, 46 L. R. A. 614, 76 Am. St. Rep. 639.

16. Limitation as to time for which valid.—*Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339; *Garrison v. United R., etc., Co.*, 97 Md. 347, 8 R. R. R. 301, 31 Am. & Eng. R. Cas., N. S., 301, 55 Atl. 371, 99 Am. St. Rep. 452; *Crowley v. Fitchburg, etc., R. Co.*, 185 Mass. 279, 10 R. R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 70 N. E. 56; *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 31 Am. St. Rep. 601, 16 L. R. A. 345, following *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, distinguishing *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859.

17. *Heffron v. Detroit City R. Co.*, 52

N. W. 802, 92 Mich. 406, 16 L. R. A. 345, 31 Am. St. Rep. 601.

18. *Jenkins v. Brooklyn Heights R. Co.*, 30 App. Div. 622, 51 N. Y. S. 868.

19. Expiration of time limit without passenger's fault.—*Taylor v. Nassau Elect. R. Co.*, 32 App. Div. 486, 53 N. Y. S. 5; *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339; *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 31 Am. St. Rep. 601, 16 L. R. A. 345.

20. Voluntary attempt to walk to transfer point.—*Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339.

21. Duty of conductor to give proper transfer.—*Morrill v. Minneapolis St. R. Co.*, 115 N. W. 395, 103 Minn. 362, 28 R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629.

by a passenger in consequence.²² Where a street car passenger, as the result of the negligence or mistake of the conductor of the initial car in giving him a wrong transfer check, is compelled to pay a second fare, the measure of damages, in the absence of malice, insult, or other aggravating circumstances, is the fare overpaid.²³ As to the measure of damages where the passenger is ejected, see post, "Damages," chapter 28.

§ 2248. Examination of Transfer by Passenger.—It is held that as the duty to see that a proper transfer check is given rests upon the conductor,²⁴ the passenger is not bound to examine the transfer when it is given to him,²⁵ but may rely upon the inference that the conductor has properly done his work and performed the duty imposed upon him.²⁶ And where a passenger on a street car makes a timely request for a transfer check, but it is not issued to him until just as he is leaving the car, he is not bound by a condition therein making it his duty to examine the date, etc., and see that the same are correct.²⁷ But it is also held that it is the duty of a passenger receiving a transfer ticket from one route of a street railway to another to read it, and his failure to do so can not give him any right against the company which he would not have had had he read it, and thereby been notified that it provided that it would not be honored unless used within a certain time after its delivery to the passenger.²⁸ And it has been held that where a passenger who was not familiar with the practice of a company to give colored transfer checks, each designating the line on which it was to be used, and not good on any other line, by a mistake received a wrong check from a conductor without reading it, he was required to pay his fare on the second line.²⁹

§ 2249. Care Required in Asking for and Using Transfer.—A passenger must, at his peril, exercise ordinary care to ask for the proper transfer and board the right car.³⁰

§ 2250. Conductor's Duty with Respect to Explanation of Passenger.—It is held that the conductor of the second car is under no obligation to accept the explanations of a passenger presenting a wrong or defective transfer.³¹ But

22. Liability for failure to issue serviceable transfer.—*Birmingham R., etc., Co. v. Turner*, 154 Ala. 542, 45 So. 671; *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937; *Muckle v. Rochester R. Co.*, 29 N. Y. S. 732, 79 Hun 32, 61 N. Y. St. Rep. 193. See post, "Ejection of Passengers," chap. 25.

23. Measure of damages.—*Hoelljes v. Interurban St. R. Co.*, 43 Misc. Rep. 350, 87 N. Y. S. 133; *Moon v. Interurban St. R. Co.*, 85 N. Y. S. 363; *Carr v. Toledo Tract. Co.*, 19 O. C. C. 281, 10 O. C. D. 296.

24. Morrill v. Minneapolis St. R. Co., 103 Minn. 362, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395.

25. Examination by passenger.—*Lawshe v. Tacoma R., etc., Co.*, 29 Wash. 681, 6 R. R. R. 38, 29 Am. & Eng. R. Cas., N. S., 38, 70 Pac. 118, 59 L. R. A. 350; *Morrill v. Minneapolis St. R. Co.*, 103 Minn. 362, 115 N. W. 395, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629.

26. Morrill v. Minneapolis St. R. Co., 103 Minn. 362, 115 N. W. 395, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629; *Moon v. Interurban St. R. Co.*, 85 N. Y. S. 363; *Memphis St. R. Co. v. Graves*, 110 Tenn. 232, 75 S. W. 729, 8 R. R. R. 505, 31 Am. & Eng. R. Cas., N. S., 505, 100 Am. St.

Rep. 803; *O'Rourke v. Street R. Co.*, 103 Tenn. (19 Pickle) 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

27. Laird v. Pittsburg Tract. Co., 166 Pa. 4, 31 Atl. 51.

Where a transfer check given to a passenger on leaving a street car has two punches, one correctly indicating the hour when issued, and the other showing it to be two hours old, and the passenger takes the proper car immediately after receiving the check, the conductor has no right to treat the check as old, and ignore the correct time punched thereon, and the company is liable for the passenger's ejection. *Laird v. Pittsburg Tract. Co.*, 166 Pa. 4, 31 Atl. 51.

28. Heffron v. Detroit City R. Co., 52 N. W. 802, 92 Mich. 406, 16 L. R. A. 345, 31 Am. St. Rep. 601.

29. Bradshaw v. South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481, 16 Am. & Eng. R. Cas. 386.

30. Care required in asking for and using transfer.—*Eddy v. Syracuse Rapid-Transit R. Co.*, 50 App. Div. 109, 63 N. Y. S. 645; *Cleveland City R. Co. v. Conner*, 74 O. St. 225, 78 N. E. 376.

31. Conductor's duty with respect to explanations of passenger.—*Norton v.*

it is held that where a passenger is aboard a street car without the proper transfer check, which is due to the mistake or fault of the conductor of the car from which he was transferred, and not to the fault of the passenger, the conductor of the transfer car must accept the reasonable explanation of the passenger in regard to the transfer in dispute.³²

Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 118 Am. St. Rep. 132; Woods *v.* Metropolitan St. R. Co., 48 Mo. 125.

32. Indianapolis St. R. Co. *v.* Wilson, 161 Ind. 153, 7 R. R. R. 841, 30 Am. & Eng. R. Cas., N. S., 841, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261. See Georgia R., etc., Co. *v.* Baker, 120 Ga.

562, 54 S. E. 639, 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246. See, also, Morrill *v.* Minneapolis St. R. Co., 103 Minn. 362, 115 N. W. 395, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, holding that a transfer slip is not the sole and exclusive evidence of the passenger's right to ride.

CHAPTER XXIII.

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§§ 2251-2255. Duties as to Transportation in General—§ 2251. General Statement as to Nature of Undertaking.—The general rule is that a contract for the carriage of passengers imposes on the carrier the duty to carry safely and expeditiously, and to conserve, by every reasonable means, the convenience, comfort, and peace of the passengers.¹ But the contract does not give the passenger a right of transportation contrary to the terms of his contract nor is the carrier estopped to deny him such by reason of acts of its conductor in previously accepting such contract.²

§ 2252. Duty to Inform, Direct and Escort Passengers.—It is unquestionable the duty of a common carrier of passengers for hire to provide agents and servants for the purpose of giving information to the traveling public as to the running and destination of its cars.³ A carrier, through its proper agents, is bound to give passengers information enabling them to travel in comfort and safety, and a passenger has the right to rely upon such instructions.⁴ It is a matter of common knowledge that street railway companies discharge this duty by having upon every car, or train of cars, run by them, a conductor whose duty

1. Duty as to transportation in general.—Baltimore, etc., R. Co. v. Davis, 44 Ind. App. 375, 89 N. E. 403.

Failure to carry safely is a breach of the obligation imposed by the contract creating the relation of passenger and carrier. Canaday v. United R. Co., 114 S. W. 88, 134 Mo. App. 282.

2. Performance of special contract.—Johnson v. Michigan United R. Co., 153 Mich. 65, 116 N. W. 529.

3. Dillon v. Lindell R. Co., 71 Mo. App. 631.

4. Duty to inform passengers.—Hunter v. Southern Railway, 90 S. C. 507, 73 S. E. 1017.

it is to give this information.⁵ And if a passenger, relying on the direction of a servant who has no authority to instruct passengers as to movement of trains, takes a car against the direction of the conductor, who informs her that it will not carry her to her destination, she assumes the risk of the authority of the former to direct the destination of the car.⁶

Duty to Direct and Escort Passenger to Proper Cars.—A passenger who sustains damages by reason of having been directed by the carrier's employees to take the wrong car is entitled to recover whether or not the act of the employee's was negligent, inadvertent, willful, knowing, or malicious; but willfulness, malice, or other aggravating circumstances may be shown, as bearing on the amount of recovery.⁷ Where a gateman at a union depot negligently misdirects a passenger to a train of another road, proof that the gateman was defendant's servant, that while so acting he misdirected the passenger, and that thereby the passenger suffered injury, authorizes a recovery irrespective of the theory of joint agency.⁸ Where a passenger is directed by a ticket agent to take the wrong car of a train, but such mistake is corrected by the conductor, it is not the duty of the conductor to escort the passenger to the right car; the train being vestibuled, and she not being ill to such a degree as to require assistance.⁹

§ 2253. Liability of Carrier for Misinformation.—Misinformation as to Trains.—A passenger, misinformed by a ticket collector that he might take a later train to destination, was not required to know that such train had been taken off by reason of advertisement of the fact.¹⁰ This is based on the principle that where a carrier's servant in charge of a train negligently gives a passenger wrong information on which the passenger acts to his injury, the carrier is liable for actual damages.¹¹

Station at Which Train Does Not Stop.—See post, "Station at Which Train Does Not Stop," §§ 2443, 2448.

§ 2254. Duty of Passenger to Inform Himself.—In General.—It is the duty of a person about to take passage on a railroad train to inform himself, when, where, and how he can go, or stop, according to the regulations of the railroad company.¹²

§ 2255. Mistakes and Delays in Furnishing Tickets.—Where a passenger's ticket, by an alleged error of the selling agent, reads for the wrong station, the conductor of the initial train is under no obligation to correct the error, or assist the passenger in procuring a ticket to the right station.¹³ Where the failure of a railway company to give a passenger the ticket contracted for is the proximate cause of his discomfort, exposure, and sickness, the company is liable in damages.¹⁴ And if the defect in a passenger ticket arises from the fault of the carrier's agent, the carrier is liable to the passenger for the damages sustained

5. *Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

6. Relying on information of servant having no authority.—*Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

7. Erroneous directions as to train.—*Robertson v. Louisville, etc., R. Co.*, 142 Ala. 216, 37 So. 831.

8. Joint agency immaterial.—*Louisville, etc., R. Co. v. Cannon*, 158 Ala. 453, 48 So. 64.

9. Duty to escort passenger to right car.—*Illinois Cent. R. Co. v. Harper*, 35 So. 764, 83 Miss. 560, 64 L. R. A. 283, 102 Am. St. Rep. 469.

10. Misinformation as to trains.—*Wilcox v. Southern Railway*, 74 S. E. 122, 91 S. C. 71.

11. Liability for giving erroneous information.—*Wilcox v. Southern Railway*, 91 S. C. 71, 74 S. E. 122.

12. Duty of passenger to inform himself.—*Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Atchison, etc., R. Co. v. Gants*, 17 Pac. 54, 38 Kan. 608, 5 Am. St. Rep. 780.

13. Duty of conductor to correct error.—*International, etc., R. Co. v. Doolan*, 56 Tex. Civ. App. 503, 120 S. W. 1118.

14. Agents mistake as to ticket.—*Texas, etc., R. Co. v. Wynn*, 44 Tex. Civ. App. 29, 97 S. W. 506.

Mistakes as to ticket.—See ante, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

by the refusal of the conductor to accept the ticket.¹⁵ Where a railroad company's agent, through his own fault, sells a passenger a ticket to the wrong place, and the passenger, on discovering the mistake, uses due care in selecting a route from the place of discovery to the desired destination, the company is liable for damages, though he selects a route which causes him more discomfort than another, which he might have selected, would have caused him.¹⁶

Delay in Furnishing Ticket of Transportation.—Where a passenger through his agent purchased transportation over a carrier's line between specified points, and paid the fare to the carrier's agent at the destination, who negligently failed to keep his agreement to notify the agent at the starting to deliver a ticket to the passenger, who, having no money, was unduly delayed to his great damage, the carrier is liable.¹⁷ And where a railroad company issued an order for tickets, which was not honored for over ten days because the agent to whom the order was directed did not before that time receive notice to furnish the tickets, the delay was unreasonable, and the company liable for damages caused thereby.¹⁸

Refusal to Issue Exchange Tickets.—Where a passenger's mileage entitles him to exchange tickets over a particular route, whether such route belongs to the carrier issuing the mileage book or not, a refusal to issue such ticket renders the carrier liable in damages.¹⁹

§§ 2256-2275. Route, Time and Means of Transportation—§§ 2256-2262. Right and Duty to Ride on Particular Train or Car—§ 2256. In General.—Where a carrier sells a ticket between two points on its road, with no restrictions as to trains, the purchaser may assume that he can ride on any train or car carrying passengers to that point,²⁰ unless it appears that he has notice of a rule limiting him to a particular train or car.²¹

15. *Galveston, etc., R. Co. v. Wiseman* (Tex. Civ. App.), 136 S. W. 793.

Where a passenger holding a round-trip ticket, which was good only for return passage, after his identification by signature on the ticket in the presence of an agent of the carrier, who should witness the signature and stamp the ticket, did all he could to perform the conditions imposed on him, but the agent failed to stamp the ticket, and thereafter a conductor placed a stamp thereon, and a subsequent conductor refused to accept the ticket as stamped, the carrier was liable to the passenger for the damages resulting from the conductor's refusal to accept his ticket and demanding payment of fare under penalty of ejection from the train. *Galveston, etc., R. Co. v. Wiseman* (Tex. Civ. App.), 136 S. W. 793.

16. **Damages caused by selection of route.**—*Texas, etc., R. Co. v. Armstrong* (Tex. Civ. App.), 41 S. W. 833.

17. **Delay in furnishing ticket of transportation.**—*Reeves v. Seaboard, etc., R. Co.*, 149 N. C. 244, 62 S. E. 1078.

18. **Failure to honor order for tickets.**—*St. Louis, etc., R. Co. v. Culver* (Tex. Civ. App.), 86 S. W. 628.

19. **Refusal to issue exchange tickets.**—A mileage book issued by defendant provided that plaintiff was entitled to transportation in exchange tickets over certain lines under the local regulations, and subject to all the conditions of the contract, but only on trains advertised to

carry passengers, and to and from stations at which such trains were scheduled to stop. Defendant refused to issue an exchange ticket for transportation between two points, claiming that, as it did not own the track between such points, such part of the route was not a part of its line, although it ran trains over it. Defendant's timetable advertised trains between such points, and it made no distinction, either therein or in the map forming a part thereof, between those points and others admitted to be on that part of the route owned by it. Held, that defendant was liable in damages for its refusal to issue the exchange ticket. *Schmidt v. Cleveland, etc., R. Co.*, 74 S. W. 674, 25 Ky. L. Rep. 11.

20. **Right to ride on particular train.**—*Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85.

21. **In absence of notice.**—Plaintiff, having entered one of defendant's cars at Fiftieth street and paid his fare, rode to Sixty-Fifth street. The car he was on not going above that street, he purchased another ticket, reading "Good only from 65th street * * * for a continuous ride." After having waited for the car, plaintiff walked to his destination, Seventieth street. In the afternoon of the same day he entered defendant's car at Fifty-Seventh street, paid his fare, and at a place above Sixty-Fifth street tendered the ticket he had purchased, which was refused. Held that, it not appearing

Ordinarily speaking, and in some cases under statutory provision, the published schedule of trains is an offer, which, when accepted by a person by asking for a ticket, gives him a legal right to be transported by the first train stopping at his destination.²² But the sale of a railroad ticket office, before the arrival of a train, gives no specific right to the purchaser in the absence of express representations to that effect by the carrier's agent, to take that particular train which is then at the station, or is about to arrive, and the train need not be held beyond the regular time of starting to allow him to get upon it.²³ An electric railroad is not required to run all its cars the entire length of its line in the same direction, nor provide for the transfer of passengers from one car to another in the same direction, but may run its cars to such points or stations as will best serve its own convenience and the convenience of the traveling public, and require passengers to take such cars only as will transport them to their destination without change.²⁴

Crowded Condition of Street Car.—A passenger on a street car who receives a transfer to another line is not entitled to board the first car that reaches the transfer point, regardless of whether there is room for him on the car.²⁵

§ 2257. Round Trip Ticket.—As a rule, the purchase of a round trip ticket does not obligate the company to carry the passenger on any particular train.²⁶ Thus, it has been held, that if the holder of a round trip ticket was not told by a duly-authorized agent of the railroad company that he could return on a certain train, which he knew did not usually stop at his station, he would have no absolute right to return on that train, provided there was another on which he could return before his ticket expired.²⁷ But where a round trip ticket calls for certain advertised trains, the holder of the ticket may return upon either of those trains he elects, and the carrier is liable for any breach of contract in this respect.²⁸

that plaintiff had notice of any rule limiting him to a particular car, he was entitled to ride on any of defendant's cars at least on the day the ticket was dated. *McMahon v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 282.

22. Acceptance of schedule as an offer.—*Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690.

23. No right to ride particular train.—*Paulitsch v. New York, etc., R. Co.*, 102 N. Y. 280, 6 N. E. 577, reversing 50 N. Y. Super. Ct. 241.

A printed railroad ticket from L. S. to L., when issued by the railway company, and accepted by a purchaser, does not import a contract to carry the purchaser to L. on the first train leaving L. S. after the purchase, but merely indicates an undertaking to carry the purchaser to L. on a train which, according to the company's time cards, stops at L. *Usher v. Chicago, etc., R. Co.*, 80 Pac. 956, 71 Kan. 375.

24. Electric road—Running cars to different places along line.—*Mills v. Seattle, etc., R. Co.*, 50 Wash. 20, 96 Pac. 520, 19 L. R. A., N. S., 704.

25. Crowded condition of car.—*Hanna v. Nassau, etc., R. Co.*, 45 N. Y. S. 437, 18 App. Div. 137.

26. Round-trip ticket.—*Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460.

The purchaser of a round-trip ticket on a particular day acquired no right to

ride on a particular train or class of trains, unless the ticket so stated, or the agent of the railroad company so informed him at the time of the purchase, but he acquires only the right to ride, subject to the reasonable regulation of the railroad company. *Claybrook v. Hannibal, etc., R. Co.*, 19 Mo. App. 432.

27. Central R., etc., Co. v. Roberts, 91 Ga. 513, 18 S. E. 315.

28. Excursion ticket—Choice of date and train—Selection of crowded train—Carried only part of way by another train.

—In *Great Northern R. Co. v. Hawcroft (Eng.)*, 21 L. J. Q. B. 178, 16 Jur. 196, it is held that where a railroad company issues a ticket reading, "B. to L. and back—Excursion ticket—To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof," and advertises a morning and evening excursion train on Saturdays, it contracts to carry the passenger back to B. on any date that he may choose and by any of the advertised trains that he may select, and if the passenger selects a train which becomes so crowded that he can not find room in it, and the company does not send him by that train, there is a breach of its contract, and if it takes him by another train only a part of the way on his return trip, without previous notice, this is another breach, and the passenger may recover the expense of hiring a carriage to complete his return trip.

§ 2258. Ticket Calling for Particular Train.—Where a railroad agent at the regular ticket office sells a ticket good only on a special train which is in charge of a third person, whose name is signed to the ticket, but of whose contract with the carrier the purchaser is ignorant, such sale constitutes a contract of transportation binding on the carrier.²⁹

§ 2259. Ticket Requiring Change of Trains.—A carrier of passengers may so arrange the running of its trains or cars that passengers destined for a station may go through without change on some vehicles, and on others be required to change at an intervening station.³⁰

§ 2260. Trains Not Stopping at Passenger's Destination.—A person who buys a ticket from a railroad company is entitled to offer the same as fare only on a train which is scheduled to stop, for the purposes of receiving and discharging passengers, at the place mentioned in the ticket as his destination; and the fact that at such place there is a railroad crossing at which all trains are required to stop does not change this rule.³¹ And the holder can not sue for a breach of the contract in failing to stop and take him on at a station not so advertised.³² A railroad company has the legal right to make reasonable rules and regulations for the running of its trains and the carriage of passengers thereon, and it incurs no legal liability because in following such reasonable regulations and trains schedules it does not stop its through or limited trains at all stations, especially when it is not shown that it does not afford to the public adequate facilities for travel upon its road.³³ And where adequate local passenger traffic has been provided for by a carrier between two points, a regulation that another train should not engage therein is reasonable.³⁴

29. Ticket calling for particular train.—*Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88; *Eddy v. Searcy* (Tex.), 15 S. W. 108.

30. Requiring change of train.—*St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

At an intersecting street, plaintiff, a passenger, was offered a transfer to another car, which was at hand, ready to carry him to his destination, four blocks north, but plaintiff refused the transfer, stating that if he had known the car was not going to his place of destination, as indicated thereon, before he boarded it, he would have taken another car; the car being transferred en route to another track in order to make up lost time. Held, that there was no actionable breach of the carrier's contract to transport plaintiff to destination. *Dryden v. St. Louis Transit Co.*, 96 S. W. 1044, 120 Mo. App. 424.

31. Train not stopping at passenger's destination.—*Pittsburgh, etc., R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

32. Tickets good only on certain trains.—*Wilson v. New Orleans, etc., R. Co.*, 63 Miss. 352.

33. Right of carrier to make regulations.—*Kyle v. Chicago, etc., R. Co.*, 105 C. C. A. 151, 182 Fed. 613.

In absence of statute, a railroad may adopt a rule that certain trains will stop only at designated places. *Southern R. Co. v. Flanigan*, 74 S. E. 85, 10 Ga. App. 745.

It is a well-established general rule that

in the absence of statutory provisions to the contrary a railroad company may make rules providing that particular trains shall stop only at certain stations when it furnishes reasonable means of reaching all stations on its road by some of its trains, and that it is the duty of a person taking passage on a train to inform himself when, where and how he may stop, according to the regulations, and if he make a mistake not induced by the company, he has no remedy against the company for its enforcement of such rule. *Evansville, etc., R. Co. v. Wilson*, 50 N. E. 90, 20 Ind. App. 5.

A railroad company may adopt a regulation that one of its through, or fast trains, running regularly on its road, shall stop only at certain designated stations or places. *Atchison, etc., R. Co. v. Gants*, 17 Pac. 54, 38 Kan. 608, 5 Am. St. Rep. 780.

A railroad company has power, subject to liability for damages for any breach of contract involved, to determine for itself what train shall stop at particular places. *Lake Shore, etc., R. Co. v. Pierce*, 11 N. W. 157, 47 Mich. 277.

A passenger, having paid his fare, is not entitled to board a train not scheduled to stop at the station from which he is to embark. *Newmark v. New York, etc., R. Co.*, 111 N. Y. S. 379, 127 App. Div. 58.

34. Reasonable regulation.—*Ohage v. Northern Pac. R. Co.*, 200 Fed. 128, 118 C. C. A. 302.

A carrier's regulation for the operation

Information That Train Will Stop.—When a person purchasing a ticket expressly for a particular train of cars at the time of the purchase is informed by the agent of the railroad company that the train will stop at the station for which the ticket is purchased, he has a right to take passage on such train, and it is the duty of the railroad company to allow him to leave the train at that station.³⁵

§ 2261. Vehicles Not Designated for Passengers.—In the absence of a statute requiring it, or a custom permitting it, a person has no right to ride on trains not run for the purpose of carrying passengers.³⁶ It follows as of course that a carrier has a right to prohibit passengers from riding on such trains, or to prescribe the conditions on which they may ride.³⁷ And payment of fare to its office agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition.³⁸ And if a carrier receives a person on its special train as a passenger, for the purpose of transportation from one place to another, it assumes toward him the same duties as if he had been a passenger traveling on the same train on its regular trips, the passenger assuming no risks on this trip other than on a regular one, except such as are necessarily incident to the character of the train and the purposes for which it is being run.³⁹ In some states the law gives to passengers, upon certain conditions, the absolute right to ride upon specified freight trains.⁴⁰

Effect of Custom—Train Not Stopping at Destination.—Where a carrier customarily accepted passengers on a certain freight train for stations at which it made stops necessary for the handling of freight, the carrier was not bound absolutely to furnish such transportation, and, on notifying passengers that the train would not stop at a certain station, it was their duty to leave the same.⁴¹ In such a case, a passenger desiring transportation, with knowledge of such custom, was not bound to make special and independent inquiry with reference to whether the train would stop at his destination in the absence of notice to the contrary, or to obtain a special permit from the

of a limited train may reasonably permit the discharge of passengers at a particular station, and yet prohibit the taking on of passengers there. *Ohage v. Northern Pac. R. Co.*, 200 Fed. 128, 118 C. C. A. 302.

Where defendant railroad company undertook to carry plaintiff from G. to B., and furnished her a ticket from G. to E., agreeing to furnish her at E. a ticket from that point to B., defendant was not bound to send plaintiff on one of its through trains, which did not regularly stop at B. *Sears v. Louisville, etc., R. Co.*, 56 S. W. 725, 22 Ky. L. Rep. 152.

Where, just as a train is coming up, an intending passenger buys a ticket of the agent to a station on the line in the direction in which the train is going, marked, "For this day and train only," the selling, at such a time, of a ticket so marked, does not of itself, in the absence of express representations to that effect by an agent of the company, imply a contract by it to carry such passenger to that station, by that particular train, when the posters and timetables of the company showed that the train did not stop there, and, by the custom of the company, the ticket is good for any train on that day, or till used. *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120, 6 Atl. 592.

35. Effect of express representation.—*Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703.

36. Right to ride on freight trains.—See ante, "Vehicle Not Designated for Passengers," § 2261.

37. Rules as to freight trains.—*Thomas v. Chicago, etc., R. Co.*, 72 Mich. 355, 40 N. W. 463.

A carrier may make and enforce reasonable rules with reference to carrying passengers on freight trains, and properly exclude passengers from unscheduled extra freight trains. *Reed v. Chicago, etc., R. Co.*, 120 N. W. 442, 84 Neb. 8.

38. Rules as to freight trains—Payment of fare.—*Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457.

39. Passenger's rights on such train.—*Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156.

40. Under Laws 1907, p. 444, c. 274, an absolute right is given to passengers, except certain minors, to ride on specified freight trains by complying with the limitation of liability provided in such statute on request of the railway company. *Davis v. Atchison, etc., R. Co.*, 106 Pac. 288, 81 Kan. 505. See ante, "Duty to Receive and Carry," chapter 4.

41. Train not stopping at destination.—*Wieland v. Southern Pac. Co.*, 1 Cal. App. 343, 82 Pac. 226.

superintendent,⁴² nor was it necessary for him to inquire whether the custom still survived.⁴³

§ 2262. Several Carriers Using Same Road.—Where the carrier ran its train over a portion of the road of another company with an agreement to carry passengers on tickets issued by such other railroad company, the proceeds of which were divided between the two roads, the presence of the initials of both companies on the ticket and the absence of any limitation as to its being intended for use only on particular trains would strongly indicate to a purchaser who knew that the trains of both companies were run over the road that the ticket was intended to be used on either company's trains.⁴⁴

§ 2263. Route.—It is a reasonable regulation for a railroad company operating a direct and a circuitous route between two points to require through passengers to go by the most direct route.⁴⁵ And where a carrier operates a direct and a circuitous route between two points, the failure of the carrier to notify a through passenger that he must go by the more direct route does not entitle the passenger to ride on the circuitous route.⁴⁶

Tickets Not Calling for Branch Road.—A ticket calling for transportation over a carrier's railroad main line does not entitle the passenger to round trips over branch lines intersecting such main line.⁴⁷

Misrepresentations as to Route.—Where a passenger claimed that by the misrepresentation as to the best route made by carrier's agent he and his family were caused to go in a wrong direction, which necessarily caused them delay and inconvenience, to the injury of his wife, the carrier was not liable for delays on other connecting roads over which he traveled to his destination, in the absence of proof that such delays were not caused by failure of such connecting carriers to run their trains on time or by other negligence on their part.⁴⁸

Varying from Scheduled Trip.—Where a passenger, in a caboose attached to a freight train which was making a regular scheduled trip, was, before he or the train reached their destination, taken off in the caboose on a branch line,

42. Duty to make inquiry—Special permit.—*Wieland v. Southern Pac. Co.*, 1 Cal. App. 343, 82 Pac. 226.

43. Where defendant carried passengers on a certain freight train having no regular schedule, and which did not always stop at R., and in case a stop was not to be made there it was the custom either to lock the caboose or to announce the fact before leaving F., a passenger with knowledge of such custom was entitled to assume its continuance and that he would again be given transportation on the same terms as before, unless notified to the contrary according to the custom. *Wieland v. Southern Pac. Co.*, 82 Pac. 226, 1 Cal. App. 343.

44. Several carriers using same road.—*Pittsburgh, etc., R. Co. v. Berryman*, 36 N. E. 728, 11 Ind. App. 640.

45. Carrier operating two routes.—*Church v. Chicago, etc., R. Co.*, 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616.

Where a railroad corporation runs and operates two roads between two points on its through route—one a part of the through route, the other a longer, more circuitous route, used simply for trains passing between the two points—a passenger purchasing a through ticket is

only entitled to travel over the usual through and most direct route; the company is not bound to carry him over the circuitous route. *Bennett v. New York, etc., R. Co.*, 69 N. Y. 594, 35 Am. Rep. 250, affirming 5 Hun 599.

A railroad corporation in operating a single system may operate two or more lines of road between its terminals, but a passenger purchasing a ticket to his point of destination has no option to take a circuitous route, and he is confined to the through route. *Order* 104 N. Y. S. 561, 119 App. Div. 223, affirmed, which reverses 102 N. Y. S. 742, 52 Misc. Rep. 585. *Kelly v. New York City R. Co.*, 84 N. E. 569, 192 N. Y. 97.

46. Effect of failure to notify passenger as to route.—*Church v. Chicago, etc., R. Co.*, 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616.

47. Ticket good on main line does not include branch roads.—*Whitham v. Chicago, etc., R. Co.*, 43 Wash. 30, 85 Pac. 852.

48. Misrepresentations as to route.—*Judgment*, 86 S. W. 71, reversed in *St. Louis, etc., R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 2 L. R. A., N. S., 110, 122 Am. St. Rep. 631.

on an irregular side trip without notice, and exposed to cold, causing rheumatism, the jury were warranted in finding the carrier guilty of actionable negligence.⁴⁹

Special Contract.—Where, after full explanation of the peculiar circumstances, a carrier contracts to convey a passenger by a particular route or under specified conditions, the passenger may recover any damages sustained by breach thereof.⁵⁰

§§ 2264-2275. Failure or Delay in Transportation—§ 2264. Failure to Fully Perform Contract.—Where a carrier contracted to carry certain passengers in an automobile from one place to another and return, and the automobile broke down, and it could perform its contract only by sending another automobile it was under obligation to do so.⁵¹

Waiver of Performance.—Where a carrier contracts to carry certain passengers in an automobile from one place to another, and the automobile breaks down, and the carrier fails within a reasonable time after being informed of the accident to furnish another machine to complete the journey, the passengers leaving the automobile and walking back is not a waiver of performance.⁵²

§§ 2265-2275. Delay in Transportation—§ 2265. In General.—It is the duty of a carrier to transport a passenger, within a reasonable time.⁵³ And the carrier must exercise such care and effort to avoid delay to a passenger as is due under the circumstances.⁵⁴ It has been held that a delay of twenty-four hours was unreasonable in the absence of evidence excusing the carrier therefor.⁵⁵

§§ 2266-2273. Published Schedule and Connections—§ 2266. In General.—Ordinarily it is the duty of the carrier to run its trains on schedule time, and make the usual and advertised connections, negligently failing to do which it is liable for any injury to a passenger directly resulting therefrom.⁵⁶ The true rule seems to be that although a carrier can not by contract limit its common-law liability for injury for negligence, yet where a passenger has, or should have, knowledge that the schedules as published are not guaranteed by the carrier, he takes passage subject to such delays as are not due to negligence or willful act of the carrier.⁵⁷ This rule is based upon the principal that a carrier of passengers is not liable as an insurer.⁵⁸

49. Varying from scheduled trip.—*Rosted v. Great Northern R. Co.*, 78 N. W. 971, 76 Minn. 123.

50. Special contract.—*Southern R. Co. v. Daughdrill*, 75 S. E. 925, 11 Ga. App. 603.

51. Excuses for failure to perform.—*Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141.

52. Waiver of performance.—*Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141.

53. Time in general.—*Green v. Missouri, etc., R. Co.*, 121 Mo. App. 720, 97 S. W. 646.

54. Care to avoid delay.—*Latour v. Southern Railway*, 71 S. C. 532, 51 S. E. 265, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379.

55. Twenty-four hour delay.—*International, etc., R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356.

56. Delay in transportation—In general.—*Taber v. Seaboard, etc., Railway*, 81

S. C. 317, 62 S. E. 311; *Mulligan v. Southern Railway*, 84 S. C. 171, 65 S. E. 1040.

It is ordinarily the duty of the carrier to run its trains on schedule time, and make advertised connections, and it is liable for injuries resulting from a negligent failure to do so. *Taber v. Seaboard, etc., Railway*, 66 S. E. 292, 84 S. C. 291, 19 Am. & Eng. Ann. Cas. 1132.

57. True rule.—*Mulligan v. Southern Railway*, 84 S. C. 171, 65 S. E. 1040.

58. While a carrier of passengers must transport with all reasonable diligence, in order to reach destination on the time advertised in its time tables, and exercise reasonable foresight in anticipating and removing obstructions, it is not an insurer as to the time of arrival, and is only liable for delay caused by its negligence. *Judgment* 110 N. Y. S. 1125, reversed. *Cormack v. New York, etc., R. Co.*, 90 N. E. 56, 196 N. Y. 442, 24 L. R. A., N. S., 1209, 17 Am. & Eng. Ann. Cas. 949.

§ 2267. **Duty to Conform to Timetable.**—A carrier must use due care and diligence in order to run its passenger trains according to its published timetables, and a passenger sustaining injury from its failure to do so may recover therefor against the carrier.⁵⁹ So it is held that if the failure to start a passenger train according to the advertised or customary time is negligence, a passenger injured thereby may recover resultant damages.⁶⁰ Or if a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses thereby occasioned.⁶¹ It is a part of a contract of a railroad company with the public that its trains will be run on schedule time, so as to render it liable to a passenger for failure to do so.⁶² The publication of

59. *Georgia*.—Savannah, etc., R. Co. v. Bonaud, 58 Ga. 180.

Massachusetts.—Boston, etc., R. Co. v. Bartlett (Mass.), 3 Cush. 224; Sears v. Eastern R. Co. (Mass.), 14 Allen 433, 92 Am. Dec. 780.

Mississippi.—Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

New Hampshire.—Gordon v. Manchester, etc., Railroad, 52 N. H. 596, 13 Am. Rep. 97.

North Carolina.—Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

South Carolina.—Miller v. Southern R. Co., 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99.

England.—Buckmaster v. Great Eastern R. Co. (Eng.), 23 L. T., N. S., 471, 3 Ry. & C. T. Cas. xxiv; Denton v. Great Northern R. Co. (Eng.), 5 El. & Bl. 860, 2 Jur., N. S., 185, 25 L. J. Q. B. 129; Dunlop v. Edinburgh, etc., R. Co., 16 Jur. (Eng.), 407; Great Northern R. Co. v. Hawcroft (Eng.), 21 L. J. Q. B. 178, 16 Jur. 196; Fitzgerald v. Midland R. Co. (Eng.), 34 L. T., N. S., 771, 3 Ry. & C. T. Cas. xxii; Hamlin v. Great Northern R. Co. (Eng.), 1 H. & N. 408, 2 Jur., N. S., 1122, 26 L. J. Ex. 20; LeBlanche v. London, etc., R. Co. (Eng.), 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas. xxiii; Thompson v. Midland R. Co. (Eng.), 34 L. T., N. S., 34, 3 Ry. & C. T. Cas. xxiii; Woodgate v. Great Western R. Co. (Eng.), 51 L. T., N. S., 826, 33 W. R. 428, 49 J. P. 196.

60. Weed v. Panama R. Co., 12 N. Y. Super. Ct. 193, affirmed in 17 N. Y. 362; Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690; Miller v. Southern R. Co., 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99; Buckmaster v. Great Eastern R. Co. (Eng.), 23 L. T., N. S., 471, 3 Ry. & C. T. Cas. xxiv.

Neglect of fireman to get up steam.—The failure of a railroad company to promptly start a passenger train, owing to the neglect of the fireman to get up steam, will render the carrier liable for damages sustained by a passenger by reason of delay so caused. So held in Buckmaster v. Great Eastern R. Co.

(Eng.), 23 L. T., N. S., 471, 3 Ry. & C. T. Cas. xxiv.

Ten-Hour delay, in starting train—Failure to inform passengers.—In Miller v. Southern R. Co., 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99, it is held that proof that a train was due to leave a station twenty minutes late, did so leave, but after moving about one hundred yards returned to the depot, and there remained ten hours without any information to passengers as to cause of delay or probable duration, prevents nonsuit in suit by passengers for failure to carry.

61. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

A railroad company failing to run a train according to its published schedule, unless prevented by some valid reason, is liable to a passenger, or prospective passenger, injured by reason of such failure for the damages sustained by him as the direct and necessary result of such failure. So held in Savannah, etc., R. Co. v. Bonaud, 58 Ga. 180.

Under § 1963 of N. Car. Code, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has a right to be transported by the first train stopping at his destination. So held in Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

62. General duty to keep schedule time.—Miller v. Southern R. Co., 69 S. C. 116, 48 S. E. 99, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33.

A public advertisement of the times when trains run enters into the contract of carriage, and forms part of it. Denton v. Great Northern R. Co. (Eng.), 5 El. & Bl. 860, 2 Jur., N. S., 185, 25 L. J. Q. B. 129.

It is part of a railroad company with the public that its trains will be run on schedule time, so as to render it liable to a passenger for failure to do so. So held in Miller v. Southern R. Co., 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99.

What constitutes contract.—In LeBlanche v. London, etc., R. Co. (Eng.), 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas.

a timetable, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated therein; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence.⁶³ The taking by a passenger of a ticket does not prove a contract, or impose a duty binding the carrier to have a train ready to start on schedule time; and to maintain an action for its failure to do so the passenger must show a breach either of an express contract or of a legal obligation created by the published timetable.⁶⁴

Effect of Advertised Schedule.—It may be stated as a general rule that railroad corporations, by advertising the hours when trains will start, agree with holders of tickets that trains shall start at the hours named; but with an implied reservation of power to change the hours upon giving reasonable notice.⁶⁵ Where the folders issued by a carrier are not issued pursuant to any statutory requirement, it is not required to adhere to the schedules appearing therein merely because the folders remain in circulation.⁶⁶

Clause Limiting Liability.—It would seem that the English railway companies are now in the habit of inserting notices in their time tables that they do not warrant that the trains will arrive and depart at the precise time indicated.⁶⁷ But this practice may have been adopted from abundant caution, and does not seem evidence of the understanding of the legal profession that the timetable, without the notice, would import a warranty. In this country nearly all the railroads publish timetables, and delays, not attributable to negligence, are not uncommon, yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented shows very strongly what has been understood to be the law upon the subject.⁶⁸ It is generally held that where the timetables of a railroad company provide that the carrier refuses to guarantee the punctuality of its trains in conformity with the time designated in the timetables, such conditions constitute a part of the contract with a passenger, and no recovery can be had for damages sustained by a passenger from failure to run trains according to the carrier's timetables.⁶⁹

xxiii, it appeared that plaintiff has taken a ticket at defendant's station in L. for S., via L.; and in consequence of delay on the journey he arrives at L. after the ordinary train had left, and he took a special train from there to S. It was held that the facts and documents which constituted the contract for transportation were the taking and granting of the ticket, the timetable and the conditions; and that the carrier thereby contracted to make every reasonable effort to insure his prompt transportation.

63. Liability for delay—Publication of time table.—*Gordon v. Manchester, etc., Railroad*, 52 N. H. 596, 13 Am. Rep. 97.

A railroad company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable, to a person sustaining injury from such failure, for the damages actually sustained by him as the direct and necessary result thereof. *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180.

A carrier is not liable for a failure to run its trains in conformity with its published schedule, where the same is not due to its negligence. *Gerardy v. Louisville, etc., R. Co.*, 102 N. Y. S. 548, 52 Misc. Rep. 466.

64. What constitutes contract to run on time.—*Gerardy v. Louisville, etc., R. Co.*, 102 N. Y. S. 548, 52 Misc. Rep. 466.

65. Effect of advertised schedule.—*Sears v. Eastern R. Co. (Mass.)*, 14 Allen 433, 92 Am. Dec. 780.

Railroad companies may change their timetables and may take off and put on trains; only reasonable notice to the public of such changes being necessary. 2 Comp. Laws, § 6235. *Van Camp v. Michigan Cent. R. Co.*, 100 N. W. 771, 137 Mich. 467.

66. Effect of folders issued by carrier.—*Ohage v. Northern Pac. R. Co.*, 200 Fed. 128, 118 C. C. A. 302.

67. See Bovill, C. J., in Lord v. Midland R. Co., 36 L. J. C. P. 170, L. R. 2 C. P. 339, 15 W. R. 405, 16 L. T. 576; *Hurst v. Great Western R. Co. (Eng.)*, 19 C. B., N. S., 310, 11 Jur., N. S., 730, 34 L. J. C. P. 264, 13 W. R. 950, 12 L. T. 634; *Prevost v. Great Eastern R. (Eng.)*, 13 L. T., N. S., 20; *Buckmaster v. Great Eastern R. Co. (Eng.)*, 23 L. T., N. S., 471, 3 Ry. & C. T. Cas. xxiv.

68. Gordon v. Manchester, etc., Railroad, 52 N. H. 596, 13 Am. Rep. 97.

69. Hurst v. Great Western R. Co. (Eng.), 19 C. B., N. S., 310, 11 Jur., N.

But under proper circumstances a recovery may be both upon the grounds of breach of contract and false representation.⁷⁰

Working Timetables.—Where a working timetable issued by a carrier is not intended for the information of the public nor as an advertisement, but is only for the information of employees, the company reserving the right to vary it at pleasure, any information which a passenger may obtain therefrom, either directly or by statements made from it by the carrier's agent, are not binding and can not be considered in determining the carrier's liability.⁷¹

§ 2268. Right to Change Schedule.—Railroad companies generally make an express or an implied reservation of power to change their schedules, upon giving reasonable notice.⁷² It has been held that posting handbills was not a reasonable notice.⁷³

S., 730, 34 L. J. C. P. 264, 13 W. R. 950, 12 L. T. 634; *Prevost v. Great Eastern R. Co.* (Eng.), 13 L. T., N. S., 20; *Thompson v. Midland R. Co.* (Eng.), 34 L. T., N. S., 34, 3 Ry. & C. T. Cas. xxiii; *McCartan v. Northeastern R. Co.* (Eng.), 54 L. J. Q. B. D. 441, 5 Ry. & C. T. Cas. ix.

70. Change of schedule by connecting road—Failure of initial carrier to give notice—Breach of contract and false representation.—But in *Denton v. Great Northern R. Co.* (Eng.), 5 El. & Bl. 860, 2 Jur., N. S., 185, 25 L. J. Q. B. 129, an action for not running a train according to the carrier's timetable, it appeared that the timetables published by the carrier stated that a train for passengers would leave P. for H. at 7 p. m. The whole line from P. to H. did not belong to defendant carrier, but the latter part, from M. to H., belonged to another railway company. On 27th of February, prior to the publication and fixing up of the stations by defendant of their timetables for the month of March, but after the same had been printed and issued, the latter railway company gave defendant railway notice of its intention to cease running the train from M. to H., which was a continuance of the 7:20 p. m. train from P. to H. The timetable contained the following notice: "The companies make every exertion that the trains shall be punctual; but the arrival or departure at the time stated will not be guaranteed, nor will the companies hold themselves responsible for delay, or any consequences arising therefrom." It was held that defendant company was liable for the damages sustained by plaintiff in consequence of the train not running as advertised, both on the ground of contract and of false representations.

71. Working timetables.—*Geer v. Michigan Cent. R. Co.*, 142 Mich. 511, 106 N. W. 72.

72. So held in *Sears v. Eastern R. Co.* (Mass.), 14 Allen 433, 92 Am. Dec. 780; *Boston, etc., R. Co. v. Bartlett* (Mass.), 3 Cush. 224; *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.

Must give notice of intent to change schedule.—In *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627, it is said in the opinion: "Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general timetable. All that can be required from him, by the public and passengers is that when he makes the variation he acts under it with reasonable care and diligence. *Sears v. Eastern R. Co.* (Mass.), 14 Allen 433, 92 Am. Dec. 780; *Gordon v. Manchester, etc., Railroad*, 52 N. H. 596, 13 Am. Rep. 97. That is to say, due care and diligence in giving notice of the change and in running the train upon the changed time."

Prior purchase of ticket.—And in *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627, it is said in the opinion: "Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms part of it."

73. Handbills posted at stations and in cars.—In *Sears v. Eastern R. Co.* (Mass.), 14 Allen 433, 92 Am. Dec. 780, it is held that if the hours at which railroad trains will start have been advertised in public newspapers, it is not giving reasonable notice of a change of the hour of any particular train to post up handbills announcing such fact at the stations and in the cars of the railroad company; and if no other notice is given, one who has bought tickets, by the package, in advance, in accordance with the advertisement, and has presented himself at the station to be carried, before the appointed hour for a train to start, without knowledge of the change of schedule, may recover damages for the injury caused him by the delay. And, in such case, the railroad can not exonerate itself by showing a usage on its part, for several years, to make occasional changes in the hours for certain trains to start, without other notice thereof than by handbills.

The postponement had been made for

§§ 2269-2273. Liability Based on Negligence—§ 2269. In General.

—A carrier of passengers is liable for the damages resulting to a passenger from negligent delay in transporting him to his destination.⁷⁴ And, as in other negligence cases, a carrier can not be held liable for delay in transporting a passenger to his destination unless its proximate cause was negligence for which the carrier is responsible.⁷⁵ But a carrier's responsibility with respect to running its passenger trains in conformity with its published timetables is not that of an insurer, and it can be held liable only for negligent failures to comply with them.⁷⁶ The rule seems to be that a carrier of passengers is liable for

the accommodation of passengers who desired to remain in Boston to attend places of amusements. Certain notices of the change had been given, but none of them had reached plaintiff. They were printed on handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. *Brown v. Eastern R. Co.* (Mass.), 11 Cush. 97; *Malone v. Boston, etc., R. Co.* (Mass.), 12 Gray 388, 74 Am. Dec. 598.

74. England.—*Buckmaster v. Great Eastern R. Co.* (Eng.), 23 L. T. 471, 3 Ry. & C. T. Cas. xxiv; *Great Northern R. Co. v. Hawcroft* (Eng.), 21 L. J. Q. B. 178, 16 Jur. 196; *Le Blanche v. London, etc., R. Co.* (Eng.), 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas. xxiii. **Illinois.**—*Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391.

Kentucky.—*Illinois Cent. R. Co. v. Head*, 119 Ky. 809, 15 R. R. R. 283, 27 Ky. L. Rep. 270, 38 Am. & Eng. R. Cas., N. S., 283, 84 S. W. 751; *Southern R. Co. v. Marshall*, 111 Ky. 560, 64 S. W. 418, 23 Ky. L. Rep. 813.

Mississippi.—*St. Clair v. Kansas City, etc., R. Co.*, 76 Miss. 473, 24 So. 904, 71 Am. St. Rep. 534.

New York.—*VanBuskirk v. Roberts*, 31 N. Y. 661.

South Carolina.—*Latour v. Southern Railway*, 71 S. C. 532, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379, 51 S. E. 265; *Miller v. Southern R. Co.*, 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99.

Texas.—*International, etc., R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356.

Virginia.—*Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

Detention in unhealthy climate.—A carrier of passengers is liable for the damages resulting from an unreasonable detention of a passenger at an intermediate point, in an unhealthy climate. So held in *VanBuskirk v. Roberts*, 31 N. Y. 661.

Train left standing in swampy place—Injury to health.—In *Weed v. Panama*

R. Co., 12 N. Y. Super. Ct. 193, affirmed in 17 N. Y. 362, it appeared that defendant carrier, to serve its own interests, left its train standing during the night in a swampy place, instead of running it promptly to its destination, as it was feasible to do. It was held that the passenger could recover against the carrier for injury to his health caused by such delay.

Carried only part of journey—Compelled to purchase tickets over another road—Mental suffering.—In *St. Louis, etc., R. Co. v. Berry*, 4 Texas App. Civ. Cas., § 166, 15 S. W. 48, it appeared that plaintiff purchased tickets over defendant's road for himself, his wife, and two children. Defendant carried them only part of the distance, and they were compelled to buy tickets over another road, and reached their destination after several days' delay. There they were detained some time awaiting for their baggage. The extra expense incurred on account of the delay was \$90. It was held that damages for mental suffering were recoverable, and that a verdict for \$500 was not excessive.

75. Savannah, etc., R. Co. v. Bonaud, 58 Ga. 180; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631; *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690.

Train derailed by storm because of delay.—In *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631, it appeared that when a train of cars was running three-quarters of an hour behind the usual, ordinary, and advertised time for the running of trains upon the road of the carrier, it was upset by a sudden gust of wind which crossed the track, but not that portion of the track where the train would have been if running on time, whereby a passenger was injured. It was held that such injury was not the natural result of the train being behind time, and that the damages sustained were too remote to be recovered against the carrier.

76. Gordon v. Manchester, etc., Railroad, 52 N. H. 596, 13 Am. Rep. 97; *Latour v. Southern Railway*, 71 S. C. 532, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379, 51 S. E. 265.

Carrier not required to be prepared to

only such delays as could have been prevented by reasonable care and diligence,⁷⁷ or, as some say, ordinary care.⁷⁸ It is also said that a carrier must exercise such care and effort to avoid delay to a passenger as is due under the circumstances.⁷⁹ Thus, it is said that as business engagements of the greatest moment often depend on the promptness of railroads in running on their schedule time, it is reasonable that something more should be required of them in this regard than the diligence and care which an ordinary prudent man would exercise in the conduct of his own affairs. Nevertheless, safety and promptness are not to be put on the same plane, for promptness must always yield to safety. The sound and reasonable rule is to require that care and effort to avoid delay which is due under the circumstances. In considering what is due care and effort, consideration is to be given to the immense public importance of prompt departure and arrival of trains, the ability of the particular railroad to meet the demands upon it, the degree of diligence in having engines and cars sufficient for the business of the roads, and any other facts that would tend to establish or disprove due care. A somewhat careful examination of the authorities leads to the conclusion that this is the sound principle, and that any effort to state a more definite rule would lead to confusion.⁸⁰ Of course, a carrier of passengers

accommodate extraordinary number of passengers.—*Gordon v. Manchester, etc., Railroad*, 52 N. H. 596, 13 Am. Rep. 97.

77. England.—*LeBlanche v. London, etc., R. Co. (Eng.)*, 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas. xxiii.

Kentucky.—*Southern R. Co. v. Miller*, 33 Ky. L. Rep. 505, 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311, 110 S. W. 351.

Nebraska.—*McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

South Carolina.—*Miller v. Southern R. Co.*, 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99.

A common carrier must use ordinary care to carry its passengers to their destination in a reasonable time, but is not responsible for delays caused by accidents that ordinary care may not guard against. So held in *Southern R. Co. v. Miller*, 33 Ky. L. Rep. 505, 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311, 110 S. W. 351.

Where a train is delayed, a passenger is not entitled to actual damages, unless the carrier's conduct was willful or negligent. So held in *Miller v. Southern R. Co.*, 69 S. C. 116, 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33, 48 S. E. 99.

Road obstructed by wrecked train.—In *Southern R. Co. v. Miller*, 33 Ky. L. Rep. 505, 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311, 110 S. W. 351, an action for negligent delay in transporting a passenger, it is said in the opinion: "If there was a wreck on the road, and this prevented the train from running into Burgin (the passenger's destination), the defendant (carrier) is not responsible for such delay as ensued which could not be avoided by ordinary care on its part."

78. A common carrier must use ordinary care to carry its passengers to their destination in a reasonable time, but is not responsible for delays caused by accidents that ordinary care may not guard

against. *Southern R. Co. v. Miller*, 110 S. W. 351, 33 Ky. L. Rep. 505, 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311.

79. So held in *Latour v. Southern Railway*, 71 S. C. 532, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379, 51 S. E. 265.

Failure to hold train for returning funeral party.—In *Southern R. Co. v. Marshall*, 111 Ky. 560, 64 S. W. 418, 23 Ky. L. Rep. 813, it is held that where a funeral party was delayed in returning home by a carrier's failure to comply with its contract to hold a train for them, the measure of damages in an action by one of the party to recover on account of the delay was such sum as would compensate plaintiff for any time he lost, or expense he incurred, or personal inconvenience or discomfort he suffered by reason of the delay.

Train wreck—Twenty-one hour delay.—In *International, etc., R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356, it appeared that defendant railroad contracted to transport plaintiff from P. to B. via S. on June 9, 1903. Plaintiff left P. at 8 a. m., and defendant's train was due to arrive at B. via S., at 4 p. m. Plaintiff arrived at S. about 1 p. m., and was there compelled to remain twenty-four hours for the train to B., by reason of an alleged wreck on that branch of defendant's road. It was held that such delay was unreasonable, and constituted a breach of defendant's contract to transport plaintiff without unreasonable delay.

80. *Latour v. Southern Railway*, 71 S. C. 532, 51 S. E. 265, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379; note to *Hansley v. Jamesville, etc., R. Co.*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; *Gordon v. Manchester, etc., Railroad*, 52 N. H. 596, 13 Am. Rep. 97.

Rationale of doctrine.—In *Gordon v. Manchester, etc., Railroad*, 52 N. H. 596,

can not be held responsible for delays caused solely by storms or other acts of God.⁸¹ Where a passenger is delayed by an unusual storm,⁸² or by washouts caused by a storm,⁸³ if the carrier promptly repaired its track as soon as the washout is discovered,⁸⁴ it can not be held liable in damages. And a carrier of passengers may be excused for delay in transportation caused by an inevitable

13 Am. Rep. 97, it is said in the opinion: "Undoubtedly, the 'representation made by railway companies in their timetables can not be treated as mere waste paper.' Lord Campbell, C. J., in *Denton v. Great Northern R. Co.* (Eng.), 5 El. & Bl. 860, 2 Jur., N. S., 185, 25 L. J. Q. B. 129. It must be conceded that such a public advertisement at least imposes on the defendants the obligation of using due care and skill to have their trains arrive and depart at the time thus indicated. For any want of punctuality which they could have avoided by the use of due care and skill to have their trains arrive and depart at the time thus indicated, they are unquestionably liable. Nor can they excuse a nonconformity to the timetable for any cause, the existence of which was known or ought to have been known to them at the time of publishing the table. 'They make the time advertised a criterion or ordinary reasonable time.' The publication of the timetable can not amount to less than this, viz., a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done by the use of due care and skill to accomplish that result. Does it go beyond this? Does it amount to an absolute and unconditional engagement that the trains shall arrive and depart at the precise moments indicated in the table? Does it make the company warrantors or insurers of punctuality, for delays which are due, not to their fault, but to pure accident? If these questions are answered in the affirmative, a very singular result will follow. Railroad companies will be under a much more onerous obligation to run punctually than to run safely. They may, then, on the same state of facts, be liable for the loss of an hour's time, and not liable for the loss of a year's time or for the loss of a limb."

81. *VanHorn v. Templeton*, 11 La. Ann. 52; *Compton v. Long Island R. Co.*, 1 N. Y. St. Rep. 554, 41 Hun 642; *Fitzgerald v. Midland R. Co.* (Eng.), 34 L. T., N. S., 771, 3 Ry. & C. T. Cas. xxii.

Snow fell in defendant's railroad yards to a level depth of almost a foot, and was blown by an unusually high wind into drifts three to five feet high, which became packed around the switch points, so that they could not be operated, and defendant, though it worked a large number of extra men in the yards throughout the night, was unable to clean out the switches so as to permit

trains to move, and the train on which a passenger arrived that evening was stalled some 600 feet or more from the depot. The tracks and yards were in perfect condition and capable of being used if not obstructed by snow and ice. Held, that the obstruction by the snow-storm was an "act of God," so as to relieve defendant from liability to the passenger for nondelivery. Judgment 110 N. Y. S. 1125, reversed in *Cormack v. New York, etc., R. Co.*, 90 N. E. 56, 196 N. Y. 442, 24 L. R. A., N. S., 1209, 17 Am. & Eng. Ann. Cas. 949.

82. **Unusual storm.**—A carrier agreeing to transport a passenger to a certain port, and then to convey him by steamboat to the place of destination, is not liable for delay occasioned by the failure of the steamboat to reach the point at the stipulated time, caused by an unusual storm. *Van Horn v. Templeton*, 11 La. Ann. 52.

A common carrier of passengers can not be held responsible for delays caused by storms and tempests without the intervention of human agency. *Compton v. Long Island R. Co.*, 1 N. Y. St. Rep. 554, 41 Hun 642.

Storm at sea.—Failure to have ship at intermediate point.—In *VanHorn v. Templeton*, 11 La. Ann. 52, it appeared that defendants agreed to convey plaintiffs from San Francisco to New Orleans, in about twenty-four days, connecting at San Juan, whence they were to be taken by the steamer *Daniel Webster* to New Orleans. Such steamer did not appear at San Juan for ten days after the arrival of plaintiffs. A violent storm at sea prevented defendants from having a steamship at San Juan in time. It was held that this was an inevitable accident and overpowering force, which exempted defendants from responsibility.

Not bound to forward passenger by special train.—In *Fitzgerald v. Midland R. Co.* (Eng.), 34 L. T., N. S., 771, 3 Ry. & C. T. Cas. xxii, it is held that where a railroad company has contracted to use due diligence to have a train reach a junction in time to catch a connecting train, and its failure to do so is the result of unavoidable causes, such as floods, it is not bound to forward a passenger by special train.

83. **Washout caused by a storm.**—*Compton v. Long Island R. Co.*, 1 N. Y. St. Rep. 554, 41 Hun 642.

84. **Prompt repaid.**—*Compton v. Long Island R. Co.*, 1 N. Y. St. Rep. 554, 41 Hun 642.

accident, due solely to human agency, and not properly an act of God, as where a train is delayed by the wreck of another train, caused without negligence.⁸⁵ Where the vehicle in which a passenger begins his journey, is wrecked,⁸⁶ or where the wreck of another vehicle prevents him from finishing his journey in the initial vehicle, such accidents not being due to the negligence of the carrier, the passenger can not recover if the carrier uses every effort at his command to circumvent the delay, and this is especially applicable where the passenger refuses to take advantage of the facilities the carrier places at his command.⁸⁷ Similar questions are usually left to the jury under proper instruction,⁸⁸ but it will not be presumed, in the absence of proof, that the carrier was in no way responsible for the wreck,⁸⁹ or that it used due diligence to repair the damage to its track and resume the operation of its trains.⁹⁰

Train Late When Passenger Boards.—A passenger, who knows that a train, because of a washout, was late when he boarded it, can not recover because of the carrier's failure to run the train on schedule time, in the absence of proof that the washout was due to its negligence.⁹¹

§ 2270. Wilful Delay.—Where a carrier, in order to prevent one of two rival steamship companies from getting passengers at its destination, leaves its train standing during the night at a low swampy place, instead of proceeding to its destination, as it could do, the carrier is liable for injuries to the health of the passengers, resulting from the delay.⁹²

§ 2271. Fault or Neglect of Agents.—A carrier contracting for the transportation of passengers is liable for damages arising from unreasonable delay along the route, occasioned by the fault or neglect of those legitimately engaged in the line of transportation.⁹³ Thus, it has been held that the fact that the delay was due to the wilful act of the carrier's agent or servant,⁹⁴ whether such act was ratified by the carrier or not,⁹⁵ will not excuse the car-

85. Act of God not necessary.—*Cormack v. New York, etc., R. Co.*, 196 N. Y. 442, 90 N. E. 56, 24 L. R. A., N. S., 1209, 17 Am. & Eng. Ann. Cas. 949.

86. A street car passenger instead of boarding a car which he was asked to take because of an accident to the car in which he was riding, remained in the car, which was placed upon a siding, and he remained in such car for an hour or more, held, that he was not entitled to recover from the carrier on the theory that there had been a violation of the contract of transportation. *Norton v. Union R. Co.*, 109 N. Y. S. 73, 58 Misc. Rep. 188.

87. *Norton v. Union R. Co.*, 109 N. Y. S. 73, 58 Misc. Rep. 188.

88. Plaintiff was a passenger on a train which was stopped by a wreck. She was notified that she would have to be transferred to the other side of the wreck, and was twice told by the conductor to get off for that purpose, but she concluded to remain in the car; a claim agent of the road who was in the car so advising her. The conductor was requested to inform her when the other train arrived. On being informed of its arrival, she started out at once, but was too late to catch it. She was taken back to her station without charge, and the money for her ticket refunded. Held, that liability for failure to carry her on her journey

should have been submitted to the jury, with an instruction that there could not be punitive damages, but only compensatory damages. *Alabama, etc., R. Co. v. Purnell*, 69 Miss. 652, 13 So. 472.

89. Presumption as to responsibility for wreck.—*International, etc., R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356.

90. Presumption of operation.—*International, etc., R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356.

91. Knowledge of passenger that train is late when boarding.—*Gerardy v. Louisville, etc., R. Co.*, 102 N. Y. S. 548, 52 Misc. Rep. 466.

92. Wilful delay.—*Weed v. Panama R. Co.*, 12 N. Y. Super. Ct. 193, affirmed in 17 N. Y. 362.

93. Fault or neglect of those in charge.—*Van Buskirk v. Roberts*, 31 N. Y. 661.

94. Wilful neglect of conductor.—A railroad company, in an action against it for damages caused by detention on its route of a passenger, can not defend by showing that the detention was the result of the wilful act of the conductor. *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474, affirming 12 N. Y. Super. Ct. 193.

95. In an action against a railroad corporation for its failure to transport a passenger with proper dispatch, it is no defense that the delay was caused by the

rier from liability. And a carrier of passengers may be responsible in damages from delays resulting from mistakes or negligence of ticket agents or other railroad employees in directing passengers as to the movements of trains or in regard to the proper trains to take passage on.⁹⁶ A person buying a railroad passenger ticket has the right, until otherwise informed, to rely upon information received by him from a ticket seller in a union depot who sold tickets furnished by the defendant railway company, as well as the tickets of other roads, as to the arrival, departure and running time of trains on defendant's road, provided he does not disregard other reasonable means of information.⁹⁷ But where, on sale of a ticket, the agent states that the train will make close connections at a certain point, it is not a guaranty of such connection.⁹⁸

Failure to Make Proper Connections.—Where a passenger with the conductor's knowledge continued on the train to another station for the purpose of making connection, and shortly after arrival a train left with which he could have made connection had the conductor informed him thereof, missing which he was delayed eight hours, resulting, in addition to the loss of time, in some bodily fatigue and some extra expense, he was entitled to recover therefor, if the delay was the result of the carrier's negligence.⁹⁹

Interruption of Journey.—Where a carrier is fully advised of quarantine, and a passenger asks of the conductor of one of its trains for information on the subject, it is liable for failing to give him information as to the quarantine,

willful act of defendant's agent or servant, whether such act is ratified by defendant or not. *Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388.

96. *Pittsburg, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703, 9 Am. R. Rep. 396; *Illinois Cent. R. Co. v. Pearson*, 80 Miss. 26, 31 So. 435; *St. Clair v. Kansas City, etc., R. Co.*, 76 Miss. 473, 24 So. 904, 71 Am. St. Rep. 534; *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 5 Am. & Eng. R. Cas., N. S., 238, 55 Am. St. Rep. 883.

97. So held in *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 5 Am. & Eng. R. Cas., N. S., 238, 55 Am. St. Rep. 883.

Information from ticket agent—Carried beyond destination.—If a person purchase a ticket expressly for a particular train, and at the time of the purchase he is informed by the agent of the railroad that it will stop at the station for which the ticket is purchased, he will be entitled to take passage on such train, and it will be the duty of the railroad company to allow him to leave the train at that station. So held in *Pittsburg, etc., R. Co. v. Nuzum*, 50 Ind. 141, 9 Am. R. Rep. 396, 19 Am. Rep. 703.

Misdirection and refusal to sell ticket—Ejected into cold weather.—A person who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, can recover for any injury proximately caused by being put out of the station into the cold weather, while waiting for the next train. So held in *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690.

Floods—Advised by conductor to travel on another road—Washouts.—In

Turner v. Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 5 Am. & Eng. R. Cas., N. S., 238, 55 Am. St. Rep. 883, it appeared that plaintiff purchased a ticket to his destination from defendant railway, and was delayed on the way by floods and high water on its railway. The omission of defendant to fulfill its engagement caused plaintiff to seek transportation, by the advice of defendant's conductor, over a second road, which carried him part of his way, when he was again delayed by washouts on the line of such second carrier. It was held that defendant was liable for the expense thereby incurred by plaintiff including that incident to the unavoidable delay on the line of the second carrier.

Failure of ticket agent to inform prospective passenger of existence of quarantine—Initial carrier's liability.—In *St. Clair v. Kansas City, etc., R. Co.*, 76 Miss. 473, 24 So. 904, 71 Am. St. Rep. 534, it is held that if a railroad ticket agent, knowing of quarantine regulations prohibiting travel on a particular route, of which his company is the initial carrier, other routes being open, induce a person who is ignorant of the facts to buy a ticket by such route, assuring him of noninterference in traveling on the ticket, and the purchaser is prevented from reaching his destination by quarantine officers and the employees of a connecting carrier, constituting a part of the route over which the ticket was sold, the initial carrier will be liable for the resulting damages.

98. So held in *Latour v. Southern Railway*, 71 S. C. 532, 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379, 51 S. E. 265.

99. **Failure to notify passenger of connecting trains.**—*Taber v. Seaboard, etc., Railway*, 81 S. C. 317, 62 S. E. 311.

which would manifestly make his uninterrupted journey impossible.¹

§ 2272. Interference by Third Persons.—A carrier is only required to exercise ordinary care and prudence to guard and protect its passengers against delays caused by the wrongful and illegal acts of third persons.² Hence, if the failure of the carrier to carry a passenger to his destination without delay is caused by the wrongful acts or interference of third persons, the carrier can not be held liable.³ But the mere fact that the carrier might be compelled to carry a number of other persons free of charge for whose conduct the passenger was in no way answerable is not sufficient to discharge the carrier from its liability. The carrier in such a case is obligated to perform its contract and public duty, unless it was prevented from doing so by something far more serious than the loss of a few fares from persons insisting on riding free of charge.⁴

§ 2273. Duty to Furnish Other Transportation.—Since, without negligence, a carrier is not liable for a failure to forward passengers on schedule time, a railroad company is not bound by its conductor's promise to furnish a passenger other transportation, where a train has been delayed by a washout for which the company is not to blame.⁵ And it is held that a passenger upon an electric car which is unreasonably delayed, has no right to insist upon riding, without the payment of another fare, upon another car of the same road in order to sooner reach his destination, but if the carrier refuses to make the desired transfer, his remedy is an action for damages for breach of the railway's contract with him.⁶

§ 2274. Special Contracts as to Time.—Neither a ticket agent selling a ticket to a passenger nor a conductor taking up the ticket has authority to make a special contract binding the carrier to carry the passenger on schedule time.⁷

§ 2275. Effect as to Limited Tickets.—Where the carrier's delay causes a limited ticket to expire before the passenger can use it for the completion of her journey, according to the original contemplation, she is entitled to an extension of the time limit so it may be so used.⁸

1. Interruption of journey.—*Hassel-tine v. Southern Railway*, 75 S. C. 141, 55 S. E. 142, 6 L. R. A., N. S., 1009.

2. Leclair v. Tacoma R., etc., Co., 62 Wash. 157, 113 Pac. 268, citing *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519.

3. Leclair v. Tacoma R., etc., Co., 62 Wash. 157, 113 Pac. 268.

4. Leclair v. Tacoma R., etc., Co., 62 Wash. 157, 113 Pac. 268.

That a number of persons boarded a car on which plaintiff was a passenger and demanded free transportation, which the railroad company was under no obligation to give them, and that the company's employees were unable to eject them because of their number, did not excuse a breach of the contract of carriage between the company and plaintiff. *Leclair v. Tacoma R., etc., Co.*, 62 Wash. 157, 113 Pac. 268.

5. Duty to furnish other transportation.—*Houston, etc., R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. 201.

6. Car delayed—Right to transfer to another car.—*Taylor v. Nassau Elect. R. Co.*, 53 N. Y. S. 5, 32 App. Div. 486.

7. Power to make contract.—*Gerardy v. Louisville, etc., R. Co.*, 102 N. Y. S. 548, 52 Misc. Rep. 466.

A statement by a ticket agent, on selling a ticket to a passenger, that the train was late, but would make up for lost time and arrive at its destination on time, and a similar statement by the conductor on taking up the ticket, do not establish a special contract binding the carrier to carry the passenger on schedule time. *Gerardy v. Louisville, etc., R. Co.*, 102 N. Y. S. 548, 52 Misc. Rep. 466.

8. A round trip ticket between S. and G. limited to four days from date of issuance having been purchased by plaintiff for his wife, and she having left G. in time to return to S. within the time limit of the ticket, there was a delay so that she missed the train connecting at F. for S. There was another train leaving F. on that day, but it did not run through to S., and she waited until the next day, her ticket having expired the day before, when she took the train running through from F. to S. Held, that she was not bound to take the train which would not carry her through to S., and was entitled

§§ 2276-2350. Nature of Liability and Degree of Care Required—

§ 2276. Nature of Liability in General.—The duty of a carrier of passengers is to carry safely and deliver the passengers,⁹ and this duty is initiated by the acceptance of the passengers by the carrier for transportation,¹⁰ and when the duty once begins the carrier can not be excused therefrom because of the existence of facts which authorized it to refuse to accept the passenger in the first instance,¹¹ but this duty of a carrier to exercise a high degree of care for the safety of a passenger ordinarily continues until such passenger is discharged.¹²

§ 2277. Liability of Act of God or Public Enemy.—General Rule Stated.—Public carriers of passengers, equally with common carrier of goods, come within the application of the general rule that when the law imposes a duty upon any person, the performance shall be excused if rendered impossible without any default on his part, by the act of God or the public enemy.

Act of God.—As in other branches of the law, the courts have not always been particular to draw the distinction which should, according to some authorities, be observed between acts of God and inevitable accidents, but have used the expressions interchangeably. For example, it has been said that “a company would not be guilty of such culpable negligence as to make it liable in damages if it failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been rea-

to ride from F. to S. on her ticket on the day she presented it. *Stevens v. Wichita Valley R. Co.*, 45 Tex. Civ. App. 196, 100 S. W. 807.

9. Nature of liability in general.—*Hannibal Railroad v. Swift* (U. S.), 12 Wall. 262, 20 L. Ed. 423; *Stauffer v. Metropolitan St. R. Co.* (Mo.), 147 S. W. 1032.

The contract between a carrier and passenger for hire is that the carrier will transport the passenger to his destination in safe and sound cars, equipped with all necessary and proper appliances, operated in a safe and proper manner, and without injury. *Burgoyne v. Chicago City R. Co.*, 187 Ill. App. 59.

It is the duty of the common carrier to safely and securely carry persons who bear to it the relation of passenger. *St. Louis, etc., R. Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. 58, affirmed in 95 Tex. 685, no op.

The carrier undertakes to transport the passenger safely from the initial point of transportation to the place of destination. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Missouri, etc., R. Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447.

10. Duty initiated.—See ante, “Relation of Carrier and Passenger,” chapter 21.

11. Duty where carrier could have refused to accept passenger.—If a common carrier of passengers and of goods and merchandise have reasonable ground for refusing to receive and carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground if desirous of avoiding responsibility. If not thus insisting, he receives the passengers and

their baggage and other property, his liability is the same as though no ground for refusal existed. *Hannibal Railroad v. Swift* (U. S.), 12 Wall. 262, 20 L. Ed. 423.

12. Termination of duty.—*Williamson v. Central, etc., R. Co.*, 127 Ga. 125, 56 S. E. 119. See *Central R. Co. v. Whitehead*, 74 Ga. 441; *Southern R. Co. v. Wright*, 6 Ga. App. 172, 64 S. E. 703; *Ashtabula Rapid Transit Co. v. Holmes*, 67 O. St. 153, 65 N. E. 877.

Where a person is entitled to passage on a train, he has a right to the protection due a passenger until he has safely alighted by the proper egress. *Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

The duty of a carrier of passengers to exercise the degree of care exacted of it by law for the passengers safety, continues until the contract of carriage is complete, and terminated by delivery of the passenger at the terminus of his journey uninjured. *El Paso Elect. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

If a railway company furnishes, though without charge, transportation to a civil officer, to a point which he may designate as necessary to the discharge of an official duty, the same liability which it assumes to transport him safely to the place he first designated, will attach to the company for his safe carriage to any point beyond, to which he deems it necessary to go for the proper performance of his duty, and to which its servants having charge of him as a passenger, voluntarily transport him. *International, etc., R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

sonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. In such case injury can not be held to be attributable to any fault or negligence of the company; it results from inevitable accident—vis major—the act of God.”¹³ Unquestionably, no liability attaches to carriers of passengers for accidents caused by the occurrences which are designated by these terms. If an accident results, without any negligence on the part of the carrier, from extraordinary and unprecedented weather, no liability attaches.¹⁴ A carrier of passengers by railroad is not responsible for accidents resulting from extraordinary and unprecedented floods, the consequences of which could not have been avoided by due care and diligence on the part of the carrier.¹⁵ Thus, where an accident resulted from a washout, caused, as witnesses testified, by “the hardest rain at and about the locality of the accident which any of the witnesses had ever seen in that part of the county,” and it appeared that the section boss had passed over the track but a short time before the accident and found it safe, it was held that the court should have charged the jury that the company was not responsible unless those in charge of the train knew of the washout.¹⁶ The derailment of a train by a snow slide, proceeding from a cause over which the company had no control, and under circumstances which it was bound neither to anticipate nor to expect, and against which, under the circumstances, it was not bound to make provision, has been declared to be an inevitable accident, and it has been held that the carrier could not be held responsible for injuries resulting therefrom to passengers.¹⁷ But a landslide or washout, which is caused by a fall of rain which is not of unusual violence, is not properly an act of God, but an event against which it is the duty of the carrier to guard.¹⁸ And, of course, in order to relieve the carrier from liability for the consequence of an act of God, the extraordinary occurrence must alone have been sufficient to produce the given result, without any concurring negligence on the part of the carrier.¹⁹

13. *Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

A common carrier as well as an individual is excused from responsibility for injuries caused by an act of God. *Briggs v. Durham Tract. Co.*, 147 N. C. 389, 61 S. E. 373.

Plaintiff, while riding in the caboose of a freight train, was injured by a derailment of the train. The train had previously encountered a hard rain, with high winds, and at the place where it was wrecked it encountered a cyclone which passed over the right of way; its path extending from 250 to 400 yards in width and 7 or 8 miles in length. The cyclone unroofed, wrenched from their foundations, and destroyed houses, and its force stopped the train, wrenched and lifted the cars from their trucks, and hurled one of them a distance of 150 feet into a field beyond, and when it struck the ground whirled it around like a top. Only the engine and three heavy iron-tanked oil cars remained on the track. Held, that the wreck was the result of an act of God, for which the carrier was not responsible. *Galveston, etc., R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177.

14. *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411, 37 Am. & Eng. R. Cas. 135; *Missouri Pac. R. Co. v. John-*

son, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128; *Connelly v. Manhattan R. Co.*, 60 Hun 495, 39 N. Y. St. Rep. 561, 15 N. Y. S. 176.

15. *Ellet v. St. Louis, etc., R. Co.*, 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324; *San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. 517; *Norfolk, etc., R. Co. v. Marshall*, 90 Va. 836, 20 S. E. 823.

16. *International, etc., R. Co. v. Halloran*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

17. *Denver, etc., R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518.

18. *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, reversing 5 Mackey (16 D. C.) 356; *Texas, etc., R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698.

19. *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

A carrier is liable for injuries to a passenger though the immediate cause thereof was an act of God, where the negligence of the carrier concurred in any degree in causing the injuries. *Sandy v. Lake St., etc., R. Co.*, 85 N. E. 300, 235 Ill. 194, affirming judgment *Lake St. Elevated R. Co. v. Sandy*, 137 Ill. App. 244.

An act of God will not excuse a carrier

Thus where a freight train, standing on a side track, was driven partly upon the main track by a violent storm and was run into by a passenger train, injuring plaintiff, it was held that, since the passenger train could have been flagged by an employee of defendant, who discovered the dangerous position of the freight cars, had he exercised proper diligence, the defense that the accident resulted from the act of God could not avail defendant, assuming that the storm was of a character properly to be denominated an act of God.²⁰ The non-performance of a contract of transportation is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal or precise performance of it impossible.²¹

Act of the Public Enemy.—If a railroad bridge crossing a river is burned by the public enemy a few hours before the passing of a train, and in consequence thereof the train is precipitated into the river, without any negligence on the part of the railroad or its employees, there can be no recovery for injuries sustained in the accident by a passenger.²²

§§ 2278-2279. Liability as Insurer—§ 2278. In General.—In a few early cases, both in England and the United States, it seems to have been assumed that the common-law liability of carriers of passengers is the same as that of carriers of goods.²³ But that this line of decision is no longer considered

from liability imposed by law, unless the injury could not have been prevented by any reasonable foresight or care. *Black v. Charleston, etc., R. Co.*, 69 S. E. 230, 87 S. C. 241, 31 L. R. A., N. S., 1184.

^{20.} *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614.

^{21.} Defendant, a public carrier of passengers, contracted to carry plaintiff from one place to another, agreeing to carry him over the last part of the specified route by a particular steamer. The steamer named was wrecked by the act of God. It was held that, notwithstanding the loss or wrecking of the steamer, it was the duty of defendant to exercise all due diligence in providing another vessel for the carriage of plaintiff, and that, for a failure so to do, defendant was liable in damages. *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

^{22.} *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

^{23.} In the case of *White v. Bolten*, Peake 113, which was decided in 1791 and seems to be the first reported case involving the question of the liability of a carrier for injuries to passengers, Lord Kenyon said that proprietors of mail coaches, when they carry passengers, "are bound to carry them safely and properly."

And in the case of *Bremner v. Williams*, 1 Car. & P. 414, decided in 1824, Best, C. J., said he considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is the duty to examine it previous to the commencement of every journey." Another early English case which goes far to support the view that the liability of carriers of passengers and of carriers of goods is the same, as that of *Sharp v. Grey*, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured.

There the axle was an iron bar inclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement that the defect could not have been seen on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of the different judges would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. Gaselee, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J., said: "The chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence, upon the same principle as a shipowner who furnishes a vessel which is not seaworthy." And Alderson, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The jury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a

authority, is a proposition in regard to which there can now be no question,²⁴ and it may be laid down as a general rule that a carrier of passengers although bound to a high degree of care is not, in the absence of statute, an insurer of the passenger's safety,²⁵ and is only responsible for its own negligence in caus-

coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

In the New York case of *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination.

The only authority cited to sustain the decision was the above-cited English case of *Sharp v. Grey*, 9 Bing. 457.

But in the later English case of *Readhead v. Midland R. Co.*, L. R., 2 Q. B. 412, L. R., 4 Q. B. 379, 36 L. J. Q. B. 181, 38 L. J. Q. B. 169, 5 Eng. Rul. Cas. 436, Mr. Justice Smith, writing the opinion of the court when the case came before the Exchequer Chamber, in alluding to and dissenting from the New York case, points out that no authority for the broad doctrine therein laid down is to be found in *Sharp v. Grey*.

In the California case of *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135, after citing the cases of *Miles v. Johnson* (S. C.), 1 McCord 157; *Cohen v. Hume* (S. C.), 1 McCord 439, *Rutherford v. McGowen* (S. C.), 1 Nott & McC. 17, and *Fisher v. Clisbee*, 12 Ill. 344, to the proposition that "the law regards ferry-men as common carriers, and has imposed upon them the same duties and liabilities," the court said: "The principle deduced from these authorities is that as soon as the ferry-man signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring, except by act of God or the public enemy."

24. *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705.

New York decisions.—The New York case *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, was in conflict with the previous case, in the same court, of *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517.

And in the still later case of *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, affirming 65 Barb. 32, *Andrews, J.*, after holding that carriers of passengers are not insurers, said: "Some remarks, which seem adverse to this view, were made by the learned judge

who delivered the opinion in *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, but the subsequent cases show that it was not the intention of the court to depart from the established doctrine upon the subject."

Pennsylvania decisions.—In *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581, *Agnew, J.*, in delivering the opinion of the court said: "*Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, holding that a carrier is bound absolutely to provide a safe vehicle, irrespective of any question of negligence, is not in accord with the American cases generally, or the modern English decisions."

25. Not an insurer.—*Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

Alabama.—*Culberson v. Empire Coal Co.*, 156 Ala. 416, 47 So. 237.

Arkansas.—*Oliver v. Fort Smith Light, etc., Co.*, 89 Ark. 222, 116 S. W. 204; *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648.

Connecticut.—*Thorson v. Groton, etc., St. R. Co.*, 85 Conn. 11, 81 Atl. 1024; *Kebbe v. Connecticut Co.*, 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167.

Delaware.—*People's R. Co. v. Baldwin* (Del.), 7 Pen. 383, 72 Atl. 979; *Braunstein v. People's R. Co.*, 2 Boyce's (25 Del.) 55, 78 Atl. 609; *Coyle v. People's R. Co.* (Del.), 7 Pen. 454; 80 Atl. 638; *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369; *Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040; *Butler v. Wilmington City R. Co.*, 2 Boyce's (25 Del.) 262, 78 Atl. 871; *Duggan v. New Jersey, etc., Ferry Co.* (Del.), 7 Pen. 318, 76 Atl. 636; *Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793.

Florida.—*Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

Illinois.—*Chicago, etc., R. Co. v. Flynn*, 131 Ill. App. 502; *Barnes v. Danville St. R., etc., Co.*, 235 Ill. 566, 85 N. E. 921.

Indiana.—*Louisville, etc., Tract Co. v. Korbe*, 175 Ind. 450, 93 N. E. 5.

Kentucky.—*Chesapeake, etc., R. Co. v. Burke*, 147 Ky. 694, 145 S. W. 370, Ann. Cas. 1913D, 208.

Massachusetts.—*Glennen v. Boston Elevated R. Co.*, 207 Mass. 497, 93 N. E. 700, 32 L. R. A., N. S., 470; *Beattie v. Boston Elevated R. Co.*, 201 Mass. 3, 86 N. E. 920; *Tompkins v. Boston Elevated R. Co.*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A., N. S., 1063.

Michigan.—*Keeley v. City Elect. R. Co.* (Mich.), 133 N. W. 1085.

Missouri.—*Canaday v. United R. Co.*, 134 Mo. App. 282, 114 S. W. 88; *Stauffer*

ing injury to a passenger.²⁶ By the common law, there is a marked distinction between the liability of common carriers of goods and carriers of passengers. For the obvious reason that a great difference exists between the inherent nature of persons and of goods, the passengers being capable, in a measure, of exercising that vigilance and foresight in the maintenance of their rights which the

v. Metropolitan St. R. Co. (Mo.), 147 S. W. 1032; *Rice v. Chicago, etc., R. Co. (Mo. App.)*, 131 S. W. 374.

New Hampshire.—*Boucher v. Boston, etc., Railroad*, 76 N. H. 91, 79 Atl. 993, 34 L. R. A., N. S., 728.

New York.—*O'Neil v. New York, etc., R. Co.*, 106 N. Y. S. 128, 121 App. Div. 487.

North Carolina.—*Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212; *Marable v. Southern R. Co.*, 142 N. C. 557, 55 S. E. 355; *Briggs v. Durham Tract. Co.*, 147 N. C. 389, 61 S. E. 373.

Ohio.—*Railroad Co. v. Anderson*, 21 O. C. C. 288, 11 O. C. D. 765; *Ferrell v. C., H. & D. R. Co.*, 12 Wkly. L. Bull. 234, 9 O. Dec. Reprint 361.

Pennsylvania.—*Carothers v. Pittsburg R. Co.*, 229 Pa. 558, 79 Atl. 134.

Tennessee.—*Southern R. Co. v. Brooks*, 125 Tenn. 260, 143 S. W. 62; *Nashville, etc., R. Co. v. Elliott*, 41 Tenn. (1 Coldw.) 611, 78 Am. Dec. 506.

Texas.—*International, etc., R. Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829; *International, etc., R. Co. v. Clark*, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op.; *St. Louis, etc., R. Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38, affirmed in 97 Tex. 645, no op.; *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576; *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *St. John v. Gulf, etc., R. Co. (Tex. Civ. App.)*, 80 S. W. 235.

Utah.—*Christensen v. Oregon, etc., R. Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

Vermont.—*Parker v. Boston, etc., Railroad*, 84 Vt. 329, 79 Atl. 865.

Virginia.—*Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

West Virginia.—*Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325; *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

The law does not impose on carriers the duty of absolutely warranting the safety of passengers, and for casualties against which human sagacity can not provide, nor the utmost prudence prevent, a carrier is not liable. *Irwin v.*

Louisville, etc., R. Co., 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

A carrier of passengers for hire is required to use a high degree of care to prevent injury to his passengers, but is not required to protect them from every injury, and, in an action by a passenger for personal injuries, it was error to charge that the carrier owed the passengers the duty to use "such a degree of care as would be necessary under all the circumstances of the case as would prevent injury to the passengers;" such charge making the carrier an insurer. *Carothers v. Pittsburg R. Co.*, 79 Atl. 134, 229 Pa. 558.

A charge that railway companies, in carrying passengers, do not become insurers of their safety, and are not liable for injuries which result from an accident produced by a latent defect in machinery or roadbed, which could not have been foreseen or guarded against by due care, and, if the wreck was accidentally caused by some unexplained defect which could not have been provided against by defendants by the exercise of such care as reasonably cautious persons would have exercised under the circumstances, plaintiff could not recover, is correct, with a further explanation as to what prudence and care reasonably cautious persons would have exercised under the circumstances. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

"While a carrier of passengers is liable for injuries resulting from the slightest negligence on its part, it is not an insurer of their safety against all contingencies except those arising from the act of God and the public enemy as are carriers of goods. For an injury happening to the person of passenger without fault on the carrier's part it is not responsible. As the law does not presume that anyone has been negligent, it is always necessary, in order to recover against a common carrier on that ground, to prove negligence, either directly or by evidence of facts from which it may be reasonably presumed." *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

²⁶ A carrier, though held to strict care in the safe transportation of passengers, is not an insurer of their safety, and is only responsible for its own negligence in causing injury to a passenger. *Reiss v. Wilmington City R. Co. (Del.)*, 67 Atl. 153. See post, "Liability Based on Negligence," § 2279.

owners of goods, who have entrusted them to others, can not do,²⁷ carriers of passengers are not, like carriers of goods, insurers against everything but the acts of God and the public enemies.²⁸ Owners of vessels engaged in carrying

27. As distinguished from carriers of goods.—*Georgia*.—*Wright v. Georgia R. Co.*, 34 Ga. 330.

Massachusetts.—*Hubbard, J., in Ingalls v. Bills (Mass.)*, 9 Metc. 1, 43 Am. Dec. 346.

Mississippi.—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

Tennessee.—*Railroad v. Mitchell*, 58 Tenn. (11 Heisk.) 400.

The common carrier of goods has actual possession of and absolute control over them, and is an insurer against loss or damage, except when occasioned by the act of God or a public enemy, while the carrier of passengers is only bound to the exercise of care; so that, in case of injury to a passenger over whose conduct the carrier has no physical control, his own misconduct bars his remedy, whether the injury was caused by the concurring negligence of the carrier or the joint negligence of the carrier and others; but in the case of goods, where the thing carried is incapable of contributory negligence, the law requires its safety to be insured. *Transfer Co. v. Kelly*, 36 O. St. 86, 38 Am. Rep. 558.

The liability of a common carrier, for injury to a passenger, is somewhat different from his liability for goods. The latter he stores away at his own discretion, the former is a sufficient being, and has certain duties of his own to perform. *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409.

As to the liability of carriers of goods as insurers, see ante, "Carriers of Goods," Part II.

28. United States.—*Boyce v. Anderson (U. S.)*, 2 Pet. 150, 7 L. Ed. 379; *Stokes v. Saltonstall (U. S.)*, 13 Pet. 181, 10 L. Ed. 115; *Washington, etc., R. Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *Dunlap v. Steamboat Reliance*, 2 Fed. 249; *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10922.

Alabama.—*Louisville, etc., R. Co. v. Mulder*, 149 Ala. 676, 42 So. 742.

California.—*Fairchild v. California Stage Coach Co.*, 13 Cal. 599; *Nagle v. California, etc., R. Co.*, 88 Cal. 86, 25 Pac. 1106.

Connecticut.—*Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319.

Georgia.—*Central, etc., R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Illinois.—*Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483; *Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578.

Kentucky.—*Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591, 9 Ky. L. Rep. 22.

Maine.—*Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

Maryland.—*Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Massachusetts.—*Ingalls v. Bills (Mass.)*, 9 Metc. 1, 43 Am. Dec. 346; *Shattuck v. Rand*, 142 Mass. 83, 7 N. E. 43.

Michigan.—*Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103, 72 N. W. 1112; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Missouri.—*O'Connell v. St. Louis, etc., R. Co.*, 106 Mo. 482, 17 S. W. 494; *Gilson v. Jackson County Horse R. Co.*, 76 Mo. 282, 12 Am. & Eng. R. Cas. 132; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

Montana.—*Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; *Foley v. Brunswick Tract. Co.*, 66 N. J. L. 637, 50 Atl. 340, 23 Am. & Eng. R. Cas., N. S., 621.

New Jersey.—*New Jersey Tract. Co. v. Gardner*, 58 N. J. L. 176, 31 Atl. 893.

New York.—*Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, 18 N. E. 859, 37 Am. & Eng. R. Cas. 150, 2 L. R. A. 252; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, affirming 65 Barb. 32; *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258.

Pennsylvania.—*Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Loring v. Colder*, 8 Pa. 479, 49 Am. Dec. 533.

South Carolina.—*Renneker v. South Carolina R. Co.*, 20 S. C. 219, 18 Am. & Eng. R. Cas. 149.

Tennessee.—*Railway Co. v. Manchester Mills*, 88 Tenn. (4 Pickle) 653, 14 S. W. 314.

Texas.—*International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829; *Gulf, etc., R. Co. v. Killebrew*, 85 Tex. 386, 20 S. W. 182, 20 S. W. 1005; *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *San Antonio, etc., R. Co. v. Lynch (Tex. Civ. App.)*, 55 S. W. 517; *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128;

passengers assume obligations somewhat different from those whose vehicles or vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some respects less extensive and more qualified than in the latter, as the owners of the vehicle or vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive, and perhaps even more stringent.²⁹ Consequently instructions which, in effect, hold carriers of passengers liable as insurers against injuries to passengers are erroneous.³⁰ Similarly, a charge requiring the use of reasonable and proper care and prudence by the employees of a defendant railroad company as to carry with safety those who ride on its cars, has been regarded as not being "plain and free from cavil."³¹ In a case in which the trial court had charged the jury that while railroad companies are not to be regarded as the insurers of the safety of their passengers, still they are required to use the utmost care and provide for the safety of their passengers, and the failure to use such care and caution is negligence, the reviewing court, in holding that the charge was inconsistent and erroneous, said that it was not the duty of the railway company to provide for the safety of its passengers, but to use the highest degree of care to that end.³² But it has been held that a charge that an inspection of

Albright *v.* Penn., 14 Tex. 290; Texas, etc., *R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

Vermont.—Hadley *v.* Cross, 34 Vt. 586, 80 Am. Dec. 699; Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

Virginia.—Farish & Co. *v.* Reigle, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

29. Passenger vessel distinguished from carrier of goods.—Washington, etc., *R. Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061; *Stokes v. Saltonstall* (U. S.), 13 Pet. 181, 10 L. Ed. 115.

"It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent, that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that so far as human care and foresight can go, he will transport them safely." *Stokes v. Saltonstall* (U. S.), 13 Pet. 181, 10 L. Ed. 115.

30. Texas, etc., *R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

An instruction to the effect that a carrier of passengers is liable for an injury from a defect in a vehicle unless he has used the "greatest possible care and diligence that was necessary" is erroneous for the reason that it requires the carrier to be gifted with prescience and to know what no human skill and foresight would reveal, and, in effect, makes the carrier an insurer of the life and limb of the passenger. *Gilson v. Jackson County Horse R. Co.*, 76 Mo. 282, 12 Am. & Eng. R. Cas. 132.

And, on the same ground, a charge

which, in effect, stated that it was the duty of the defendant railroad company, as a carrier of passengers, to carry the plaintiff safely has been held to be erroneous. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

31. Dallas Consol. Tract. R. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925.

32. Houston, etc., R. Co. v. Greer, 22 Tex. Civ. App. 5, 53 S. W. 58.

In a suit by a passenger for personal injuries caused by the wrecking of a train, it is reversible error to charge that, while railroad companies are not insurers of the safety of their passengers, still they are required to use the utmost care, "and to provide for the safety of their passengers," and the failure to use such care is negligence. *Houston, etc., R. Co. v. Greer*, 53 S. W. 58, 22 Tex. Civ. App. 5.

In *International, etc., R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240, the trial court charged the jury as follows: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." While the judgment below was reversed largely upon other grounds, in commenting upon this charge, Stayton, A. J., in delivering the opinion of the court, said: "The judge who tried this cause certainly did not intend to inform the jury that a carrier of passengers must use such care as will actually result in the safe carriage of passengers, and that the exercise of a degree of care which does not accomplish that result was negligence for which the carrier would be liable; for this would be to make the carrier an insurer. The charge is susceptible of such a construction, and may

cars and appliances must be sufficient to insure the safety of passengers against accident is not capable of the construction that the word "insure" was meant in the limited sense that the company was an insurer; the court further explaining that the company must exercise such duty of inspection as in the judgment of those who understood the subject was sufficient to insure, etc.³³

Under Statute.—The carrier's liability may be extended by statute to embrace all cases except where the injury is due to the criminal negligence of the passenger or his violation of an express rule of the carrier actually brought to his notice, and a corporation accepting a charter under the laws of a state whose statutes so provide can not complain that they are invalid.³⁴

Injury to Slaves.—The doctrine of common carriers, as to goods, does not apply to the carriage of slaves, and the carrier is not liable for the loss of, or injury to, slaves, unless the injury has been caused by the negligence or unskillfulness of himself or his agents.³⁵

Distinguished from Care Owed to Strangers or Trespassers.—A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligation of both the company and the passenger.³⁶

§ 2279. Liability Based on Negligence.—In the absence of some statute otherwise providing, the liability of carriers of passengers depends solely upon negligence; no responsibility attaches to a passenger carrier for any injuries to passengers except those which are the proximate result of the negligence or

have been so understood by the jury; it is likely, however, in view of the facts, that the jury were not misled by this, when considered in connection with the one which followed it."

33. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125, 67 N. Y. S. 985.

34. Extension of liability by statute to all cases except where passenger criminally negligent, etc.—*Chicago, etc., R. Co. v. Zerneck*, 183 U. S. 582, 76 L. Ed. 339, 22 S. Ct. 229; *Chicago, etc., R. Co. v. Eaton*, 183 U. S. 589, 46 L. Ed. 341, 22 S. Ct. 228.

What is criminal negligence within meaning of statute.—"In *Omaha, etc., R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114, the words of the statute exempting railroad companies from liability, 'where the injury done arose from the criminal negligence of the persons injured,' were defined to mean 'gross negligence,' 'such negligence as would amount to a flagrant and reckless disregard,' by the passenger, of his own safety, and 'amount to a willful indifference to the injury liable to follow.' This definition was approved in subsequent cases." *Chicago, etc., R. Co. v. Zerneck*, 183 U. S. 582, 76 L. Ed. 339, 22 S. Ct. 229.

35. Injury to slaves.—*Mitchell v. Western, etc., R. Co.*, 30 Ga. 22.

Power to control.—The carrier of passengers has, in the carriage of slaves, no

supervision or control of them and has no right to restrain a slave passenger in the exercise of his right of locomotion by using chains or other violent means, unless there has been an express stipulation granting it this power. *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22.

The slave has volition and feelings, which can not be entirely disregarded or overlooked in conveying him from place to place. He can not be stored away like a common package. The carrier has not, and can not have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, and not a package of goods. He is, in fact, a passenger, paid for as a passenger, and so treated and held, not only by defendant, but by plaintiff. *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22.

• Liable only for gross neglect.—If a slave is taken on board the cars by a carrier to be conveyed solely from motives of humanity and in consequence of his distress, no reward, hire or freight being charged for his passage, a carrier will be responsible only for gross neglect. *Macon, etc., R. Co. v. Holt*, 8 Ga. 157.

36. Distinguished from care owed to strangers or passengers.—*Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 18 S. Ct. 68, 42 L. Ed. 491.

willful wrong of the carrier or his agents.³⁷ A common carrier of passengers

37. Injuries not arising from negligence.—*United States*.—*Stokes v. Saltonstall* (U. S.), 13 Pet. 181, 10 L. Ed. 115.

England.—*Park, J.*, in *Crofts v. Waterhouse*, 3 Bing. 321.

Delaware.—*Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369; *Freeman v. Wilmington, etc.*, Tract. Co. (Del.), 80 Atl. 1001; *Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793; *Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040.

Georgia.—*Murphy v. Atlanta, etc.*, R. Co., 89 Ga. 832, 15 S. E. 774.

Kansas.—*Atchison, etc.*, R. Co. *v. Flinn*, 24 Kan. 627, 1 Am. & Eng. R. Cas. 240.

Maryland.—*Baltimore, etc.*, R. Co. *v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Baltimore, etc.*, R. Co. *v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Stockton v. Frey* (Md.), 4 Gill 406, 45 Am. Dec. 138.

Massachusetts.—*Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346; *Sanderson v. Boston Elevated R. Co.*, 194 Mass. 337, 80 N. E. 515.

Michigan.—*Moore v. Saginaw, etc.*, R. Co., 115 Mich. 103, 72 N. W. 1112; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453; *Mitchell v. Chicago, etc.*, R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; *Grand Rapids, etc.*, R. Co. *v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Missouri.—*Olsen v. Citizens' R. Co.*, 152 Mo. 426, 54 S. W. 470; *Hite v. Metropolitan, etc.*, R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; *Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240, 90 Am. Dec. 382.

New Jersey.—*Foley v. Brunswick Tract. Co.*, 66 N. J. L. 637, 50 Atl. 340, 23 Am. & Eng. R. Cas., N. S., 621.

New York.—*Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988, reversing 44 N. Y. S. 742, 16 App. Div. 152; *Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252, 37 Am. & Eng. R. Cas. 150; *Kelly v. New York, etc.*, R. Co., 109 N. Y. 44, 15 N. E. 879; *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, criticising *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258. And see *Camden, etc.*, Transp. Co. *v. Burke* (N. Y.), 13 Wend. 611, 28 Am. Dec. 488.

North Carolina.—*Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212; *Marable v. Southern R. Co.*, 142 N. C. 557, 55 S. E. 355.

Ohio.—*Cleveland, etc.*, R. Co. *v. Osborn*, 66 O. St. 45, 63 N. E. 604.

Pennsylvania.—*Fredericks v. Northern Cent. Railroad*, 157 Pa. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306; *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Pittsburgh, etc.*, R. Co. *v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Barlick v. Baltimore, etc.*, R. Co., 41 Pa. Super. Ct. 87.

South Carolina.—*Wade v. Columbia, etc.*, Power Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676.

Tennessee.—*Railroad v. Mitchell*, 58 Tenn. (11 Heisk.) 400; *Railway Co. v. Manchester Mills*, 88 Tenn. (4 Pickle) 653, 660, 14 S. W. 314.

Texas.—*Missouri, etc.*, R. Co. *v. Hay*, 28 Tex. Civ. App. 318, 67 S. W. 171; *Dallas Consol. Elect. St. R. Co. v. Ison*, 83 S. W. 408, 37 Tex. Civ. App. 219; *Houston, etc.*, R. Co. *v. Steward*, 21 Tex. Civ. App. 33, 50 S. W. 580; *Boyles v. Texas, etc.*, R. Co. (Tex. Civ. App.), 86 S. W. 936.

Virginia.—*Reynolds v. Richmond, etc.*, R. Co., 92 Va. 400, 23 S. E. 770.

Thus, where a passenger on a street railway car was thrown from the car and injured by the sudden stopping of the car in the effort to avoid a collision, and by the shock of a collision which was not brought about by the negligence of the defendant, it is *damnum absque injuria*. *Cleveland, etc.*, R. Co. *v. Osborn*, 66 O. St. 45, 63 N. E. 604.

In another case, plaintiff had been injured by the falling upon him, from a rack above his seat in a passenger car, of a wringer which was, to some extent, wrapped in brown paper so that its apparent character, both as to bulk and weight, was not such as reasonably to attract the attention of the trainmen. Furthermore, the parcel, even though its real character was noticed by the trainmen, was not so apparently placed in a dangerous position as to demand from them an order for its removal from the rack. It was held that there was no negligence on the part of the trainmen, and that there could be no recovery. *Morris v. New York, etc.*, R. Co., 106 N. Y. 678, 13 N. E. 455, 1 Silvernail Ct. App. 513.

In a case which was before the New York court of appeals several times, and which is usually referred to by text writers as illustrating the class of accident for which no liability attaches to the carrier, the facts were as follows: Just as defendant's steamboat was leaving the dock, a man rushed through the crowd of people on board and jumped into the water. The cry of "Man overboard!" was raised and, immediately, there was a great rush of passengers to the side of the boat whence the cry proceeded,

is only liable on a breach of its public duty to exercise a high degree of care.³⁸ Thus, it has been said that it is not enough to entitle plaintiff to recover that the evidence shows the injured person did only what a prudent person would

crowding several persons, including plaintiff, through the gate-way, which had not been closed, and overboard into the water. It was held that, since the accident was of such a nature that its occurrence could not have reasonably been anticipated, it was not negligence to start the boat until the gate was closed and securely fastened across the gang-way. In delivering the opinion of the court, Peckham, J., said: "To say that the boat should not have been allowed to move a foot from the dock until this gate had been thus securely fastened, and the rail and stanchions placed in position, is to decide the matter in view of the facts which subsequently occurred, and not from the circumstances existing prior thereto. It was an accident which could not, as I think, have been reasonably anticipated. The attempt of a belated man to jump from the boat to the wharf immediately after the starting of the boat, his failure to reach the dock, and his consequent falling in the water, the cry of 'Man overboard!' the instantaneous rush of a crowd of ordinary passengers towards the side of the boat whence the cry proceeded, and the shoving of the plaintiff overboard, altogether form such an extraordinary, and therefore unheard-of, combination of circumstances, that the failure to foresee their possibility and to guard against their happening can not, in any fair or proper view of the subject, be called negligence." *Cleveland v. New Jersey Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327.

Plaintiff got on defendant's street car while it was standing partly on a curve. Before she could take her seat the car was started and the motion of the car in going around the curve threw her down and injured her. There was no evidence in the case to show that excessive speed was used or that there was other negligence in starting and running the car around the curve. While recognizing it to be a very close case, the court was of the opinion that it was error to submit the question of defendant's negligence to the jury, and held that there should be a new trial. "This case falls clearly within the rule that where an accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows." *Ayers v. Rochester R. Co.*, 156 N. Y. 104, 50 N. E. 960.

Also in an action by a passenger for injuries received by the slamming of a car door, through which his hand was injured, where, from the evidence, it

does not appear that the carrier was guilty of any act, whether negligent or otherwise, which could be fairly treated as the proximate cause of the injuries, judgment of nonsuit is correct. *Ham v. Georgia R., etc., Co.*, 97 Ga. 411, 24 S. E. 152.

Overcrowding car not negligence.—

Where a person is thrown off the rear platform of a crowded street car, without producing evidence to that effect, he can not claim that the want of pendant straps and gates for the platform is defective equipment; nor that it is negligent to allow too many passengers on the platform, if none got on after the plaintiff. *Mt. Adams, etc., R. Co. v. Reul*, 4 O. C. C. 362, 2 O. C. D. 596.

Instructions as to proximate cause.—

In an action against a railroad for injury to a passenger a charge authorizing exemplary damages on account of general bad condition of road, without reference to whether plaintiff's injury resulted therefrom, is error. *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165, 170, 10 S. W. 408.

Charge that defendant railway company is responsible to plaintiff passenger for actual and direct results of his injury proximately resulting from its negligence was proper, instead of charge that defendant is liable for injuries sustained which were the direct and natural results of negligence complained of by plaintiff. *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68.

In an action for injuries to a passenger, an instruction authorizing recovery if defendant was negligent in moving a car or in having an improperly constructed platform, if the plaintiff's injury was caused by such movement or the defective platform, is erroneous because authorizing recovery if defendant was negligent in moving the car, and plaintiff was injured by the defective platform. *Missouri, etc., R. Co. v. Hay*, 67 S. W. 171, 28 Tex. Civ. App. 318.

Instance of charges in suit against carrier for injuries from collision with rear section of train while plaintiff was riding in car with his racehorse, which were erroneous in that they authorized recovery if the conductor became aware of plaintiff's peril and failed to warn him regardless of whether the conductor was negligent or whether such lack of warning was the proximate cause of the injury. *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W. 769, affirmed in 93 Tex. 690, no op.

38. *Canaday v. United R. Co.*, 134 Mo. App. 282, 114 S. W. 88.

have done under the same circumstances, but it must likewise show that the carrier committed some fault or was guilty of some negligence which contributed to the injury.³⁹ For the treatment of the subject of proximate cause as affecting the carrier's liability, see post, "Proximate and Remote Cause," §§ 2281-2288.

Injuries Unavoidable by Human Care and Foresight.—Carriers of passengers are not liable for injuries to passengers which could not be reasonably anticipated and guarded against by human care and foresight.⁴⁰ Where the carrier of passengers has complied with the obligations which the law imposes upon it, it can not be held liable for injuries arising from an unavoidable accident.⁴¹ A carrier of passengers is not obliged to foresee and provide against casualties which have not been known to occur before and which may not be reasonably excepted. If it has availed itself of the best known and most extensively used safeguards against danger, it has done all the law requires, and its liability is not to be ascertained by what appears for the first time after the disaster to be proper precaution against its recurrence.⁴² This nonliability of

39. Carrier must be at fault.—*Gulf, etc., R. Co. v. Wallen*, 65 Tex. 568; *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

40. Injuries unavoidable by human care and foresight.—*Albright v. Penn.*, 14 Tex. 290; *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 666, 36 S. W. 485; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128.

A carrier of passengers must exercise the degree of care which very prudent men would take to guard against all dangers which may naturally, and according to the usual course of things, be expected to occur. *Austin v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 385.

It is only for the consequences of such risks as could have been provided against by proper diligence that the carrier is held liable. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687.

A carrier is not responsible for injuries to passenger from dangers which are incident to railway travel, and which proper care and skill could not avoid. *Houston, etc., R. Co. v. Richards*, 49 S. W. 687, 20 Tex. Civ. App. 203.

A railroad company is not liable for an injury resulting from an accident happening to a passenger while attempting to board a train, when the accident was caused by another passenger, who was standing on the platform; it not appearing that the passenger was on the platform by reason of any negligence on the part of the company. *Hollman v. Houston, etc., R. Co.*, 2 Posey Unrep. Cas. 557.

41. Unavoidable accident.—*Central R. Co. v. Thompson*, 76 Ga. 770; *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

Accidental injuries are not actionable;

so that, if a street car collision was accidental, a passenger could not recover for injuries received in jumping to avoid injury, however imminent the danger when he jumped. *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369.

Injuries to the hand of a passenger standing in the aisle of the car while unable to secure a seat, which were caused by the slamming by an employee of the carrier of a closet door on which the passenger's hand was braced, are attributable to mere accident and do not render the carrier liable. *Murphy v. Atlanta, etc., R. Co.*, 89 Ga. 832, 15 S. E. 774.

Buckling of rails due to heat expansion in warm weather is not an unavoidable accident, so as to relieve the carrier from liability for injuries to a passenger. *Chesapeake, etc., R. Co. v. Burke*, 145 S. W. 370, 147 Ky. 694, Ann. Cas. 1913D, 208.

The trolley of an electric car left the wire when the car was passing over a steam railroad crossing without negligence on the part of the company, and the car was run into by a locomotive. There was nothing to show that the parting of the trolley was due to any defect in the construction or in lack of care. Held, that the passenger could not recover. *Gaines v. Chester Tract. Co.*, 73 Atl. 7, 224 Pa. 52.

42. Unforeseen casualties.—*Higgins v. Cherokee Railroad*, 73 Ga. 149; *Alabama, etc., R. Co. v. Guilford*, 114 Ga. 629, 40 S. E. 794.

A carrier is not an insurer of the safety of its passengers, and it is not liable for an injury resulting to a passenger from a means not reasonably to have been anticipated or guarded against. *Chicago Terminal Transfer R. Co. v. Berkowitz*, 137 Ill. App. 95, judgment affirmed in *Berkowitz v. Chicago, etc., R. Co.*, 84 N. E. 1058, 234 Ill. 450.

So evidence that a passenger who arose

the carriers for purely accidental injuries is very well illustrated by the case of an injury to a passenger resulting from the act of the conductor who, in removing a drunken man from a street car, jostled another drunken man, who was standing in front of plaintiff, and threw him upon her. As it did not appear that there was any negligence in the manner of expelling the drunken man, or otherwise, it was held that defendant was not liable.⁴³ The operator of a passenger elevator, in attempting to sit down in the usual way upon a stool provided for that purpose, lost his balance, in consequence of the removal of the stool from its accustomed place without his knowledge, and involuntarily clutched at the lever for support, thus starting the elevator and injuring plaintiff. It was held that, under the circumstances, there was no evidence of negligence and that there could be no recovery.⁴⁴ Where a woman passenger on a street car was severely burned in consequence of the negligent act of another passenger in throwing a lighted match on her dress, it was held that there could be no recovery against the street railway company.⁴⁵

Accidents Caused by Forces of Nature.—A railroad company is not liable in damages for personal injuries caused by a sudden break in a rail, brought about by cold weather, provided the rail was sufficiently strong before the accident.⁴⁶ Nor is the proprietor of a stage coach liable to a passenger for an

and went forward in the car to see about the safety of a son who was being carried past his destination by the negligence of the carrier, was injured by the slamming of a car door which had been left open by the conductor, the slamming being caused by the sudden stoppage of the train for the purpose of repairing the negligence in going past the station, does not entitle the passenger to a recovery where it does not appear that his exposed condition was known to the conductor at the time. *Hardwick v. Georgia R., etc., Co.*, 85 Ga. 507, 11 S. E. 832.

In an action by a passenger against a street railway company to recover damages for personal injuries, it appeared that plaintiff boarded a summer car, and, being unable to enter on account of the crowd, stood on the running board next to the roadway. This was a smooth macadam road of a width of twenty feet, exclusive of the track, which was on one side. When the car reached the top of a hill and began a rapid descent, there was in plain view at a distance of from four hundred to six hundred feet an approaching wagon, drawn by one horse. At no time after the wagon came into view was it or any part of it on the track, but it was moving parallel with the track at a distance of from two to four feet therefrom. When it had come within a short distance of the wagon, the driver turned his horse's head away from the car toward the center of the road, and began to move in that direction, when suddenly the horse balked and backed the rear wheel of the wagon into the side of the car then passing, thus injuring the plaintiff. Held, that plaintiff was not entitled to recover. *Wood v. Chester Traction Co.*, 36 Pa. Super. Ct. 483.

An injury caused by the mere closing

of a car door is pure accident, for which the carrier is not liable, unless the injury is caused by some defect in the door or its appendages, or is attributable to negligence, since a carrier is not an insurer against injury. *Christensen v. Oregon, etc., R. Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

Though the guard urges passengers to speed in getting into a car of an elevated train, and a passenger within, standing by the door, holding to a rod, has her hold loosened by passengers passing by her, and her hand slips and the tip of a finger gets into the jamb of the door, and while it is there the guard closes the door onto it, there is no negligence, making the carrier liable for the injury; it not being shown that the guard saw or should have seen the position of the finger, or that he should have reasonably anticipated it, or that the hasty entrance of passengers urged by the guard would result in any injury to plaintiff. *Hines v. Boston Elevated R. Co.*, 84 N. E. 475, 198 Mass. 346.

⁴³. *Spade v. Lynn, etc., R. Co.*, 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832.

⁴⁴. *Gibson v. International Trust Co.*, 58 N. E. 278, 177 Mass. 100, 52 L. R. A. 928.

⁴⁵. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

⁴⁶. **Unforeseen forces of nature.**—*Misouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128.

An instruction that defendant is not liable if the accident was directly caused by unprecedentedly bad weather, as sudden freezes and thaws, and this weather could not have been guarded against by human foresight, skill, and judgment, is sufficiently favorable to defendant. *Mis-*

injury due to the driver's physical disability, arising from extreme and unusual cold.⁴⁷

Injuries Due to Hidden Defects.—Railroad companies in carrying passengers do not become insurers and are not liable for injuries resulting from accidents produced by latent defects in machinery or roadbed, which could not have been foreseen and provided against by exercising such prudence and care as reasonably cautious persons would exercise under the circumstances.⁴⁸

Injuries Due to Acts of Strangers.—As a general rule a railroad company is not liable for the death of a person caused by an act of some person not connected with railroad or in its employ.⁴⁹ A passenger injured in jumping from

souri Pac. R. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128.

Plaintiff, while riding in the caboose of a freight train, was injured by a derailment of the train. The train had previously encountered a hard rain, with high winds, and at the place where it was wrecked it encountered a cyclone which passed over the right of way; its path extending from two hundred and fifty to four hundred yards in width and seven or eight miles in length. The cyclone unrooted, wrenched from their foundations, and destroyed houses, and its force stopped the train, wrenched and lifted the cars from their trucks, and hurled one of them a distance of one hundred and fifty feet into a field beyond, and when it struck the ground whirled it around like a top. Only the engine and three heavy iron-tank oil cars remained on the track. Held, that the wreck was the result of an act of God, for which the carrier was not responsible. Galveston, etc., R. Co. v. Crier, 100 S. W. 1177, 45 Tex. Civ. App. 434.

47. Physical disability of stage coach driver due to cold.—If the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, or that of the defendant or his agents, but by physical disability, arising from extreme and unusual cold, which rendered him incapable for the time to do his duty; then the owner of the stage is not liable to an action for damages, for an injury sustained by a person who was a passenger. Stokes v. Saltonstall (U. S.), 13 Pet. 181, 10 L. Ed. 115.

In Story on Bailments, many cases are collected together upon this subject in pages 376-7, as illustrative of the principle, which is, by that author, laid down in these words: "If he (that is, the driver) is guilty of any rashness, negligence or misconduct, or is unskillful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins so loose that he can not govern his horses, the proprietors of the coach will be answerable. So, if there is danger in

a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if, by any incaution, he comes in collision with another carriage." To which we will add the further example; wherever there is rapid driving, which, under the circumstances of the case, amounts to rashness. In short, says the author, he must, in all cases, exercise a sound and reasonable discretion in traveling on the road, to avoid dangers and difficulties; and if he omits it, his principals are liable. Stokes v. Saltonstall (U. S.), 13 Pet. 181, 10 L. Ed. 115.

48. Hidden defects.—Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

"The subject of the liabilities of carriers of passengers is very fully discussed in Ingalls v. Bills (Mass.), 9 Metc. 1, 43 Am. Dec. 346, where the injury arose from the breaking of one of the iron axletrees, in which there was a small flaw entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. It was held that the proprietors of the coach were not liable under the circumstances for the injury, though they would have been liable had the defect been such as might have been discovered by the most careful and thorough examination. The distinction between the responsibilities of the carriers of passengers and those of goods was recognized in that case, and the latter were said to be responsible for the safe delivery of goods with but two exceptions, viz, the act of God and the kings enemies." Albright v. Penn, 14 Tex. 290.

49. Act of stranger.—Galveston, etc., R. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.; Texas, etc., R. Co. v. Storey, 37 Tex. Civ. App. 156, 83 S. W. 852.

A passenger who is injured by the malicious act of one not in the employ of the railway company, whereby the car was derailed, can not recover for the damage inflicted. Houston, etc., R. Co. v. Lee, 69 Tex. 556, 7 S. W. 324.

That a passenger endeavored to raise the car window, but, failing, a stranger to her, and presumptively a passenger,

a train, on being frightened by a cry of danger from another passenger, can not recover from railroad.⁵⁰

Injuries Due to Acts of Fellow Passengers.—A railroad company is only answerable to a passenger for the exercise of such a high degree of foresight in preventing him from injury by negligent acts of fellow passengers, as would be used by very cautious, prudent and competent persons under similar circumstances.⁵¹

Source of Liability for Injuries Occurring to Passengers.—The liability of common carriers of passengers does not flow directly from the injuries sustained, but from their duty to convey their passengers in comfort and safety. They are responsible for injuries if it appear that they knew, or ought to have known that danger existed, or was reasonably to be apprehended, and did not use proper means to avert it.⁵² Thus a carrier is liable if it knowingly allows a tree to remain upon the right of way in dangerous and decayed condition, even though the interval between a storm which blows and the time when the train passes is so brief as to give no opportunity even by the use of the utmost diligence for the inspection of the track.⁵³ But a sleeping car company is not liable for the death of one of its passengers, at the hands of an assassin, in the night time, who enters its car by stealth, while traveling through a peaceable, law-abiding country. This is not a natural or probable danger, nor one to be anticipated, against which the company is expected to guard and protect its passengers.⁵⁴

Concurring Acts of Negligence.—It is not necessary that any one separate act of negligence be the proximate cause of the injury, as a carrier is liable for an injury resulting from concurring acts of negligence in regard to different parts of its tracks and appliances.⁵⁵

of his own motion raised the window, but not quite high enough, and in consequence it suddenly fell, and injured plaintiff's hand, which she placed there without noticing to what height the window had been raised, does not render the company liable. *Dumas v. Missouri, etc., R. Co.* (Tex. Civ. App.), 43 S. W. 908.

50. *Gulf, etc., R. Co. v. Wallen*, 65 Tex. 568, 572.

51. Acts of fellow passengers.—*Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.

A carrier is not liable to a passenger for his being shot in the foot by a pistol falling from the pocket of an intoxicated passenger sleeping quietly on a seat, where such an accident could not reasonably be anticipated. *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 666, 36 S. W. 485.

Where a passenger carried alcohol on a train, without the company's knowledge, and negligently spilled it, and, before it could be removed from the car floor, another passenger carelessly threw a match into it, and a third passenger was burned in consequence, the last can not recover, although the conductor negligently permitted the sack in which the alcohol was carrier to project over the arm of the seat, into the aisle. *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652.

52. Source of liability.—*Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792.

53. *Alabama, etc., R. Co. v. Guilford*, 114 Ga. 629, 40 S. E. 794.

54. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792.

55. Liability for concurrent negligence as to road bed and operation.—In an action against a railway company for injuries to a mail clerk in consequence of the derailment of a train, the petition alleged that the company was negligent in failing to exercise proper care to furnish a safe road bed and in running the train at an unsafe speed. Two persons who passed over the track before the accident testified that the track was in a bad condition. The conductor testified that the track was apparently in a good condition, that the train was running 25 miles an hour when the derailment occurred, that it was unusual for a train to jump the track at that rate of speed, and that the train was running 25 miles an hour 110 feet from where he had been told there was a bad place. Held to require a charge that, if the concurrent negligence of the company in failing to provide a safe road bed and in failing to properly operate the train caused the injury, it was liable, though its negligent act acting separately was not the proximate cause. *Sproule v. St. Louis, etc., R. Co.* (Tex. Civ. App.), 91 S. W. 657.

Intervening Cause.—If there was an intervening cause between the negligence of the railroad and an injury sustained by the passenger, so that such intervening cause became the proximate cause of injury, and was not such as could reasonably have been contemplated from the act of the railroad, there can be no recovery against the railroad for such injury.⁵⁶ An intervening act of an independent voluntary agent does not arrest causation, nor relieve the person doing the first wrong from the consequences of his wrong, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer. The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto in any degree, whether large or small, is of no importance.⁵⁷ It is well settled that to constitute a negligent act the proximate cause of an injury it need not to be the sole cause. It is sufficient if it be a concurrent cause, for which such a result might have been contemplated or foreseen.⁵⁸

Absence of Contributory Negligence Immaterial.—In order to relieve a carrier from liability for an injury to a passenger, it is not necessary that the passenger himself must have been negligent.⁵⁹ Hence, a charge to the effect that a carrier would be liable if a passenger was injured without negligence on her part, notwithstanding the company had discharged its full duty toward her at the point of destination and alighting, is erroneous.⁶⁰

§§ 2280-2288. Liability for Negligence—Assumed Risk.—§ 2280. **In General.**—While travelers must take the risks necessarily incident to the mode of travel which they select, those risks, in the legal sense, are only such as are not due to the carrier's negligence.⁶¹ Carriers of passengers are, of course,

56. *Intervening cause.*—Texas, etc., R. Co. v. Buckworth, 11 Tex. Civ. App. 153, 32 S. W. 347, affirmed in 93 Tex. 740, no op.

57. St. Louis, etc., R. Co. v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237.

58. St. Louis, etc., R. Co. v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237.

Where plaintiff was injured while attempting to alight from a train which was put in motion before a reasonable time had elapsed to enable plaintiff to alight, and plaintiff was also interfered with by a passenger attempting to board the train, the situation was one which the carrier was bound to anticipate, and the court properly refused to charge that if the person attempting to board the train was standing on the last step of the car, and by reason of his position plaintiff was unable to make a safe departure from the train and was caused to fall, plaintiff could not recover. St. Louis, etc., R. Co. v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237.

59. **Negligence of passenger not essential to relieve carrier from liability.**—Where a passenger had jumped from a moving train at a station, it was error to instruct that, although defendant's servants had stopped the train at such station a sufficient length of time for him to alight in safety, by the exercise of ordinary care, in order for defendant to be relieved of liability they must believe that the passenger was guilty of negligence in jumping therefrom, since it does not necessarily follow that to relieve de-

fendant from liability the passenger must have been negligent. Texas, etc., R. Co. v. Atchison (Tex. Civ. App.), 54 S. W. 1075.

Where it appeared that plaintiff jumped from defendant's street car while it was in motion, under the fear that it would collide with an engine at a crossing, and the evidence showed that the motorman saw the watchman on the crossing, but did not lessen the speed, because no danger signal was given, and that the car was stopped before reaching the crossing, but that plaintiff, without seeing the watchman, had jumped when the car was about 100 feet from the crossing, it was error to charge that defendant was not liable if the car was held in proper control, and was not running faster than six miles an hour, and if, in jumping, plaintiff did not act as a reasonable person; thus making defendant's freedom from liability depend on plaintiff's contributory negligence. Dallas Consol. Tract. R. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925.

60. Texas, etc., R. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416.

61. See Washington, etc., R. Co. v. Varnell, 98 U. S. 479, 25 L. Ed. 233; Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922; Nashville, etc., R. Co. v. Elliott, 41 Tenn. (1 Coldw.) 611, 78 Am. Dec. 506.

A railroad company can not be held answerable to a passenger in damages because of matters which are ordinary incidents of travel, such as exposure to

liable for negligence,⁶² and should be held to a very strict accountability for any dereliction of legal duty which increases the hazards and dangers of travel.⁶³ If the doctrine of assumed risk has any applicability as between carrier and passenger, a passenger can not be held to have assumed any risk except that of accident not arising from any negligence of the carrier.⁶⁴

Carrier Engaged in Public Service.—In what seems to be the first reported case brought against a carrier for the recovery of damages for an injury to a passenger, it was contended that there could be no recovery for the reason that the coach upon which the plaintiff had taken passage was a mail-coach and that, therefore, the plaintiff, as owner was primarily in the public service. But Lord Kenyon disposed of the contention by saying that the idea was "too absurd to enter the head of any man."⁶⁵

Carrier Liable Even for Slightest Negligence.—Carriers are responsible for injuries arising from even the slightest negligence.⁶⁶

Carrier May Not Limit Liability for Negligence.—See post, "Limitation of Liability," §§ 2668-2693.

§§ 2281-2288. Proximate and Remote Cause—§ 2281. General Statement of Rules.—A carrier is not liable for an injury received by a passenger in course of transportation, unless the injury is the proximate result of the carrier's negligence in the performance of its duty towards him.⁶⁷ That is

drafts from windows opened by, or at request of, other passengers. *Louisville, etc., R. Co. v. Fisher*, 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A., N. S., 926.

A passenger assumes only risks which may exist after the carrier has done its full duty to passengers. *Galveston, etc., R. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

As to assumption of risks incident to mode of conveyance, see post, "Assumption of Risk of Passengers," § 2335.

62. A railroad company, as a common carrier, is made liable for negligence causing injury to passengers. *Cincinnati, etc., R. Co. v. Morley*, 4 O. C. C. 559, 2 O. C. D. 706.

63. *Carter v. McDermott*, 29 App. D. C. 145, 10 L. R. A., N. S., 1103.

64. Doctrine of assumed risk.—*Herring v. Galveston, etc., R. Co.* (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed; *Galveston, etc., R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521.

65. *White v. Boulton* (Eng.), Peake 113.

66. Slightest negligence.—*Ft. Worth, etc., R. Co. v. Stingle*, 2 Texas App. Civ. Cas., § 706; *San Antonio, etc., R. Co. v. Long* (Tex. Civ. App.), 26 S. W. 114, 116, reversed in 87 Tex. 148; *Mexican Cent. R. Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. 301, 303, affirmed in 87 Tex. 277; *Houston, etc., R. Co. v. George* (Tex. Civ. App.), 60 S. W. 313; *Houston City, etc., R. Co. v. Ross* (Tex. Civ. App.), 28 S. W. 254, 255; *Houston City, etc., R. Co. v. Desso* (Tex. Civ. App.), 28 S. W. 256; *Houston City, etc., R. Co. v. Wheeler* (Tex. Civ. App.), 28 S. W. 256.

The smallest negligence will render the carrier liable. *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061.

Any negligence, in such cases, may well deserve the epithet of "gross." *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502; *New York, etc., R. Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 296, 23 L. Ed. 898.

A carrier of passengers, for hire, is bound to exercise the highest possible degree of care; and if, by the slightest negligence on his part, an injury is sustained by a passenger, he can recover the amount of damage sustained. *Talmadge v. Zanesville, etc., R. Co.*, 11 O. 197.

A carrier of passengers is liable for any injury occasioned by the slightest negligence against which human prudence could have guarded. *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 Pac. 322, 21 Am. & Eng. Ann. Cas. 502.

Proof of slight neglect on the part of the servants of a railroad company is sufficient to fix its liability for injury to its passengers. *San Antonio, etc., R. Co. v. Long* (Tex. Civ. App.), 26 S. W. 114.

In an action against a railroad company for injuries to a passenger an instruction that if the jury believe that plaintiff's intestate was killed through the negligence of the defendant company, its agents and employees, in the manner and form as alleged in plaintiff's petition then they will find for plaintiff the actual damages sustained, was not erroneous. *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64.

67. Proximate and remote cause.—*Delaware.*—*Baldwin v. People's R. Co.* (Del.), 7 Pen. 81, 76 Atl. 1088, judgment affirmed *People's R. Co. v. Baldwin*

to say, that the injury must not be the result of the activity of some independent agency over which the carrier has no control.⁶⁸ To define the term "proximate cause" as that which naturally and probably causes the injury, or as the cause which leads up to or might naturally be expected to produce the result, is too restricted, for whether it might naturally be expected to produce the result or not, if it is the cause which produces it, it is the proximate cause.⁶⁹ Antecedent negligence does not permeate the whole course of conduct of the parties but it loses its effect as independent agencies intervene and become the legal causes of the injury.⁷⁰ In other words, there must be no intervening independ-

(Del.), 7 Pen. 383, 72 Atl. 979; *Freeman v. Wilmington, etc., Tract. Co.* (Del.), 80 Atl. 1001.

Illinois.—*Illinois, Cent. R. Co. v. Kerr*, 125 Ill. App. 363.

Mississippi.—*Natchez, etc., R. Co. v. Lambert*, 99 Miss. 310, 54 So. 836, 37 L. R. A., N. S., 264.

In an action against a street railroad for injuries to a passenger resulting from the plaintiff stepping into an unguarded excavation some distance from the car, from which he had alighted with safety, where it appeared, according to plaintiff's own testimony, that he had taken two or three steps before falling, neither a fire which from unknown causes had broken out in the car, nor the act of the conductor, on its discovery, in stopping the car and letting the passengers alight, was the proximate cause of the injury. *Goldberg v. Interurban, etc., R. Co.*, 90 N. Y. S. 347.

Where a street car passenger sued for injuries caused by the sudden jerk of the car in stopping to permit her to alight after the car had failed to stop at a prior signal, the failure to so stop was not the proximate cause of the accident. *Barnes v. Hewitt* (Tex. Civ. App.), 152 S. W. 236.

Acts of carrier held not proximate cause of injury.—*Latimer v. St. Louis, etc., R. Co.*, 40 Tex. Civ. App. 614, 90 S. W. 665; *Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566; *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Winfrey v. Missouri, etc., R. Co.*, 114 C. C. A. 218, 194 Fed. 808.

68. A trolley car passenger standing on a step within the vestibule was forced outside so as to collide with a trolley pole at the side of the track in consequence of the swaying of the crowd in the vestibule and by the swinging motion of the car. The conductor negligently failed to exercise care for the safety of the passenger. Held, that the act of the passengers in the vestibule in pushing the passenger outward beyond the side of the car was not an independent agency, but the proximate cause of the accident was the negligence of the conductor. *Tolleman v. Sheboygan, etc., R. Co.* (Wis.), 134 N. W. 406.

Plaintiff boarded a crowded street car, and before the end of his journey the car became so filled with passengers that

he was forced to stand on the running board, holding onto one of the stanchions or upright parts of the car. It had been raining, and he held an umbrella in the hand by which he held to the stanchion; and, losing his hold while the car was going at a high rate of speed, he fell into the street and was injured. He testified that the car was going in a rocking, jolting, or "wagging" motion, and that his hand "slipped from the uprights," but there was no evidence of what caused the slipping. There was no sudden or unexpected motion at the time either of the car or of the passengers. Held, that since the proximate cause of the injury was the slipping of his hand from the stanchion, which might have been caused by the fact that the same was wet, or because plaintiff was exhausted in his efforts to hold on, or by a combination of causes, there was no proof that the injury was due to the defendant's negligence, and hence plaintiff was not entitled to recover. *Johnson v. Brooklyn Heights R. Co.*, 71 N. Y. S. 568, 63 App. Div. 374.

69. Defined.—*Cleveland, etc., Tract. Co. v. Ward*, 17-27 O. C. D. 761.

70. Where a freight train passenger attempts to board it while moving and actually grabs the handrods and gets his feet on the caboose steps and is then thrown off by a jerk of the train, any antecedent negligent acts of the operatives inducing him to attempt to get on could not be the legal cause of the injury. *Ray v. Chicago, etc., R. Co.* (Mo. App.), 126 S. W. 543.

Although a passenger was put off at a dangerous place between two tunnels, if he had passed such danger and reached a place of safety, if he turned back for reasons of his own the proximate cause of his death was, not such negligence of the conductor, but his own voluntary act in turning back, for which defendant could not be held liable. *Gwyn v. Cincinnati, etc., R. Co.*, 155 Fed. 88, 83 C. C. A. 648.

Where the train ran by plaintiff's station, and on slackening speed a flagman directed plaintiff to alight from the train, in the dark, at an unsafe place, and plaintiff did so and was injured, the proximate cause of the injury was the negligence of the flagman in giving the direction, and not that of the company in running by

ent efficient cause.⁷¹ And where the carrier is negligent, resulting in injury to a passenger, it is liable only for those injuries which are proximately caused by such negligence, or, in other words, such as are reasonable and probable result of the carrier's negligent act.⁷³ Thus, it is said that a carrier is not liable for injuries resulting from an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands.⁷⁴ Thus, it is said that a carrier is not liable for injuries it could not have reasonably anticipated.⁷⁵ But it is not necessary that the exact injuries received should have been foreseen as a probable result of the negligent act of the carrier's servant, but only that a reasonably prudent man, in view of all the facts, would have anticipated some like injury.⁷⁶ Thus, a carrier may be liable

the station. *Savannah, etc., R. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197.

Defendant's building superintendent, while riding in a passenger elevator, moved the elevator boy's stool without the latter's knowledge, and he, on losing his balance while attempting to sit down, clutched involuntarily at the elevator lever, which started the elevator and caused injury to plaintiff, a passenger therein. Held, that the proximate cause of the injury was the elevator boy's act in clutching the lever, which was a mere accident, and not the act of the superintendent in moving the stool. *Gibson v. International Trust Co.*, 72 N. E. 70, 186 Mass. 454.

71. Intervening cause.—Florida, etc., R. Co. *v. Wade*, 53 Fla. 620, 43 So. 775; *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369; *McFadden v. Metropolitan St. R. Co.*, 161 Mo. App. 652, 143 S. W. 884.

73. Disease following stock.—A carrier was not liable for impairment of health of a passenger from aortic regurgitation of the heart, alleged to have been caused by nervousness following the passenger being directed to take a wrong train on the carrier's road, unless such condition was the reasonable and probable result of the carrier's reasonable and probable result of the carrier's negligent act. *Baltimore, etc., R. Co. v. Sheridan*, 101 S. W. 928, 31 Ky. L. Rep. 109.

74. Injuries carrier could not foresee.—*Stephens v. Oklahoma City R. Co.*, 28 Okla. 340, 114 Pac. 611, 33 L. R. A., N. S., 1007; Florida, etc., R. Co. *v. Wade*, 53 Fla. 620, 43 So. 775.

Where the negligence of an employee is the proximate cause of injury to a passenger, the railroad company is liable for such injury as should have been foreseen as the probable proximate result of the negligence. Florida, etc., R. Co. *v. Wade*, 53 Fla. 620, 43 So. 775.

Since injury to a passenger in an office building elevator by its sudden lowering, as he was about to leave the cage after he had been taken to one of the upper floors of the building by a boy not in defendant's employ, operating the eleva-

tor without authority, could not reasonably be foreseen as a probable result of defendant's negligence in leaving the elevator door open as the cage was standing at the first floor, while the elevator boy was temporarily absent, such negligence was not the proximate cause of the passenger's injury. *Board v. Cralle*, 109 Va. 246, 63 S. E. 995, 22 L. R. A., N. S., 297.

In an action by a passenger for personal injuries caused by a derailment, defendant's negligence can not be considered the proximate cause of the injury, so as to warrant a recovery, unless the accident might have been reasonably foreseen by a competent man, accustomed to the management of the roadbed and track of a railway, while in the exercise of extraordinary care and prudence. *Davis v. Chicago, etc., R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935, 4 Am. & Eng. R. Cas., N. S., 622.

75. A judgment for damages against a railroad company for injury to a passenger by the negligence of an employee of the company is contrary to law, and will be reversed where the evidence shows that such negligence was not a natural and probable proximate cause of the injury sustained, and that such injury could not reasonably have been anticipated. Florida, etc., R. Co. *v. Wade*, 53 Fla. 620, 43 So. 775; *Illinois Cent. R. Co. v. Kerr*, 125 Ill. App. 363.

76. Exact injuries need not be foreseen.—A steage passenger occupied a berth in defendants' steamship in the lower tier of a section in two tiers or platforms. Through the negligence of defendants' servants, the upper tier of berths fell during the night, and plaintiff, helpless with fright, was removed from her berth that repairs might be made. After her removal, she was thrown by the rolling of the ship, receiving an injury, after which she was carried by the ship servants, and left in a damp place. Held, that defendants' negligence was the proximate cause of injuries resulting from the fall and the wetting. *Smith v. British, etc., Packet Co.*, 86 N. Y. 408, affirming 46 N. Y. Super. Ct. 86.

where the injury directly results in disease⁷⁷ or causes fright which results in nervousness,⁷⁸ and the carrier is liable for all the results of its negligence which naturally flow out from and are the direct consequences thereof, although the negligent act did not of itself inflict the injury,⁷⁹ but concurred with some other agency.⁸⁰ Thus, a carrier is liable for the death or injury of a passenger,

77. If an injury is the direct cause of a diseased condition which results in paralysis, the paralysis may be ascribed to the injury as a proximate cause. *Bishop v. St. Paul City R. Co.*, 48 Minn. 26, 50 N. W. 927.

78. If the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury. *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

79. *Doolittle v. Southern R. Co.*, 62 S. C. 130, 40 S. E. 133.

Where an explosion occurred in the heating apparatus in an electric car, accompanied by an outburst of flame, which set fire to the dress of a female passenger, personal injuries received by such passenger while attempting, in her fright, to escape the danger, must be treated in assessing damages as the direct result of the accident, though she was not in fact injured by the fire. *Steverman v. Boston Elevated R. Co.*, 91 N. E. 919, 205 Mass. 508.

If the negligence of defendant produced a flash of fire, followed by smoke in the car, causing a panic among the passengers, whereby plaintiff was injured, that negligence was the proximate cause of the injury, provided the conduct of the passengers was such as might reasonably be expected under similar circumstances, considering the crowded condition of the car and the fact that it was moved by electricity. *Davis v. Paducah R., etc., Co.*, 113 Ky. 267, 68 S. W. 140, 24 Ky. L. Rep. 135.

A mother with a child in her arms signaled a street car to stop, and on the car stopping she placed the child on the platform and was in the act of boarding the car when it suddenly started, leaving her. The conductor was immediately notified of the fact, but he made no attempt to permit the mother to reach the car. The mother became frantic, and in her efforts to recover the child exposed herself to a rain storm. Held, that the negligence of the carmen in separating the mother from her child was the natural and probable cause of the injuries resulting to the mother from mental strain and shock, and her exposure to the weather, since such injuries should have been foreseen and anticipated by them. *Citizens' R. Co. v. Farley* (Tex. Civ. App.), 136 S. W. 94.

Where a railway fails to call or announce the station, to stop a reasonable time to permit passengers to embark and

disembark, or to light its platform, and permits a dangerous obstruction to remain on the platform where passengers ought to be able to embark and disembark with reasonable safety, and permits the train to leave the station without the exercise of reasonable care in observing whether passengers had safely disembarked and embarked, the injury to a passenger is not due to the independent, wrongful act of a responsible human agency, but is due to the negligence of the railroad company and its servants and employees. *Atchison, etc., R. Co. v. Calhoun*, 89 Pac. 207, 18 Okla. 75, 11 Am. & Eng. Ann. Cas. 681.

80. **Concurring acts.**—Plaintiff, while passing from one car to another of a vestibuled train while the train was rounding a curve, was caused to strike a stool left in the passageway with his heel, causing him to fall, and resulting in the injuries complained of. Held, that the motion of the train, whether negligent or not, concurred with the carrier's negligence in leaving the step in the aisle, which was the proximate cause of the injury. *St. Louis, etc., R. Co. v. Pollock*, 93 Ark. 240, 123 S. W. 790.

Where a petition charged negligence of the driver of a street car in prematurely starting it while plaintiff was alighting, and the evidence supported the charge, the fact that a defective brake contributed to the injury will not defeat a recovery, and constitutes no variance. *Buck v. People's St. R., etc., Co.*, 108 Mo. 179, 18 S. W. 1090.

Where a brakeman's actions and exclamation, "Jump for your lives!" were such as might ordinarily be expected to produce panic among the passengers and a belief of impending danger, the fact that the resulting action of another passenger added to plaintiff's terror, and operated as an additional inducement for his action, will not release the carrier. *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147.

In an action for injuries to a passenger caused by the derailment of the train, a requested instruction that, if the accident was wholly caused by a fresh break in the rail, and the break was wholly caused by frost, the jury should find for the defendant, is properly qualified by stating that, if the extreme cold was not the sole cause of the break, but contributed thereto jointly with the negligence of the defendant, plaintiff was entitled to recover. *Louisville, etc., R. Co. v. Fox* (Ky.), 11 Bush 495.

directly resulting from its negligent act, even though the passenger be in a diseased condition,⁸¹ or is otherwise physically disabled⁸² at the time. And if several concurrent acts of negligence of the carrier operate to cause the injury, it is liable, though each negligent act acting separately is not the proximate cause,⁸³ as negligence in one respect can not relieve the carrier for negligence in another.⁸⁴ A carrier is liable for injuries to a passenger, though the injuries were due to the concurring negligence of the carrier and the negligence⁸⁵ or

81. If a street car passengers's death was directly caused by being thrown against a stove in the car by a derailment, recovery could be had even though he had also suffered from rheumatism, etc., if he would not have died when he did if he had not been thrown against the stove. *MacDonald v. Metropolitan St. R. Co.*, 118 S. W. 78; 219 Mo. 468, 16 Am. & Eng. Ann. Cas. 810.

82. Physical weakness of passenger.—The liability of carriers does not depend upon the physical ability of the passengers, but upon their own conduct. And the fact that some of the passengers in a stage were in such a condition that the upsetting of the stage would be likely to produce serious results to them—as, the case of a woman who was pregnant—ought not to be pleaded in mitigation of damages, where those results were the consequence of the violation of duty on the part of the carriers, as the employment of a drunken driver. *Sawyer v. Dulany*, 30 Tex. 479.

83. Several acts of negligence.—*Sproule v. St. Louis, etc., R. Co.* (Tex. Civ. App.), 91 S. W. 657.

Plaintiff, a girl seventeen years old, boarded a street car and, being unable to get inside because of the crowd, stood on the running board, holding onto one of the stanchions. The conductor, in passing along to collect fares, swung himself around the passengers on the running board, and in doing so was struck by one of the trolley poles located four feet five and one-half inches from the track, the nearest face being two feet and eight and one-half inches, and struck plaintiff, causing the injuries complained of. Held, that there were two concurring causes which produced the injury—one, the overcrowding of the car; and the other, the conductor's act in coming in contact with the pole—both of which were the negligence of the carrier. *Horan v. Rockwell*, 96 N. Y. S. 973, 110 App. Div. 522.

84. In an action against a railroad company for injuries to a passenger, caused by falling on a platform as he was stepping off of a train which he had boarded, thinking it the train he wanted, the defendant's negligence in failing to direct plaintiff to the right car was not too remote to justify a recovery, since the fact that the danger attending on alighting from the train was increased by the further negligent act of the defendant in

reference to the condition of the platform did not relieve defendant from liability for the first act of negligence on the ground of remoteness. *Newcomb v. New York, etc., R. Co.*, 81 S. W. 1069, 182 Mo. 687.

85. Concurring negligence.—*Louisville, etc., Mail Co. v. Barnes*, 79 S. W. 261, 117 Ky. 860, 25 Ky. L. Rep. 2036, 64 L. R. A. 574, 111 Am. St. Rep. 273.

If the passenger's injury is the result of the concurring negligence of a stranger and the carrier, the latter is liable. *Irwin v. Louisville, etc., R. Co.*, 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

Deceased, having alighted from defendant's train at a junction point, while waiting for his train on another road using the same station, was struck or jostled by an express hand truck so that he was struck and killed by defendant's passenger train, which then passed the station at a high rate of speed, without signal or warning, of the approach of which plaintiff was ignorant. Held, that the negligence of defendant in so running the train past the station concurred with the negligence of the servants of the express company in striking deceased with the truck as a proximate cause of decedent's death, rendering the railroad company liable therefor. *St. Louis, etc., R. Co. v. Shaw*, 94 Ark. 15, 125 S. W. 654.

In an action by a street railway passenger for injuries in a collision with a railroad train at a crossing, the fact that the railroad company ran its train at a speed in excess of that allowed by a city ordinance, and was negligent in not slowing down or stopping when the engine operatives saw that the crossing gates were open, did not absolve the street railway company from liability, unless such negligence was the sole cause of the collision; the latter company being required to exercise the highest degree of care to avoid the collision. *Wills v. Atchison, etc., R. Co.*, 113 S. W. 713, 133 Mo. App. 625.

Where a child, against his remonstrance, was compelled by the conductor to stand on a crowded platform, from which he was thrown by the hasty departure of another passenger, held, that the liability of the company was not altered by this concurrence of the wrongdoing of a third party. *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490, 34 How. Prac. 217.

Where a passenger sued the respective

malicious act⁸⁶ of another.

Question for Jury.—The question as to whether the wrongful negligent act of the carrier is the proximate cause of the injury to the passenger is ordinarily a question of fact for the jury, as well as the question as to whether or not the carrier's act was wrongful or negligent.⁸⁷

§ 2282. Stations and Stopping Places.—Where a passenger is injured the carrier can not be held liable on the ground that it did not build,⁸⁸ or maintain a suitable station⁸⁹ or otherwise safe place, such as proper, safe and suitable approaches⁹⁰ and platforms,⁹¹ for the use and accommodation of passenger,

owners of colliding street cars for injuries, neither defendant was entitled to an instruction as to the negligence of the other, further than that each of the persons in control of the cars had a right to assume that the other would not proceed over the crossing negligently. *Zimmer v. Third Ave. R. Co.*, 55 N. Y. S. 308, 36 App. Div. 265.

The negligence in starting up a street car while one was boarding it, throwing him onto the ground, where he was run over by a truck, is a proximate cause of the injury, making the street railway company liable, notwithstanding the concurrent negligence of the driver of the truck. *Fine v. Interurban St. R. Co.*, 91 N. Y. S. 43, 45 Misc. Rep. 587.

The fact that the driver of a team on the tracks of a street railway may have contributed to the negligence of the railway, which resulted in injury to a passenger, does not relieve the railway from responsibility, if defendant, by its negligence, injured plaintiff without contributory negligence on her part. *Frank v. Metropolitan St. R. Co.*, 86 N. Y. S. 1018, 91 App. Div. 485.

If a street railway was negligent, and its negligence contributed to the injury to plaintiff, occurring from a collision at the intersection of the street railway with a steam railway, it was immaterial, as affecting the liability of the street railway company, that the steam railroad also contributed to the injury. *Gulf, etc., R. Co. v. Holt*, 70 S. W. 591, 30 Tex. Civ. App. 330.

86. Where plaintiff, a street car passenger, was injured by the derailment of a car caused by a brick maliciously placed on the track by a boy, and, though the motorman could have seen the brick in time to have stopped the car before striking it or at least reduced the speed so as to have prevented the derailment, he did neither, the malicious act of the boy was no answer to the street car company's liability for plaintiff's injuries. *O'Gara v. St. Louis Transit Co.*, 103 S. W. 54, 204 Mo. 724, 12 L. R. A., N. S., 840, 11 Am. & Eng. Ann. Cas. 850.

87. Question for jury.—A passenger unlawfully put off the train at a flag station at midnight, in a wintry storm, a great distance from his starting point and his destination, fell through a cattle guard

in trying to reach the next station. Held, that the jury should decide the proximate cause of the injury, and whether the conductor acted recklessly. *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463.

88. A branch railroad had no passenger station at its junction with the main line, and it was customary for the passengers on the branch to wait in the coaches for the arrival of the train on the main line. Held, where a young child, while standing on the platform of a coach waiting for the main train, was jerked under the coach by the coupling of cars, that the failure of the company to build a station at the junction was not the proximate cause of the accident. *De Mahy v. Morgan's, etc., Steamship Co.*, 45 La. Ann. 1329, 14 So. 61.

89. If the condition of a carrier's waiting room was the proximate cause of a passenger contracting pneumonia, the carrier is liable in damages. *St. Louis, etc., R. Co. v. Hook*, 104 S. W. 217, 83 Ark. 584.

90. In determining whether the structural defect of the approach to a passenger platform, or the dampness of the platform at the time, was the proximate cause of the slipping of plaintiff's foot, and his consequent injury, the inquiry should be, is the original defect an efficient and dominant cause, which put the other cause in operation? *Union Pac. R. Co. v. Evans*, 71 N. W. 1062, 52 Neb. 50.

Where a railroad company is guilty of negligence in blocking with a freight train the depot crossing, compelling persons desiring to take passage to choose some other route, and a person, while on the way to the depot, sustains an injury, the railroad company is not liable, unless its negligence is the proximate cause of the injury, and the injury ought to have been foreseen in the light of attending circumstances. *Mayne v. Chicago, etc., R. Co.*, 69 Pac. 933, 12 Okla. 10.

91. In an action for injuries caused by being struck by a train while about to board another train, it was error to submit the question whether defendant's failure to provide a proper platform was the proximate cause of the injury, where the ground was level on both sides of the train, and it was not shown that the failure to have such a platform was the cause of plaintiff's going on the side of the

unless such omission is the proximate cause of the injury. Thus, it is not liable on the ground that it did not maintain a railing or guard about certain portions of its platform, where the absence of the railing did not contribute proximately to the injury.⁹² But where a defect in the platform is negligently permitted to remain unrepai red, and contributes proximately to a passenger's injury, the carrier is liable.⁹³ The same rule should be applied to opening, heating and lighting the premises which are for use by passengers;⁹⁴ hence, a carrier is not liable for consequences which it can not be charged with having foreseen because of its neglect,⁹⁵ but if the neglect or omission of the carrier in this respect contributes proximately to a passenger's injury, it should be held liable in damages.⁹⁶

Facilities for Alighting and Condition of Place.—A carrier does not incur liability for an injury to a passenger, by reason of the fact that it negligently omits to maintain a safe alighting place⁹⁷ or necessary and reasonable appli-

train not usually used by passengers in getting on and off trains. *St. Louis, etc., R. Co. v. Caseday* (Tex. Civ. App.), 40 S. W. 198.

Leaving a baggage truck at the very end of the station platform, at or near the place where it has been used in unloading baggage from the baggage car of a train, and failing to light the platform at that point, is not such negligence as will render the railway company liable, where a person, while endeavoring, by running alongside the rapidly receding train, to restore a child in his arms to its mother, who is standing on the platform of a car, stumbles over the truck in the dark, and drops the child, to its injury, as the railway is not bound to foresee and guard against such extraordinary conduct. Judgment, 89 Pac. 207, 18 Okla. 75, reversed. *Atchison, etc., R. Co. v. Calhoun*, 29 S. Ct. 321, 213 U. S. 1.

92. Where plaintiff's intestate attempted to board a car on an elevated road at a station after the gate had been closed and the car was moving, and after being carried beyond the station platform fell and was killed, the absence of a railing or guard across the end of the platform can not be considered a proximate cause of the accident, and evidence as to the construction of the platform was properly excluded, in an action to recover for the death. *Larterer v. Manhattan R. Co.*, 128 Fed. 540, 63 C. C. A. 38.

93. A carrier negligently left a depression in a depot platform. A passenger, in attempting to go around the depression, then filled with water, was struck by an engine and knocked against a third person, who was thereby hurled against the handles of a truck on the platform. Held, that the negligence of the carrier in leaving the depression in the platform was the proximate cause of the injury to the third person. *Missouri, etc., R. Co. v. Harrison*, 56 Tex. Civ. App. 17, 120 S. W. 254.

94. Opening, heating, etc.—In a suit by a person against a railway company for damages sustained by reason of defendant's failure to keep the depot open, warmed, and lighted, it is error to refuse

an instruction that plaintiff can not recover if she would not have used the depot had it been open, warmed and lighted, when there is testimony upon which to base such instruction. *Texas, etc., R. Co. v. Moore* (Tex. Civ. App.), 41 S. W. 499.

95. An assault by a negro on a female passenger, in an unlighted waiting room after dark, is not such a proximate consequence of the railroad company's failure to light the room as to charge it with having foreseen the danger and render it liable therefor. *Prokop v. Gulf, etc., R. Co.*; 79 S. W. 101, 34 Tex. Civ. App. 520.

96. Rev. St. 1895, art. 4521, makes it the duty of a railroad to have its depot "lighted, warmed and open to the ingress and egress of all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all trains carrying passengers." Plaintiff and his family, passengers on defendant's train, reached their destination early in the morning, and found the depot closed. Held, that damages suffered by them by reason of exposure to inclement weather during such time as was reasonably necessary to enable them to secure accommodations were the proximate result of defendant's breach of duty, for which it was liable. *St. Louis, etc., R. Co. v. Wallace*, 74 S. W. 581, 32 Tex. Civ. App. 312.

97. At alighting place.—A passenger on a street car, which entered a switch to wait for the passing on the main track of a car running in the opposite direction, alighted therefrom intending to pass around the rear of the car and across the main track. She stumbled and fell headlong across the space between the tracks, and the car on the main track struck her. The passenger's head struck the ground either at the same time the fender of the car passed the point, or the time between her falling and the passing of the car was so short that it could not be determined. Held, that the proximate cause of the injury was the stumbling of the passenger, and not the excessive speed of the car, precluding a recovery. *Bloom*

ances and facilities for alighting passengers,⁹⁸ unless such omission or neglect contributes proximately to the injury.⁹⁹

§ 2283. Roadbed and Track.—While a carrier owes a high degree of care in regard to its tracks and roadbed, as we shall see later on,¹ yet negligence in this respect to render the carrier liable for an injury to a passenger must be the proximate cause of the injury,² or contribute proximately to the injury.³

§ 2284. Vehicles.—In order for a carrier to be held liable for injury to its passengers, because of its negligence in maintaining safe vehicles,⁴ safe couplings and platforms between cars,⁵ guard rails on offside of street cars,⁶ in mak-

v. Sioux City Tract. Co. (Iowa), 122 N. W. 831.

Any negligence of a railroad company in having its track twenty inches lower than the depot platform is not the cause of the accident, where a passenger, in alighting, instead of going down to the third step of the car, attempted to step from the second step thereof to the platform, and tripped and fell. *Kurfees v. Harris*, 46 Atl. 2, 195 Pa. 385.

98. Facilities, etc.—Where a passenger, in attempting to board a train, slipped and fell by reason alone of the icy condition of the car steps, the fact that the railroad company may also have been negligent in not providing a portable step is not a ground of recovery. *Ft. Worth, etc., R. Co. v. Work (Tex. Civ. App.)*, 100 S. W. 962.

99. The fact that a passenger, while standing on the space between two tracks provided by the railroad company as the place for passengers to leave the train, was struck and injured by a train on the other track belonging to another company, does not relieve the carrier from liability; the failure to provide a proper place for alighting being a proximate cause of the accident. *Judgment*, 99 Ill. App. 577, affirmed. *Chicago, etc., R. Co. v. Schmelling*, 64 N. E. 714, 197 Ill. 619.

1. Roadbed and track.—See post, "Roadbed and Track," § 2283.

2. Though a derailment would not have occurred but for the running of the train at a speed greater than that allowed by schedule, yet, if the train running at such speed would not have been derailed had a rail been in good condition, the defective condition of this rail is the proximate cause of the derailment. *Clyde v. Richmond, etc., R. Co.*, 59 Fed. 394.

Where plaintiff was injured while attempting to board a crowded street car at a point where the tracks ran so close together that passing cars sometimes touched, by being caught between the car and a car on the other track, the proximity of the tracks was the proximate cause of plaintiff's injury. *Scott v. Metropolitan St. R. Co.*, 120 S. W. 131, 138 Mo. App. 196.

3. In an action against a railroad company for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given

way but for the breaking of a dam on adjoining property over which the company had no control will not prevent recovery, if the negligent manner in which the culvert was constructed contributed to the accident. *Bonner v. Wingate*, 78 Tex. 333, 14 S. W. 790.

4. Vehicles.—A train on which plaintiffs' decedent was riding was derailed by the breaking of an axle, and deceased was awakened and told to jump, and in doing so received injuries from which he died. Held that, if the breaking of the axle was the result of a defect which could have been discovered by an ordinary inspection, defendant was liable, though the breaking of the axle was not the immediate cause of decedent's death. *Western Maryland R. Co. v. State*, 53 Atl. 969, 95 Md. 637.

5. Plaintiff, while traveling on defendant's passenger train, started to go from one coach to another, and on his return lost his balance by the movement of certain planks across the space between the cars, and was thrown to the ground. Defendant was changing the drawheads of its cars, and the coaches were chained together, leaving an extraordinary space between the cars of about eighteen inches covered by the planks, which were nailed at one end and loose at the other. Held, that the jury were warranted in finding that the carrier's negligence was the proximate cause of the injury. *St. Louis, etc., R. Co. v. Keitt (Tex. Civ. App.)*, 76 S. W. 311.

Where a street car conductor, in passing from a trailer to the grip car, neglected to hook into its place a chain, which performed the office of a gate between the trailer and grip car, and a passenger who was standing on the platform of the trailer, on a sudden jerk of the car, was thrown forward so that he fell through the open place where the chain should have been, whereby he was injured, the absence of the chain, and not the jerk of the car, was the proximate cause of the injury. *Hooper v. Metropolitan St. R. Co.*, 102 S. W. 58, 125 Mo. App. 329.

6. A guard rail on street cars does not necessarily prevent passengers from alighting from the side of the car on which it is placed. It is a mere warning against such an act, and its absence is not the

ing up trains,⁷ or in providing vestibuled cars,⁸ the negligence in this respect must have caused the injury or contributed proximately thereto.

§ 2285. Receiving and Discharging Passengers.—Although, as we shall see later,⁹ the duties to stop the vehicle, to stop it at the usual place, and to stop it a reasonably sufficient time, and not mislead the passenger to alight at an improper place and time, devolve upon a carrier of passengers, yet such carrier can not be held liable for an injury to a passenger on the ground that it was negligent or remiss in one of these duties unless such negligence was the proximate cause of such injury. This question has arisen in many cases where a passenger has been injured in getting on or alighting from the train, such as, where the carrier negligently fails to stop the vehicle, to permit a prospective passenger to board,¹⁰ or one already on board to alight at his destination;¹¹

proximate cause of injury to a person alighting from a moving car in front of a car going in the opposite direction. *North Chicago St. R. Co. v. Canfield*, 118 Ill. App. 353.

7. The fact that a train was improperly made up does not justify a recovery by a passenger thereon for injuries received in a derailment which resulted wholly from a totally independent cause. *Denver, etc., R. Co. v. Pilgrim*, 47 Pac. 657, 9 Colo. App. 86.

A passenger injured, not because the train was made up in violation of Burns' Ann. St. 1901, § 5191, forbidding, in the formation of a passenger train, the placing of a baggage car in the rear of a passenger car, but because the baggage car attached to the rear of the passenger car had an open and exposed platform, can not recover for the negligent and unlawful placing of the baggage car in the rear of the passenger car contrary to section 5191, since that was not the proximate cause of his injury. Judgment 82 N. E. 998, reversed. *Pittsburgh, etc., R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988.

The negligence of a railway company in operating a train with the locomotive in its rear was the proximate cause of injuries sustained by a passenger, who was thrown against an object in the car when the train collided with a horse on the track, since the consequences of so running were not so unnatural or unusual that they could not have been foreseen. *Chicago, etc., R. Co. v. Grimm*, 57 N. E. 640, 25 Ind. App. 494.

8. Where a passenger was injured by an alleged sudden and premature start of the train while she was attempting to alight at a station, the carrier's alleged negligence in failing to provide vestibuled cars to prevent passengers from being thrown off or from jumping off the train while in motion was not the proximate cause of the injury. *Latimer v. St. Louis, etc., R. Co.*, 40 Tex. Civ. App. 614, 90 S. W. 665.

9. **Receiving and discharging.**—See post, "Receiving and Discharging Passengers," §§ 2435-2489.

10. A count for personal injuries, al-

leging that defendant did not stop the car after plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground, did not state a cause of action, as the refusal to stop and accept plaintiff as a passenger was not the proximate cause of the injury alleged. Judgment, 102 Ill. App. 493, affirmed. *South Chicago City R. Co. v. Dufresne*, 65 N. E. 1075, 200 Ill. 456.

11. *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

Where a freight train carrying passengers slowed down as if to stop at a station where it was required to stop to permit a passenger to alight, and the passenger left the caboose and proceeded to the steps preparatory to alighting, and on discovering that the train would not stop attempted to alight, and was injured, if, as matter of law, he in acting as he did was not guilty of contributory negligence, the failure to stop the train at the station was the proximate cause of the injury; the act of the passenger in alighting being only an incidental cause contributing to the injury induced by the carrier's negligent failure to stop. *Kansas, etc., R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173.

The carrying of a passenger beyond his station is not the proximate cause of any of the events occurring at another place where he attempts to alight. *Dresslar v. Citizens' St. R. Co.*, 47 N. E. 651, 19 Ind. App. 383.

Plaintiff, in alighting from a street car in the evening, stepped on a small stone in the street, between the tracks and the curb, and was injured. The railroad had no regular stations, but stopped its cars near street crossings when signaled by passengers. Held that, though the conductor had carried the plaintiff beyond the point where she notified him she wished to stop, such act was not the proximate cause of the injury. *Conway v. Lewiston, etc., R. Co.*, 38 Atl. 110, 90 Me. 199.

An injury received by a pedestrian by

to stop at the proper and usual place,¹² and to properly and correctly notify the passenger as to his position,¹³ and danger,¹⁴ or refuses to return the vehicle to the usual place;¹⁵ to stop a reasonable time to permit the passenger

slipping on an icy sidewalk was not a circumstance which a street railway company should have foreseen would have been the probable consequence of its negligence in carrying such person, who was a passenger, beyond the street at which she desired to alight from the car. *Haley v. St. Louis Transit Co.*, 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295.

The act of a street railway company in failing to stop the car in obedience to a passenger's signal at the crossing nearest to her residence, in consequence of which she was carried to the next crossing, can not be said to constitute a wanton wrong, so as to make such act the proximate cause of an injury to such passenger, received by slipping on the sidewalk while she was walking back to her home. *Haley v. St. Louis Transit Co.*, 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295.

Plaintiff, while riding on defendant's street car, signaled the conductor to stop the car, and the speed decreased, and plaintiff got on the running board at the side of the car, when the conductor signaled to go ahead and the speed was increased. Plaintiff turned to again signal the conductor, and, leaning outward, his head struck a wagon overtaken by the car. Held, that the accident was not the result of the conductor's negligence, and the company was not liable for the injury. *Flynn v. Consolidated Tract. Co.*, 52 Atl. 369, 67 N. J. L. 546.

12. Plaintiff, a passenger aged sixty-seven, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barb-wire, but soon came to a bridge, to cross which he had to mount a flat car. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward with one hand on the car in front, and in landing broke his leg. Held, that his injury was the proximate result of defendant's neglect to carry him to the station, and that no negligence on his part contributed thereto. *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509.

Running past a street crossing is not the proximate cause of injury to a street car passenger hurt in an attempt to alight. *Lynch v. St. Louis Transit Co.*, 77 S. W. 100, 102 Mo. App. 630.

The negligence of a street railroad in failing to stop a car to allow a passenger to alight does not render it liable for an injury to the passenger by another car, by which he was struck after having alighted in safety, where by standing

still he could have avoided the injury from the car that struck him. *Fry v. St. Louis Transit Co.*, 85 S. W. 960, 111 Mo. App. 324.

13. A passenger, on leaving a train at night, was informed by the conductor that he had been carried about two car lengths south of the station. Walking south along the track, intending to take a cross road, the passenger discovered that he had been carried beyond the crossing, and retraced his steps, when he was injured by falling into a cattle guard at the crossing. Held, that the railroad company's negligence was not the proximate cause of the injury. *Lewis v. Flint, etc.*, R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.

Plaintiff, a shipper of cattle on defendant's train, on discovering that his cattle had been left behind, was told by the conductor that, at a certain station, there would be a train on which he could return to the place where the cattle had been left. At midnight the conductor said to plaintiff, "Here is your train," and "Be quick, and get off." The train which plaintiff was to board was about ten feet away, and moving, and, at the third step after alighting, plaintiff fell into an uncovered water way between the tracks, and received the injuries complained of. The train stopped at a switch instead of the station, at which plaintiff was told the stop would be made. Held, that the proximate cause of the injury was the act of stopping near a dangerous place, and directing plaintiff to alight, knowing that it was not at the regular and presumably safe station where plaintiff expected to alight, without notifying him that it was a different or dangerous place, and without affording any means to discover or avoid the peril, and that this was gross negligence. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, 11 S. W. 559.

14. Where a railway conductor carried plaintiff by his destination, and caused him to alight in an unsafe place, with which plaintiff was unfamiliar, and plaintiff, in going back to his destination as directed by the conductor, fell through a bridge and was injured, the negligence of the conductor, and not the mere darkness of the night, was the proximate cause of the injury. *Indianapolis, etc., R. Co. v. Barnes*, 74 N. E. 583, 35 Ind. App. 485.

15. Plaintiff took the train late in the afternoon, traveling alone. She had traveled over the road frequently, and knew that she would arrive at Wills Point (her destination) after dark. The train stopped at Wills Point long enough for her to get off. She was talking to another lady sitting by her when the train

to alight,¹⁶ or starts the vehicle while he is in the act of alighting;¹⁷ to give a signal, as by blowing whistle or ringing bell, of the starting of the train;¹⁸ to afford the passenger an opportunity to reach a place of safety;¹⁹ to announce

stopped, and did not hear them call the station, and was listening for them to do so, and did not inquire the cause of the stopping. The names of the stations were not called. As soon as plaintiff found she was passing her destination, she had the cars immediately stopped, and requested that the train be backed to the depot, a distance of some three or four hundred yards, which request was refused, and she was obliged to get off where it stopped. Held, that the negligence of defendant in not backing the train to the station, when requested, was the proximate cause of plaintiff's injuries, and defendant was liable therefor. *Texas, etc., R. Co. v. Pollard*, 2 Tex. App. Civ. Cas., § 481.

16. Where plaintiff was injured while attempting to alight from a train which was put in motion before a reasonable time had elapsed to enable plaintiff to alight, and plaintiff was also interfered with by a passenger attempting to board the train, the situation was one which the carrier was bound to anticipate, and the court properly refused to charge that if the person attempting to board the train was standing on the last step of the car, and by reason of his position plaintiff was unable to make a safe departure from the train and was caused to fall, plaintiff could not recover. *St. Louis, etc., R. Co. v. Bryant*, 46 Tex. Civ. App. 601, 103 S. W. 237.

A railroad company, negligently failing to stop its train a reasonable length of time for its passengers to disembark, and to provide reasonable facilities for that purpose, is not liable for injuries sustained by a boy four years old, who, after the train had started, was put off by a passenger, where the act of such passenger was not the probable result of defendant's negligence. *Texas, etc., R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347.

17. The negligence of a street railway company in suddenly starting an open car, by reason of which a passenger standing between two seats, in the act of alighting, was thrown forward and toward the adjoining track, in which position he was struck by a car passing on the adjacent track, held the proximate cause of the injuries sustained. *Scamell v. St. Louis Transit Co.*, 76 S. W. 660, 102 Mo. App. 198.

Where, in an action for injuries to an elevator passenger by the alleged sudden starting of the elevator before she had alighted, plaintiff's evidence warranted an inference that the movement of the elevator as plaintiff was about to leave it

caused her to fall and thrust her foot between the floor of the car and the bottom of the adjacent elevator door, while defendant claimed that the catching of plaintiff's limb was due to the act of the elevator operator in pushing plaintiff backward after the elevator had started, the negligent act of the operator in prematurely starting the car was the proximate cause of the injury. *Becker v. Lincoln Real Estate, etc., Co.*, 93 S. W. 291, 118 Mo. App. 74.

As plaintiff was getting off a horse car, the conductor touched the bell, the car started, plaintiff stumbled, and the conductor, in reaching out to grasp and save her, struck her, accelerating her fall. A motion was made to set aside a verdict against the railroad company, on the ground that, for the conductor's act in striking plaintiff, and for the injury received thereby, beyond the effect of the fall had the conductor not touched her, defendants were not responsible. Held, that the verdict should not be disturbed. *Macer v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 461.

There can be no recovery for defendant's negligent starting of a car, from which plaintiff was alighting, where the evidence is so indefinite as to leave it conjectural as to whether plaintiff's fall resulted from that cause. *Schultz v. Second Ave. R. Co.*, 42 N. Y. S. 710, 12 App. Div. 445.

18. **Signal of starting.**—Negligence by a railroad company in starting a passenger train from the station without ringing the bell or blowing the whistle, in violation of Code 1907, § 5473, was not the proximate cause of injuries to a trespasser injured by being jerked off the train by its sudden starting while he was preparing to get off. *McElvane v. Central, etc., R. Co.*, 170 Ala. 525, 54 So. 489, 34 L. R. A., N. S., 715.

19. **Place of safety.**—Plaintiff was injured by coming in contact with a pole located near the side of a street car on which he was riding. When the car started plaintiff was on the step of the rear platform facing the car, with his hands on the bars and his bucket on his left arm, with his hand through the bail, pushing against his brother, who was on the platform. The pole was located 136 feet from where the car stopped to permit plaintiff to board the same, and while the car was running this distance plaintiff was precluded from getting further up onto the platform by other passengers who preceded him. Held, that defendant's alleged failure to afford plaintiff a reasonable opportunity to get in a

the station or stopping place;²⁰ to assist passengers to alight;²¹ as well as in cases where the carrier negligently and erroneously announces the station,²² or stopping place,²³ or negligently calls a young child to the platform, for the purpose of alighting, before the train stops.²⁴

Misdirection as to Arrival of Train.—A carrier can not be held liable for an injury to a passenger because of the misdirection given by its agent to the passenger as to the arrival of the train, unless such misdirection contributed proximately to the injury.²⁵

place of safety on the car before starting it was not the proximate cause of his injury. *Cumberland, etc., R. Co. v. Thompson*, 62 Atl. 243, 102 Md. 193.

20. The employees of a railroad negligently failed to notify a passenger when he had reached his destination, and while he remained in the car a train was negligently backed into the same, whereby the management of the train, and not the failure to notify the passenger to alight. *Chicago, etc., R. Co. v. Bell*, 1 Kan. App. 71, 41 Pac. 209.

21. The failure of the employees in charge of a train to assist children to board it at a station, necessitating their mother to assist them, if negligence, was too remote to be the cause of the mother's injury, sustained while afterwards attempting to alight from the train while in motion. *Flaherty v. Boston, etc., Railroad*, 72 N. E. 66, 186 Mass. 567.

22. **Announcing station, etc.**—While plaintiff was a passenger on defendant's train at night, its employees negligently called the station, stopped the train, and opened the car door as an invitation for the passengers to alight, though the train was not within forty rods of the station; and when plaintiff attempted to alight, supposing it was the station, the train suddenly jerked, and threw her off the car. Held, that the invitation to alight was the proximate cause of the injury. *Rehearing* 65 N. E. 557, 30 Ind. App. 663, 96 Am. St. Rep. 355, denied in *Cincinnati, etc., R. Co. v. Worthington*, 65 N. E. 557, 66 N. E. 478, 30 Ind. App. 663, 96 Am. St. Rep. 355.

Where a conductor tells a passenger that her destination is the next stop in about twenty minutes, and when the train next stops before reaching her destination the passenger leaves the train from the rear without the knowledge of any of the trainmen and without injury, about 2 o'clock in the morning, at a place where no station or lights were in sight, the information given to the passenger, even if done negligently, can not be said to be the proximate cause of the injury by sickness to the passenger as the result of the fright experienced by getting off the train at the wrong place, where her surroundings excited her fears. *Florida, etc., R. Co. v. Wade*, 53 Fla. 620, 43 So. 775.

A complaint alleging that plaintiff took passage on defendant's train to a certain place, and that the train was negligently stopped before the depot was reached and the station called out, and plaintiff thereby induced to alight at a place where she supposed there was a depot platform, but where there was no platform, and that in alighting in the dark from the steps, which were three or four feet from the ground, she fell into a ditch, and that defendant's brakeman, in the negligent performance of his duty to assist her, fell on her and injured her, states a cause of action, though the fall of the brakeman, which was the immediate cause of the injury, was accidental. *Louisville, etc., R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107.

23. The negligent conduct of a street car conductor in calling a street crossing before his car had arrived at the street announced, inducing a woman to alight, at night, in a rain storm, at a strange place, is the proximate cause of injury sustained by reason of her falling on a curbstone which she was unable to see by reason of the darkness, while endeavoring to make her way homeward along a street with which she was unfamiliar. *Georgia R., etc., Co. v. McAllister*, 54 S. E. 957, 126 Ga. 447, 7 L. R. A., N. S., 1177.

24. The act of the conductor in calling the passenger, a boy ten years old, to the platform as the car neared his destination, was not negligence rendering the company liable for injury to the boy caused by his jumping from the car as the conductor, at the proper time and place, gave the signal for stopping, though the rules of the company prohibited children from standing on the platform. *Cronan v. Crescent City R. Co.*, 21 So. 163, 49 La. Ann. 65.

25. **Misdirections.**—Plaintiff, with other members of a baseball team, having purchased tickets for passage on a belated train, asked defendant's agent when the train would arrive, and were informed that it was two minutes out of H., and that by schedule would be in in thirty-one minutes. Plaintiff and two of his companions then went to a restaurant some 250 yards from the depot, and, as they were coming out of the restaurant about fifteen minutes after the agent had given the information specified, saw the

§ 2286. Accommodations and Duties during Transportation.—During what is called the period of transportation of a passenger, as distinguished from taking him up and setting him down, there are many accommodations to which the passenger is entitled and many duties which the carrier, as such, owes to the passenger, but negligence on the part of the carrier in this respect does not render it liable to a passenger for injuries he may sustain unless such negligence is a proximate factor contributing to his injury in such a way that the law requires the carrier to have foreseen the injury as a result. And this rule has been applied in regard to heating the train or car,²⁶ overcrowding cars,²⁷ warning passengers,²⁸ compelling passengers to accept a class of accommodation inferior to that agreed upon;²⁹ delaying a passenger, susceptible to extreme heat, for a considerable period in a very warm and close place;³⁰ opening and clos-

train pulling out of the station. Plaintiff ran, and in endeavoring to board the train was thrown under the wheels by an alleged sudden jerk and was injured. Held, that the agent's misstatement as to the arrival of the train, assuming it to have been negligence, was not the proximate cause of plaintiff's injury. *Southern Kansas R. Co. v. Emmett* (Tex. Civ. App.), 139 S. W. 44.

26. Duties during transit.—Plaintiff, two years of age, was about to be taken by his mother on one of defendant's trains which left their place of residence early in the morning. Plaintiff was asleep when his parents got ready to start, and was taken to the depot, a distance of two and one-half blocks, in a baby buggy. The weather was cold, but plaintiff, before boarding the cars, was wrapped up, and was warm. The cars were cold, and without fire, and plaintiff contracted a severe cold, resulting in a serious disease of the head. Held, that the evidence warranted a finding that plaintiff's injuries were the result of defendant's negligence in failing to heat its cars, and not the result of his parent's negligence in taking him to the depot. *St. Louis, etc., R. Co. v. Duck* (Tex. Civ. App.), 72 S. W. 445.

Where a passenger, because the car in which he was riding was not sufficiently heated, attempted to pass from it to another car while the train was in motion, in order to find a warmer one, and was injured, the failure of the carrier to heat the car was not the proximate cause of the injury. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493.

27. While violation of Civ. Code, §§ 2102, 2184, 2185, providing that a carrier of passengers must not overcrowd or overload his vehicle, must provide a sufficient number of vehicles to accommodate all passengers who can be reasonably expected to require carriage at the time, and must provide every passenger with a seat, will establish negligence, it will not authorize recovery for injury to a passenger, while alighting, from being thrown by the starting of the car, on the unauthorized signal of another passen-

ger; it not being shown to have any direct and casual connection with the injury. *Cary v. Los Angeles R. Co.*, 108 Pac. 682, 157 Cal. 599, 27 L. R. A., N. S., 764, 21 Am. & Eng. Ann. Cas. 1329.

The negligence of a street car company in permitting a car to be overcrowded was the proximate cause of injury to a passenger who was pushed off the car by another passenger who was pushing his way through the crowd to get into a position to alight. *Knaisch v. Joline*, 123 N. Y. S. 412, 138 App. Div. 854.

28. Where some peculiarity of an injured party, unknown to defendant carrier, whereby he could not understand what would be a sufficient warning to an ordinary person, is the proximate cause of his injury, the accident is to be referred to such party's misfortune, and not to the negligence of the defendant because of failure to give an effectual warning. *Bilotta v. Media, etc., R. Co.*, 70 Atl. 123, 220 Pa. 542.

29. Plaintiff purchased a first-class ticket and took passage on a mixed train. While the train was in motion, plaintiff stepped on a banana peel negligently permitted to remain on the floor of the water-closet, where it could not be seen by reason of the darkness. At the time of the accident the train made a sudden lurch, causing plaintiff to fall. Held, that the fact that plaintiff was compelled to ride on a mixed train instead of a first-class passenger train was not the proximate cause of his injuries, and hence it was error to permit evidence on such issue and to submit the same to the jury. *Chicago, etc., R. Co. v. Gragg*, 81 S. W. 93, 36 Tex. Civ. App. 102.

30. Where a passenger, because of a recent surgical operation, was weak, debilitated, and naturally very susceptible to extreme heat, a negligent delay without notice to her of the train for three hours in a very warm and close place, without the proper and usual accommodations furnished by railways, was the natural and probable cause of her injuries. *Gulf, etc., R. Co. v. Redeker*, 45 Tex. Civ. App. 312, 100 S. W. 362.

ing doors;³¹ directing or otherwise performing duties owing to passengers permitted to leave the train at intermediate stations,³² and in leaving an injured passenger on the track, exposed to great and known peril without mind enough to care for himself.³³

§ 2287. Control and Management of Conveyance.—The same general rules in regard to the carrier's liability for injuries depending upon the proximity of its negligence as the moving cause of the injury apply to the management of the conveyance.³⁴ So it has been held that the negligence of a carrier in causing accidents,³⁵ runaways of stagecoaches;³⁶ collision, between its own

31. Opening for only two-thirds its width of the sliding door of a subway car when it stopped at a station to take on passengers, the door being operated by the guard by means of a lever, if negligence, was not the proximate cause of injury to a passenger, who, while following others into the car, being crowded, put his hand against the casing of the door to prevent his falling, whereupon the door was opened wide and crushed his finger. *Maillefert v. Interborough Rapid Transit Co.*, 98 N. Y. S. 207, 50 Misc. Rep. 160.

32. Where a passenger was induced to leave the train by the negligent direction of the carrier, and he observed ordinary care in attempting to regain it, the carrier is liable for an injury received by the passenger, regardless of what other negligent cause co-operated in producing the injury. *Laub v. Chicago, etc., R. Co.*, 94 S. W. 550, 118 Mo. App. 488.

A train regularly stopped twice at a town; the second stop being near a restaurant, where the train stopped for twenty minutes to allow passengers to procure supper. A passenger mistakenly left the train at its first stop at the town through the negligent misdirection of a brakeman. Before learning of the mistake, the train left him. There was no servant of the railroad present to guide him, and the passenger had no knowledge of the way to take to reach the train. A conductor of an independent carrier directed the passenger, who, while obeying the direction was injured in consequence of a defect at the end of the platform where the train stopped. Held that the proximate cause of the injury was the negligent misdirection of the brakeman rendering the railroad company liable. *Laub v. Chicago, etc., R. Co.*, 94 S. W. 550, 118 Mo. App. 488.

While the passengers in an emigrant car, which had been side-tracked overnight, were outside in the morning, the train suddenly started, without any previous signal. One of the passengers jumped onto the platform of the next car to his own, and after waiting a moment, until a brakeman who stood in the passageway moved to one side, he proceeded to cross to his own car. At that moment the cars separated, having been previously uncoupled in order to divide the train, and plaintiff fell between

them, and was run over. The brakeman had remained silent all the time. Held, that negligence of the company was the proximate cause of the injury. *Andrist v. Union Pac. R. Co.*, 30 Fed. 345.

33. **Injured passenger.**—*Cincinnati, etc., R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

34. **Management of vehicle.**—A carrier is not liable for injuries received by a person traveling on one of its cars unless the negligence of its servants, either alone or in concurrence with the negligence of other persons, was the proximate cause of the injury. *Bevard v. Lincoln Tract. Co.*, 105 N. W. 635, 74 Neb. 802, 3 L. R. A., N. S., 318.

35. *Missouri, etc., R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096, see 93 Tex. 691, no op.

Where a passenger receives no bodily injury from an accident caused by negligence, but is made insane by the excitement, hardship, and suffering, the carrier is not liable in damages, since insanity is not a probable or ordinary result of such accident. *Haile v. Texas, etc., R. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774.

It was to be expected that plaintiff would re-enter the elevator in the absence of the elevator boy, so that the accident was the probable consequence of defendant's negligence, where the elevator boy after taking plaintiff, a tailor boy, to a room where he wanted to leave some of the clothes he had with him, left the leaky, hydraulic, plunger elevator with the lever forward of the center of the slot, in which it worked, to offset the leakage, and so that it might be caught and set in motion by the clothes on plaintiff's arms, and left the door open, and stayed away from the elevator so long that he should have known plaintiff would have returned to go down to the street. *Toohy v. McLean*, 85 N. E. 578, 199 Mass. 466.

Plaintiff, a man of fifty years, received

36 In an action against a stagecoach proprietor for injuries to one while a passenger, it was error to refuse to instruct that, unless the negligent act complained of was the direct and proximate cause of the runaway which resulted in the injury, plaintiff could not recover. *Taillon v. Mears*, 74 Pac. 421, 29 Mont. 161.

vehicles,³⁷ or parts thereof,³⁸ with those of another carrier,³⁹ or with those of

in a cable-railway accident injuries which rendered him unconscious for a few moments, but on regaining consciousness did not seem to be seriously injured. On the right side of his head were a few cuts and a contusion, which did not seem harmful, and the marks of which disappeared in a few days. He went about his business the same day, but, while he had always before the accident been in good health, he afterwards became nervous and irritable, unable to sleep, and suffered a dull, heavy pain in the back of his head, extending sometimes down his back. Seven months after the accident, his entire left side became paralyzed. The medical expert testimony was contradictory, but some physicians testified that the paralysis, in their opinion, was caused by the rupture of a blood vessel, and that the rupture resulted from the injury received in the accident. Held, that the jury were warranted in finding the accident the proximate cause of the paralysis. *Bishop v. St. Paul City R. Co.*, 48 Minn. 26, 50 N. W. 927.

37. A drover who is traveling as a passenger on a freight train, which is also carrying cattle belonging to him, may hold the railroad company liable for personal injuries resulting from a collision caused by the negligence of its servants, although the accident would not have happened had he not asked for, and obtained, a delay of the train until he got his stock on board. *Flinn v. Philadelphia, etc., R. Co. (Del.)*, 1 Houst. 469.

Where plaintiff was injured by a motorman allowing his car to collide with the car in which she was a passenger, the negligence of the motorman was the proximate cause of her injury. *Stevens v. New Jersey, etc., R. Co.*, 65 Atl. 874, 74 N. J. L. 237.

Plaintiff was a passenger over defendant's road. On approaching Lansing, in the night, the train ran into some flat cars standing on the Michigan Central track, sixty rods from the depot. The train was running so slowly that the plaintiff supposed it had reached and stopped at the depot. He soon ascertained that an accident had occurred. He remained in the car from five to ten minutes, and then followed other passengers across a flat car, which stood close alongside the coach. The passengers stepped from the coach onto the flat car, and jumped to the ground to go to the depot or to their homes. Plaintiff walked across the flat car, and, in jumping from it, caught the toe of his shoe in a stake hole, and fell. Held, that the collision with the train of flat cars was not the proximate cause of the injury. *Vandercook v. Detroit, etc., R. Co.*, 84 N. W. 616, 125 Mich. 459.

Where a car was switched by a "kick-

ing switch" onto a spur track, and the brake bar broke, so that the car violently collided with the baggage car, whereby a passenger was thrown down and injured, the proximate cause of the injury was the making of the switch. *Yazoo, etc., R. Co. v. Roberts*, 40 So. 481, 88 Miss. 80.

Where an action against an electric railway for injuries to a passenger was based on evidence of the negligence of the conductor of a car in stopping it to adjust the trolley after it had been thrown off by a passenger, the court properly refused to charge that the proximate cause of the collision and injury was the throwing off of the trolley. *Blanchette v. Holyoke St. R. Co.*, 55 N. E. 481, 175 Mass. 51.

38. Plaintiff was injured by a collision between two parts of a train which had broken in two, caused by the slackening of speed of the part attached to the engine as it approached a station. None of the train operatives were aware of the break until the collision, which the jury found was due to the fact that the operatives were not in a proper position to view the train just prior to the accident, and, if they had been, they could have prevented the accident by setting the brakes. Held, that the negligence of the operatives was the proximate cause of the accident. *Reeves v. Chicago, etc., R. Co.*, 24 S. Dak. 84, 123 N. W. 498.

39. *Wills v. Atchison, etc., R. Co.*, 133 Mo. App. 625, 113 S. W. 713.

Where a passenger was killed by a collision between his train and the train of another railroad company which used the track jointly with the company whose passenger he was, and there was much evidence of the negligence of the crew of the train on which he was a passenger, a verdict against the company will be supported without regard to whether the crew on the colliding train was negligent. *Chicago, etc., R. Co. v. Martin*, 53 Pac. 461, 59 Kan. 437, affirmed in 20 S. Ct. 854, 178 U. S. 245, 44 L. Ed. 1055.

Though a collision between an automobile carrying passengers and a street car resulting in injury to a passenger in the automobile occurred by reason of the breaking of a brake-rod on the automobile owing to a latent defect in such rod, the driver of the automobile was liable, where the accident would not have happened if he had had his machine under control as he was approaching the car. *Johnson v. Coey*, 86 N. E. 678, 237 Ill. 88, 21 L. R. A., N. S., 81.

Where a trolley car passenger injured in a collision between the car and a train of a steam railroad at a crossing showed by undisputed testimony that the car stood on the crossing from three to five minutes when the train ran into it, the

other vehicles; ⁴⁰ imminent danger of collision causing passenger to jump from ⁴¹ or leave ⁴² the vehicle; explosions of the controllers of street cars; ⁴³ in permit-

failure of the car men to stop the car at a reasonable distance from the crossing and to use any reasonable precaution to ascertain whether any train was approaching was not the cause of the accident and did not justify a recovery. *Schlauder v. Chicago, etc., Tract. Co.*, 97 N. E. 233, 253 Ill. 154, reversing judgment, 160 Ill. App. 309.

Where a passenger on a street car was injured in a collision between the car and a railroad train at a crossing, and the fault of the conductor of the street car in signaling to the motorman to cross when he knew a train was approaching contributed in part to the injury, the street car company was liable therefor. *Chicago City R. Co. v. Shaw*, 77 N. E. 139, 220 Ill. 532.

40. In an action by a passenger against a street railway company for personal injuries received in a collision between the defendant's car and a wagon, the plaintiff is entitled to recover if the motorman was negligent, although the driver of the wagon was also negligent. *Thurston v. Detroit United R. Co.*, 100 N. W. 395, 137 Mich. 231.

Plaintiff, a street car passenger, was injured in a collision between the car and an automobile approaching each other at a street crossing at right angles. There was conflicting evidence as to how far down the avenue the motorman could have seen the lamps of the automobile, but he actually discovered the automobile when it was only 80 to 100 feet from him and moving at a rapid rate. The chauffeur did not see the car until he was within twelve feet of it, when he turned suddenly to the right to avoid a collision, but, in the effort to do so, his machine skidded and struck the car on the side, and plaintiff was injured either by some jerk of the car incident to the handling of it by the motorman or by some jolt occasioned by the impact of the automobile, and was thrown or fell against the corner of a seat near which she was standing, and received the injury complained of. Held, that the proximate cause of plaintiff's injury was the gross negligence of the chauffeur in charge of the car in the operation of his automobile, and not negligence of the railroad company. *Minneapolis St. R. Co. v. Odegaard*, 104 C. C. A. 496, 182 Fed. 56.

Where a passenger on an open street car was injured by reason of a collision between the car and a buggy driven by a third person, the fact that the collision occurred by reason of the negligence of the driver of the buggy did not relieve the carrier from liability for its negligence, proved to have been the efficient and proximate cause of the injury. *West*

Chicago St. R. Co. v. Tuerk, 90 Ill. App. 105, affirmed in 61 N. E. 1087, 193 Ill. 385.

A street-car passenger may recover for injuries occasioned by a collision with a hook and ladder wagon caused by a want of a high degree of care by the employees in charge of the car, though negligence of the driver of the wagon contributed to cause the accident. *Oslen v. Citizens' R. Co.*, 54 S. W. 470, 152 Mo. 426.

That a passenger's companion, with whom he had boarded the car, may have been first struck, while standing on the running board preparatory to taking a seat, by a team passing along in the same direction, and thrown against such passenger, forcing him against one of the stanchions, from which he was thrown to the street, was not an independent intervening cause exonerating a street railway company; the collision with the team occurring through the railway's negligence. *Lockwood v. Boston Elevated R. Co.*, 86 N. E. 934, 200 Mass. 537, 22 L. R. A., N. S., 488.

Where an injury to a street car passenger resulted from the concurrent negligence of the motorman and the driver of a wagon, the passenger could recover from the street railway company. *Doherty v. Boston, etc., R. Co.*, 92 N. E. 1026, 207 Mass. 27.

41. Defendant's negligence, causing imminent danger of a car colliding with that on which plaintiff was a passenger, or an appearance of such danger, was the proximate cause of her injury, whether she jumped off, or was pushed off by a companion, or another passenger jumped off onto her after she had got off. *Birmingham R., etc., Co. v. Butler*, 33 So. 33, 135 Ala. 388.

If a horse-car driver was negligent in attempting to cross a steam railroad in front of an approaching train, resulting in injury to a passenger who jumped from the car in a reasonable effort to avoid injury from the expected collision, the fact that the negligence of the gate-man in lowering the gate between the horses and the car united in producing the result does not absolve the horse-car company from liability. *Washington, etc., R. Co. v. Hickey*, 17 S. Ct. 661, 166 U. S. 521, 41 L. Ed. 1101.

42. Plaintiff was a passenger on a train which became disabled between stations,

43. Where, on the explosion of the controllers of a car, a passenger left her seat and stepped off the car, in motion, and was injured, the proximate cause of the injury was not the act of her leaving her seat, but the explosion of the controllers. *Louisville, etc., Tract. Co. v. Worrell* (Ind. App.), 86 N. E. 78.

ting vehicle to become overcrowded;⁴⁴ in running its cars with knowledge of existing danger;⁴⁵ in running vehicles with dangerous, reckless,⁴⁶ or unlawful,⁴⁷ speed;⁴⁸ in suddenly starting or stopping⁴⁹ the vehicle; or in negligently failing to close the door of the vehicle;⁵⁰ will render the carrier liable for in-

and while in this condition was run into by another train, injuring many persons. Some one stated in plaintiff's hearing that another train was approaching from the rear, and there was about to be another collision, whereupon plaintiff left her car and went to the side of the track, where she was poisoned by poison ivy. Held, that plaintiff was entitled to recover from the railroad for the injury resulting from the poisoning. *Estes v. Missouri Pac. R. Co.*, 85 S. W. 627, 110 Mo. App. 725.

44. A passenger, owing to the crowded condition of the car and platform, was obliged to stand on the first step of the car, and to maintain his position he held to the stanchions on the side of the steps. A fellow passenger on the platform, while attempting to pass to the bumper on the rear of the car, came in contact with the passenger, causing him to loosen his hold on the stanchions, and throwing him to the ground. Held, that the proximate cause of the injury was, not the negligence of the company in permitting the car to become overcrowded, but the act of the fellow passenger, for which the company was not liable. *McVay v. Brooklyn, etc., R. Co.*, 48 Misc. Rep. 551, 99 N. Y. S. 266.

The negligence of a railroad company in overcrowding its cars, compelling a passenger to ride on the platform, from which he was pushed by the jostling of other passengers, was a proximate cause, the casualty being one which the company might reasonably have foreseen, though it could not have foreseen the particular circumstances. *International, etc., R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

45. Where a motorman, after an explosion in the controller box, permitted the car to run for several blocks after the explosions and flames began, there was a causal connection between the panic among the passengers, by which plaintiff received a nervous shock, and the negligence of the motorman. *Logan v. United R. Co. (Mo. App.)*, 148 S. W. 444.

46. In an action against a street railroad company for injuries, the evidence held to show that the proximate cause of the injury to the passenger who was riding upon the platform of a street car was not the speed of such car, but the sudden turning of unmanageable horses in front of such car, which up to that moment had a clear way upon the track. *North Chicago St. R. Co. v. O'Donnell*, 115 Ill. App. 110.

Plaintiff, who was directed by the con-

ductor of a horse car to ride on the front platform, was injured by being kicked by one of the horses. By reason of the driver's negligence in driving the horses at a high rate of speed the horse which kicked plaintiff fell as the car was rounding a curve. The car was stopped, and the driver and others moved it back from the fallen horse, which, in his endeavor to release himself, kicked plaintiff while standing on the platform. Held, that the driver's negligence ended with the fall of the horse, and therefore was not the proximate cause of plaintiff's injury. *Roedecker v. Metropolitan St. R. Co.*, 84 N. Y. S. 300, 87 App. Div. 227.

47. In order that a street railroad may be held responsible for injuries to a passenger on the ground that it was running its cars at a greater speed than allowed by a city ordinance, the speed must have caused or contributed to cause the accident. *Dallas Consol. Elect. St. R. Co. v. Ison*, 37 Tex. Civ. App. 219, 83 S. W. 408.

Where a passenger alighted from an east-bound cable train running faster than the ordinances permitted, and was injured by a west-bound car, the speed of the car from which he alighted can not be held to have had no direct agency in causing the injury. *Weber v. Kansas City Cable R. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541.

48. Where a passenger was thrown from a street car through the negligence of the employees, by a sudden start of the car, and fell between the feet of a mule hitched to a coal wagon, and the mule became unmanageable, causing the wagon wheel to pass over the passenger, the negligence of the street railroad was the proximate cause of the injuries. *Parker v. St. Louis Transit Co.*, 83 S. W. 1016, 108 Mo. App. 465.

49. Where, in an action for injuries to a passenger by the sudden stopping of street cars, following an assault by another passenger on the conductor, plaintiff's evidence did not show that such assault was the operation of a cause of the accident beyond the control of the carrier, it was proper to charge that if plaintiff, while a passenger, was thrown from the car and injured on account of the sudden stopping thereof, she was prima facie entitled to recover. *Willis v. St. Joseph R., etc., Co.*, 86 S. W. 567, 111 Mo. App. 580.

50. A passenger on a car, in attempting to close a door which had been left open for some time, and was causing discomfort because of cold air, was injured

juries to passenger only in cases where the negligence caused the injuries, or contributed proximately thereto.

§ 2288. Protection of Passengers.—Although there rests upon a carrier of passengers certain duties to protect its passengers from assaults and torts by third persons, yet the same general rule applies in such cases in respect to proximate cause as in other cases, and the carrier is liable only where its negligence contributed proximately to the injury.⁵¹ But where the carrier's negligence contributes proximately to the injury⁵² irrespective of whether or not the act of the third person was negligent,⁵³ the carrier is liable.

§ 2289. What Constitutes Negligence.—Negligence, in the ordinary legal sense, imports the absence or want of such care as the law exacts in the performance of any given undertaking.⁵⁴ Accordingly, it may, for the purpose of this subject, be said that a failure to exercise the degree of care and diligence due from carriers of passengers to their passengers is negligence on the part of a passenger carrier,⁵⁵ rendering such carrier liable for injuries, which are the prox-

by reason of a sudden lurch of the car, which precipitated him through the doorway. Held, that the injury was the direct and logical result of the carrier's negligence in not closing the door, and hence the carrier was liable, although the lurch of the car was the immediate cause of the injury. *Denver, etc., R. Co. v. Bedell*, 54 Pac. 280, 11 Colo. App. 139.

51. Protection of passengers.—Where a conductor, hearing a disturbance in a car, entered and quieted the passengers causing the trouble, his failure to eject such passengers was not the proximate cause of injury to an innocent passenger from a renewal of the difficulty after reaching a station. *Illinois Cent. R. Co. v. Gunterman* (Ky. App.), 122 S. W. 514.

A passenger on a street car, who was smoking, threw a lighted match so that it ignited the dress of a female passenger which blazed and caused a panic in the car, because of which plaintiff either was thrown, pushed, or jumped from the car and was injured. The motorman then stopped the car and acted promptly in the emergency in extinguishing the fire. Held, that the fact that the passenger was permitted to smoke on the front seat of the car, in violation of a rule of the company, was not the proximate cause of the injury. *Fanizzi v. New York, etc., R. Co.*, 99 N. Y. S. 281, 113 App. Div. 440.

A trainman's act in lending a pistol to a passenger was not the proximate cause of the injury to a second passenger shot by a third who attempted to shoot the passenger who borrowed the pistol while the latter was trying to shoot him; and hence the carrier is not liable for such injury. *Penny v. Atlantic, etc., R. Co.*, 69 S. E. 238, 153 N. C. 296, 32 L. R. A. N. S., 1209.

Plaintiff went to defendant's station to take a train which was about two hours late, and while waiting in the waiting room of the station was injured in a

scuffle among several boys who had entered the depot. There was no agent of the defendant in the depot at the time. Held, that the negligence of the defendant in not having a station agent present was not the proximate cause of plaintiff's injury, as defendant could not anticipate such result. *Missouri, etc., R. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 695.

If an injury to a passenger inflicted by a fellow passenger could not have been foreseen, or was not the reasonable or probable consequence of the omission of the conductor to eject the offender, the carrier would not be liable. *Kline v. Milwaukee Elect. R., etc., Co.*, 131 N. W. 427, 146 Wis. 134, Ann. Cas. 1912C, 276.

52. That a passenger was injured by the tort of a third person does not relieve the carrier from liability for its failure to use due care which gave an opportunity to such person to commit the act. *Elgin, etc., Tract. Co. v. Wilson*, 75 N. E. 436, 217 Ill. 47, affirming judgment, 120 Ill. App. 371.

53. *Missouri, etc., R. Co. v. Wolf*, 40 Tex. Civ. App. 381, 89 S. W. 778.

54. What constitutes negligence.—See 1 Shear. & Redf. on Negl., sec. 3; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Cochran, J., in Baltimore, etc., R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49.

55. United States.—*New York Cent. R. Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Steamboat New World v. King* (U. S.), 16 How. 469, 14 L. Ed. 1019.

Indiana.—*Citizens' St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125;

imate result of such failure,⁵⁶ in the absence of contributory negligence on the part of the passenger.⁵⁷ A mere error of judgment committed under stress of excitement and imminent peril does not constitute negligence.⁵⁸ By "negligence," when used in instructions, ordinarily is meant either the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances. But it is not proper in such cases as

Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466.

Kentucky.—Louisville R. Co. v. Park, 96 Ky. 580, 29 S. W. 455.

Maryland.—Baltimore, etc., R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Minnesota.—Reem v. St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638.

New Jersey.—Hansen v. North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718; New York, etc., R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052.

New York.—Deyo v. New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418.

Ohio.—Cleveland, etc., R. Co. v. Manson, 30 O. St. 451.

Unless the carrier exercised such care for the protection of its passengers, it will be held to be negligent. Lake Shore, etc., R. Co. v. Hotchkiss, 14 O. C. D. 431, affirmed in 69 O. St. 557, 70 N. E. 1125.

Pennsylvania.—Holmes v. Allegheny Tract. Co., 153 Pa. 152, 25 Atl. 640.

Texas.—Texas, etc., R. Co. v. Davidson, 3 Tex. Civ. App. 542, 21 S. W. 68; St. Louis, etc., R. Co. v. Harrison, 32 Tex. Civ. App. 368, 73 S. W. 38, affirmed in 97 Tex. 645, no op.

West Virginia.—Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393.

But compare Michigan Cent. R. Co. v. Coleman, 28 Mich. 440, 12 Am. R. Rep. 59; Galloway v. Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447, 58 Am. & Eng. R. Cas. 245; Omaha St. R. Co. v. Craig, 39 Neb. 601, 58 N. W. 209, 58 Am. & Eng. R. Cas. 208.

Illustrations.—It is the duty of a street railway company to exercise the highest degree of care in operating its cars to prevent injury to passengers, and failure of its servants in that respect is its negligence. Citizens' R. Co. v. Craig (Tex. Civ. App.), 69 S. W. 239.

A passenger may recover for inconvenience and injury due to a failure of the carrier to exercise that degree of care towards her that is due a passenger. Judgment (Tex. Civ. App.), 107 S. W. 71, reversed. Gulf, etc., R. Co. v. Overton, 110 S. W. 736, 101 Tex. 583, 19 L. R. A., N. S., 500.

Failure of the motorman on a street car to exercise reasonable care in listening for signals to stop the car given by a passenger who desired to alight, in consequence of which he did not stop the car, and the passenger was injured in at-

tempting to alight from it while in motion, was actionable negligence. Fuller v. Denison, etc., R. Co., 74 S. W. 940, 32 Tex. Civ. App. 399.

Where it was alleged that a passenger's injuries were caused by defendant's failure to furnish coaches which were warmed and provided with water, it was error to refuse an instruction that it was defendant's duty to exercise such a high degree of foresight and prudence as would have been used by other cautious, prudent, and competent persons under similar circumstances, and to charge that defendant was only required to use reasonable care and diligence to warm its coaches and provide water. Arrington v. Texas, etc., R. Co. (Tex. Civ. App.), 70 S. W. 551.

56. International, etc., R. Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343; International, etc., R. Co. v. Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152, affirmed in 93 Tex. 643, no op.; International, etc., R. Co. v. Tasby, 45 Tex. Civ. App. 416, 100 S. W. 1030; Levy v. Campbell (Tex.), 19 S. W. 438; Martin v. St. Louis, etc., R. Co. (Tex. Civ. App.), 56 S. W. 1011; St. Louis, etc., R. Co. v. Martin (Tex. Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op. See, also, Texas, etc., R. Co. v. Carlton, 60 Tex. 397.

A railroad company is responsible for the slightest neglect which is the proximate cause of injury to a passenger who is without fault. Indianapolis, etc., R. Co. v. Emmerson (Ind. App.), 98 N. E. 895.

57. **In the absence of contributory negligence** on the part of the passenger. St. Louis, etc., R. Co. v. Kennedy (Tex. Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op. See post, "Contributory Negligence of Passenger."

58. **Error of judgment.**—A person attempted to board a slowly moving street car just starting up a viaduct. He succeeded in placing one foot on the lower step, but was unable to pull himself up, and he collided with a rod of a sign on the viaduct warning trespassers. The conductor quickly discovered his peril and tried to assist him to board the car, but without success. Held, that the conductor was as a matter of law not negligent for failing to signal the car to stop, instead of attempting to assist such person to board the car. Mathews v. Metropolitan St. R. Co., 137 S. W. 1003, 156 Mo. App. 715.

these to so define negligence. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence.⁵⁹

Question of Law or Fact.—It is always for the court to decide whether a given state of facts will support an inference of negligence, and the issue should be treated as one of fact only when the evidence offers ground for a difference of opinion among reasonable minds in the characterization of the act alleged to be culpable.⁶⁰

§§ 2290-2342. Degree of Care Required—§ 2290. In General.—Since negligence on the part of carriers of passengers consists of the omission to exercise the care which the law exacts of them, it becomes important to define the degree of care required, the omission of which will make passenger carriers responsible for consequential injuries to the persons of passengers. The common-law rule, for the purpose of determining questions of liability for injury, divided passengers into two classes, first, those being transported, and, second, those not being transported, and as to the first class exacted of the carrier the highest practical care and diligence for their safety, and in case of injury, resulting from defective roadbed, equipment, or management, a presumption of the carrier's negligence was indulged by law in favor of the injured person, and as to the second class exacted of the carrier the exercise of ordinary care, no presumption being indulged in favor of either party in case of accidental injury.⁶¹ While he is being carried over the road, and where the injury occurs from a defect in the roadbed, machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road, the carrier is held to the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accident.⁶² But in the approaches to the cars such as platforms, halls, stairways, and the like, a less degree of care is required; and for the reason that the consequences of a neglect of the high skill and care which human foresight can obtain to are naturally of a much less serious nature, the rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the danger to be apprehended.⁶³

59. "Negligence" used in charge.—In *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434.

A charge that railroad companies must exercise that degree of foresight as to "possible dangers" to their passengers, etc., and a failure to do so is negligence, held not error, as it requires no more than the highest degree of care as to possible dangers to which the passenger may be exposed and not all possible dangers. *Missouri, etc., R. Co. v. Scarborough* (Tex. Civ. App.), 51 S. W. 356, affirmed in 93 Tex. 715, no op.

A charge that negligence, as applied to railroads engaged in the transportation of passengers, is a failure to exercise such a high degree of foresight as to possible dangers and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under the same or similar circumstances, cor-

rectly defines negligence as applied to the duty owed by a carrier to its passengers, and is sufficient, when taken in connection with a further charge that the railroad does not, by accepting a passenger, become an insurer of his safety, but is only bound to use a high degree of care, etc. *St. Louis, etc., R. Co. v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 343.

60. Question of law and fact.—*Mathews v. Metropolitan, St. R. Co.*, 156 Mo. App. 715, 137 S. W. 1003.

61. Division into classes.—*Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied, 85 N. E. 1026.

62. Kelley v. Manhattan R. Co., 112 N. Y. 443, 20 N. E. 383, 385, 3 L. R. A. 74.

63. Kelley v. Manhattan R. Co., 112 N. Y. 443, 20 N. E. 383, 385, 3 L. R. A. 74.

One on a railroad station platform by invitation of the company with reference to his baggage, and not as a mere licensee, was entitled to have the company

Passengers Not Being Transported.—See post, "As to Stations and Stopping Places," §§ 2351-2385.

Passengers in Transportation.—Public carriers of passengers being transported are not, like common carriers of goods, liable as insurers, but the degree of care for the safety of such passengers which the law imposes upon them is much higher than the ordinary care required of men who sustain to each other nothing more than the common relations of life, which one citizen, merely as such, sustains to another. It is true that expressions are found, in a few cases, which leave it to be inferred that the courts were of the opinion that carriers of passengers are only bound to exercise ordinary skill and care to secure the safety of passengers.⁶⁴ But this is not the law. Because the safety and even the lives of passengers are necessarily intrusted, in a great degree, to the care of the carriers who transport them, the law deems it reasonable that the carrier should be bound to exercise a very high degree of care,⁶⁵ according to the circumstances.⁶⁶ Passengers only take those risks which the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert.⁶⁷ To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings. He assumes the trust voluntarily, and for it receives a sufficient compensation; and we think it very apparent that in no case of the bailment of goods is there so great and imperative a demand for the utmost skill and diligence as from the carrier of passen-

exercise ordinary care to keep the platform reasonably safe for his use, and could recover for injury resulting from its negligent failure to do so. *Cleveland, etc., R. Co. v. Jones* (Ind. App.), 99 N. E. 503.

64. For example, in *Boyce v. Anderson* (U. S.), 2 Pet. 150, 7 L. Ed. 379, the court seems to have been of the opinion that passenger carriers are "liable only for ordinary neglect."

65. Degree of care required.—In general.—*United States.*—*The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061; *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502; *Steamboat New World v. King* (U. S.), 16 How. 469, 14 L. Ed. 1019; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas., 225; *Boyce v. Anderson* (U. S.), 2 Pet. 150, 7 L. Ed. 379; *New York Cent. R. Co. v. Lockwood* (U. S.), 17 Wall. 357, 21 L. Ed. 627; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 296, 23 L. Ed. 898; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 S. W. Ct. 932; *Shoemaker v. Kingsbury* (U. S.), 12 Wall. 369, 20 L. Ed. 432.

Delaware.—*Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040.

New Jersey.—*Brackney v. Public Service Corp.*, 77 N. J. L. 1, 71 Atl. 149.

New York.—*Sheppard v. Brooklyn Heights R. Co.*, 131 N. Y. S. 507, 146 App. Div. 806.

Ohio.—*Cleveland, etc., R. Co. v. Manson*, 30 O. St. 451; *First Nat. Bank v. Marietta, etc., R. Co.*, 20 O. St. 259, 5 Am. Rep. 655; *Manville v. Cleveland, etc., R. Co.*, 11 O. St. 417, affirming 2 Wst. L. M. 495, 2 O. Dec. Reprint 359; *Talmadge v. Zanesville, etc., Road Co.*, 11 O. 197; *Cincinnati St. R. Co. v. Fullbright*, 7

Wkly. L. Bull. 187, 8 O. Dec. Reprint 361; *Holmes v. Ashtabula Rapid Transit Co.*, 10 O. C. D. 638; *Cincinnati St. R. Co. v. Kelsey*, 9 O. C. C. 170, 6 O. C. D. 209; *Brooklyn St. R. Co. v. Kelley*, 6 O. C. C. 155, 3 O. C. D. 393; *P. C. & St. L. R. Co. v. Martin*, 2 N. P. 353, 3 O. Dec. 493, affirmed, no opinion in 55 O. St. 650, 48 N. E. 1117; *Cincinnati Tract. Co. v. Baron*, 3 N. P., N. S., 633, 16 O. D. N. P. 537, affirmed in 76 O. St. 599, 81 N. E. 1182.

Tennessee.—*Nashville, etc., R. Co. v. Elliott*, 41 Tenn. (1 Coldw.) 611, 78 Am. Dec. 506; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

Texas.—*Adams v. St. Louis, etc., R. Co.* (Tex. Civ. App.), 137 S. W. 437.

A carrier owes to actual and constructive passengers a higher degree of care than to travelers at highway crossings. *Washington, etc., R. Co. v. Vaughan*, 69 S. E. 1035, 111 Va. 785.

A "Very high degree of care."—"The duty of a railroad company to its passengers requires a very high degree of care on the part of the company." *Lake Shore, etc., R. Co. v. Hotchkiss*, 14 O. C. D. 431, affirmed in 69 O. St. 557, 70 N. E. 1125; *Cincinnati, etc., R. Co. v. Brown*, 9 O. C. C. 198, 6 O. C. D. 225.

66. As dependent on circumstances.—"The law exacts of carriers of passengers a high degree of care for the safety of passengers, according to circumstances." *Ashtabula Rapid Transit Co. v. Holmes*, 67 O. St. 153, 65 N. E. 877.

67. Risks taken by passenger.—*United States.*—*The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061.

Ohio.—*Cincinnati, St. R. Co. v. Fullbright*, 7 Wkly. L. Bull. 187, 8 O. Dec. Reprint 361.

gers. Especially is this true when the passengers are carried upon railroads by steam, for then, in consequence of the greater speed, the hazards to life and limb are largely increased. And the authorities are unanimous in exacting of passenger carriers a very high degree of care for the safety of their passengers.⁶⁸ The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence.⁶⁹ Hence a jury is very properly instructed that a carrier of passengers is bound to exercise more than ordinary care and diligence.⁷⁰ It has been held not to be erroneous to instruct a jury, in an action against a surface railway company, that defendant "was required to exercise, through its servants, a very high degree of care and skill in the operation of its cars."⁷¹ The rule of diligence in carrying for the safety of passengers, while it imposes the duty of great vigilance upon the common carrier, yet has its limitations.⁷² As was said by the supreme court of the United States:⁷³ "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not,

68. California.—*Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, 32 L. R. A. 193.

Florida.—*Florida, etc., R. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 52 Am. & Eng. R. Cas. 409, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Georgia.—*Gardner v. Waycross, etc., Co.*, 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

Illinois.—*Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239.

Indiana.—*Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234, 49 Am. Rep. 168.

Iowa.—*Kellow v. Central, etc., R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; *Sales v. Western Stage Co.*, 4 Iowa 547.

Kansas.—*Southern Kansas R. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45.

Kentucky.—*Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455.

Massachusetts.—*Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83.

Missouri.—*Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 97 Am. Dec. 402; *Huel-senkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

Nebraska.—*East Omaha St. R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas., N. S., 300.

New Jersey.—*Hansen v. North Jersey St. R. Co.*, 64 N. J. L. 686, 46 Atl. 718; *Scott v. Bergen County Tract. Co.*, 63 N. J. L. 407, 43 Atl. 1060; *Whalen v. Consolidated Tract. Co.*, 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723.

New York.—*Palmer v. Delaware, etc.,*

Canal Co., 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, affirming 46 Hun 486; *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, reversing 47 Barb. 247.

North Carolina.—*Lambeth v. North Carolina R. Co.*, 66 N. C. 494, 8 Am. Rep. 508.

Ohio.—*Brooklyn St. R. Co. v. Kelley*, 6 O. C. C. 155, 3 O. C. D. 393; *Cleveland, etc., R. Co. v. Manson*, 30 O. St. 451.

Pennsylvania.—*Smedley v. Hestonville, etc., R. Co.*, 184 Pa. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas., N. S., 649; *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. 91, 2 Am. & Eng. R. Cas. 172.

Tennessee.—*Mississippi, etc., R. Co. v. Ayres*, 84 Tenn. (16 Lea) 725.

Texas.—*Texas Cent. R. Co. v. Stewart*, 1 Tex. Civ. App. 642, 20 S. W. 962.

Virginia.—*Farish & Co. v. Reigle*, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

West Virginia.—*Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393.

Wisconsin.—*Davis v. Chicago, etc., R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 4 Am. & Eng. R. Cas., N. S., 622, 33 L. R. A. 654, 57 Am. St. Rep. 935.

69. Baltimore, etc., R. Co. v. Wightman, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384; *Virginia Cent. R. Co. v. Sanger*, 56 Va. (15 Gratt.) 230; *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792; *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. 248, 37 Am. & Eng. R. Cas. 179.

70. Fisher v. West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337, 23 L. R. A. 758.

71. Koehne v. New York, etc., R. Co., 32 App. Div. 419, 52 N. Y. S. 1088, affirmed in 165 N. Y. 603, 58 N. E. 1089.

72. Rule limited.—*Felton v. Horner*, 97 Tenn. 578, 37 S. W. 696.

73. Language of United States supreme court.—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

for instance, require, with respect to either passenger or freight trains, steel rails, and iron or granite cross ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains, air brakes, bell pulls, and a brakeman upon every car, but it does require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier and the manner of conveyance employed." ⁷⁴ It would seem, however, that the standard of care and diligence for a particular carrier can not be made to depend upon his pecuniary condition or the amount of his earnings. ⁷⁵ And for this reason a charge that "defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business," has been held to be erroneous. ⁷⁶

Ordinary and Reasonable Care.—On the other hand, instructions which exact of carriers of passengers nothing more than ordinary care do not require a sufficiently high degree of care and are clearly erroneous. ⁷⁷ And this has very properly been held to be true of instructions which require merely reasonable care. Thus, an instruction holding a carrier of passengers to the "exercise of reasonable skill and diligence" only has been held to the erroneous ⁷⁸ as has

^{74.} The liability of a railway company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers known to a passenger when he elects to be transported on it. Hence a short road, doing a small business and running only mixed trains, is not required to apply all the delicate checks and guards that are in use. *International, etc., R. Co. v. Copeland*, 60 Tex. 325.

Sufficiency as dependent on nature of road and amount of its business.—Treating of the subject of the use of certain engines and machinery on short branch roads with comparatively a small amount of business Mr. Wharton says: "If I employ a carrier of small means, and machinery, knowing what his capacity is, I must take him as I find him. * * * A railroad doing a small business in a sparsely populated territory, and running only a few trains, is not required to apply all the delicate checks and guards that are in use. * * * Diligence in all these cases is not the perfection of the ideal road; it is the practical adequacy of the actual road for the particular duty it undertakes." *International, etc., R. Co. v. Copeland*, 60 Tex. 325, quoting Whart. on Neg., sec. 140.

^{75.} **Care required not dependent on pecuniary ability of carrier.**—*Arkansas Mid. R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, 44 Am. & Eng. R. Cas. 311.

^{76.} *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229. In so holding the court said: "This might, and probably would, be understood to require of the defendants all practicable care to the extent of their means, which would make the ability of the corporation the measure of the care and diligence required, and that obviously is not the true test—and judging from other parts of the instructions it was not so intended—still the terms used are so explicit that there is reason to fear that the jury may have

been misled, and induced to require as a standard a higher degree of care and diligence than the law actually demands. It would be quite likely to be so, if it appeared that the corporation was receiving a large income from this business beyond the expenses. If, on the other hand, it appeared that the receipts did not equal the running expenses, the jury might feel at liberty to exact a lower degree of care and diligence. * * * The objection to the passage in question now before us is, the danger that the jury may have understood that the defendants were bound to use all practicable care and skill to the extent of their means; and as we do not know that their means were not understood to be ample, we can not be sure that the jury were not misled."

^{77.} *Iowa*.—*Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221.

Kentucky.—*Brown v. Louisville R. Co.*, 21 Ky. L. Rep. 995, 53 S. W. 1041.

Nebraska.—*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Washington.—*Payne v. Spokane St. R. Co.*, 15 Wash. 522, 46 Pac. 1054.

An instruction only requiring of the carrier's servants the use of ordinary care to prevent injury to a passenger calls for a standard of care below the legal requirement. *Groshong v. United R. Co.* (Mo. App.), 121 S. W. 1084.

A charge to the jury, in an action for injuries, which only imposes upon a street railway company the duty of exercising "ordinary and reasonable care," in reference to its passengers, is inadequate and erroneous. *Holmes v. Ashtabula Rapid Transit Co.*, 10 O. C. D. 638.

^{78.} *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 44 Am. & Eng. R. Cas. 322, 13 S. W. 1044, 22 Am. St. Rep. 781.

also an instruction enunciating the doctrine that a carrier of passengers is not liable for an injury caused by an accident resulting from a cause which could not have been foreseen or prevented by the exercise of reasonable care, vigilance, and foresight.⁷⁹ There are, however, some cases which tend to support the view that the expressions "due care" or "reasonable care" sufficiently define the care required.⁸⁰ But it seems that the expression as used in these cases should be taken to have been employed to designate the high degree of care imposed by law as being reasonable in view of the relation existing between the carrier and his passenger.⁸¹ Thus it is said by the New York court that a railroad company is not an insurer of its passengers, but is required to exercise an ordinary degree of care in the operation of its road, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it is devoted.⁸² And it is apprehended that the expression "reasonable care," unexplained, will usually be understood by the average mind to be practically synonymous with "ordinary care." And it certainly is open to the objection that it is not sufficiently explicit to convey to the minds of the average jury an accurate conception of the requirement of the law.⁸³ It has very properly been held that an instruction that, "In this case the defendant, being a carrier of passengers for hire, the law imposes upon it a reasonable degree of care and foresight to prevent injuries to persons lawfully traveling in its cars," is defective in not defining what, under the law, constitutes a reasonable degree of care.⁸⁴

Duty to Passenger and Employee Distinguished.—The difference between the degree of care which railroad companies owe to a passenger and to an employee is vast. As to the former, they are held liable for the slightest negligence; as to the latter, they are bound to use only ordinary care.⁸⁵

Private Carriers of Passengers.—Private carriers for hire are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances.⁸⁶

79. *Moore v. Des Moines, etc., R. Co.*, 69 Iowa 491, 30 N. W. 51, 27 Am. & Eng. R. Cas. 315.

A request for an instruction which, in effect, defined the care exacted of carriers of passengers to be the degree of care exercised by reasonably cautious persons engaged in like service under like circumstances was held to have been properly refused. *Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310.

80. *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699. In this case, Poland, Ch. J., in delivering the opinion of the court, said: "Some of the books and cases say the carrier of passengers is only liable for the want of due care, or reasonable care; others say they are bound to extraordinary care, and the highest diligence, to ensure the safety and security of their passengers. But we apprehend there is no real difference in the meaning of these terms as applied to the subject. In any business involving the personal safety and lives of others, what is due care, reasonable diligence? Clearly nothing less than the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained."

And in *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538, 7 So. 119, 41 Am. & Eng. R.

Cas. 143, 7 L. R. A. 323, 16 Am. St. Rep. 63, the expression "reasonable care" was used.

81. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65, 47 Am. & Eng. R. Cas. 501.

82. *Olopp v. Interborough Rapid Transit Co.*, 126 N. Y. S. 184, 69 Misc. Rep. 595.

83. In *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31, 6 N. E. 225, in holding that a request for an instruction was properly refused, the court said that, if the meaning of the instruction requested was that the defendant was bound to use reasonable care to prevent injuries that could be prevented, it was immaterial, as it gave no rule of reasonable care.

84. *Dickert v. Salt Lake City R. Co.*, 20 Utah 394, 59 Pac. 95.

85. **Passenger and employee not entitled to same care.**—*Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

A railroad company owes a higher degree of care to a passenger in providing a safe means of exit than it would owe to one of its servants. *Silva v. Boston, etc., Railroad*, 90 N. E. 547, 204 Mass. 63.

86. **Private carrier.**—*Shoemaker v. Kingsbury (U. S.)*, 12 Wall. 369, 20 L. Ed. 432.

The passenger in such case takes upon himself the risks incident to the mode of

§§ 2291-2328. Statements of the Rule—§ 2291. In General.—The degree of care which carriers of passengers are required to observe for the protection of their passengers is variously expressed in the books. All the authorities seem to have in view one purpose, to throw around the passenger every guard which reason and prudence would suggest as likely to shield him from accident or loss; and in exacting such protection for the person standing in the relation of passenger, the carrier is held liable for the slightest degree of negligence on its own part, or its servants or employees. However, the duty does not extend so far as to make the carrier a practical insurer of a passenger, as it is of goods or property.⁸⁷

§ 2292. Statements Requiring "Extraordinary," "Great," "Extreme" or "Strict" Care.—The courts have sometimes said, and have sustained charges to the effect, that carriers of passengers are bound to exercise "strict diligence,"⁸⁸ "strict care,"⁸⁹ "great care and caution,"⁹⁰ "extreme care and diligence,"⁹¹ "extraordinary care,"⁹² "extraordinary care and caution,"⁹³ "extraordinary care and diligence,"⁹⁴ "extraordinary diligence,"⁹⁵ and extraordinary vigilance, aided by the highest skill.⁹⁶ And it has been said that a carrier "is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of

conveyance. *Shoemaker v. Kingsbury* (U. S.), 12 Wall. 369, 20 L. Ed. 432.

Where an accident occurs to a passenger carried on such a train, by the car in which he was carried being thrown off the track, the contractors are not responsible, unless the accident is directly attributable to their negligence or unskillfulness in that particular; that is to say, in the management and running of the train. Accordingly, an instruction that it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution, was held erroneous, in that it turned the attention of the jury from the question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. *Shoemaker v. Kingsbury* (U. S.), 12 Wall. 369, 20 L. Ed. 432.

87. Statement of rule.—*Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *Baltimore, etc., R. Co. v. Noell*, 73 Va. (32 Gratt.) 394; *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. F. 578, 58 Am. & Eng. R. Cas. 337, 23 L. R. A. 758.

88. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65, 47 Am. & Eng. R. Cas. 501.

89. *Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793.

90. *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495, 34 How. Prac. 315.

91. *Sloane v. Southern California R.*

Co., 111 Cal. 668, 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, 32 L. R. A. 193.

92. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Dahlberg v. Minneapolis St. R. Co.*, 32 Minn. 404, 21 N. W. 545, 18 Am. & Eng. R. Cas. 202, 50 Am. Rep. 585.

A carrier of passengers is bound to exercise extraordinary care in performing all of the duties imposed by that relation. *Louisville, etc., R. Co. v. Forrest*, 65 S. E. 808, 6 Ga. App. 766.

93. *Raymond v. Burlington, etc., R. Co.*, 65 Iowa 152, 21 N. W. 495, 18 Am. & Eng. R. Cas. 217.

94. *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, 58 Am. St. Rep. 46.

Extraordinary diligence—Rule at common law.—If the facts show that the plaintiff was at the time a passenger, he was entitled, under the principles of the common law, to extraordinary care and diligence by the defendant. If the facts show that he was not a passenger, but a servant, and that his injuries were inflicted by the negligence of the master, without any contributory negligence on his part, he would be entitled to ordinary diligence on the part of the master. *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141.

95. *Gardner v. Waycross, etc., Co.*, 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

96. Extraordinary vigilance aided by highest skill.—A carrier of passengers is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225.

extraordinary vigilance, aided by the highest skill." ⁹⁷ These expressions, while they are not objectionable on the ground that they state the rule of care incorrectly, are scarcely explicit enough to be of any practical value in defining, for the instruction of a jury, the degree of care exacted of passenger carriers.⁹⁸ But while it seems desirable for courts, when using these vague and unsatisfactory expressions, to explain their meaning, it has been held that they are not bound to do so.⁹⁹ Possibly it would be the duty of a trial court, when using these and similar phrases, to explain their meaning if properly requested to do so.¹

§§ 2293-2310. Statements Requiring an Extremely High Degree of Care—§ 2293. In General.—The books contain a number of expressions of the rule which exact not only a very high, but, according to some of the authorities, an excessive degree of care. These statements, together with the criticisms upon them, will be disposed of before the more approved expressions of the rule are considered. It should be borne in mind, however, that in most of the cases in which the expressions about to be considered occur, they were used in the opinions merely by way of argument and were not necessarily meant to be strictly accurate statements of the requirement of the law. For this reason, the cases which actually involved the correctness of instructions in which the expressions were used, while cited in the compilation which immediately follows, will be reviewed more in detail later on, in connection with a consideration of the correctness of the statements.

§ 2294. Statements Requiring the "Utmost" Care, etc.—Among the expressions of the rule which exact an extremely high degree of care, are statements requiring the exercise of the utmost care,² the utmost care and caution,³

⁹⁷. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225.

⁹⁸. In *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495, 34 How. Prac. 315, while a charge requiring the exercise of great care and caution was held not to be erroneous it was said that it is not well calculated to convey to the mind of a jury any accurate idea of what care and diligence is required in the transportation of persons.

⁹⁹. In *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71, objection was made to an instruction in which the jury was told that the defendant was bound to exercise extraordinary care, and it was urged that the court did not explain to the jury what was extraordinary care, leaving it to each juror to put his own construction on the phrase. But the appellate court characterized the objection as hypercritical. It, however, does not appear from the report of this case that any request for an explanatory instruction was made in the court below.

1. See *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

2. **Statements requiring "extremely" high care.—United States.**—*Irvine v. Delaware, etc., R. Co.*, 184 Fed. 664, 106 C. C. A. 600.

Massachusetts.—*Beattie v. Boston Elevated R. Co.*, 201 Mass. 3, 86 N. E. 920; *Tompkins v. Boston Elevated R. Co.*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A., N. S., 1063.

Missouri.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.), 134 S. W. 45.

Ohio.—*Interurban R., etc., Co. v. Hancock*, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

Oklahoma.—*Chicago, etc., R. Co. v. Stibbs*, 87 Pac. 293, 17 Okla. 97.

Texas.—*Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58.

Utah.—*Christensen v. Oregon, etc., R. Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

Vermont.—*Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

Virginia.—*Norfolk, etc., R. Co. v. Rhodes*, 63 S. E. 445, 109 Va. 176.

West Virginia.—*Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337, 23 L. R. A. 758; *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. 248, 37 Am. & Eng. R. Cas. 179.

Though a railroad company is not an insurer beyond what the utmost care, human skill, diligence and foresight can provide against, yet the slightest negligence on its part is regarded gross negligence, rendering it liable for injuries sustained by a passenger, in consequence of such negligence. *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

3. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628, affirming 8 Abb. Pr., N. S., 205, 1 Sweeney 568.

the utmost care and skill,⁴ the utmost care, skill, and caution,⁵ the utmost degree of care, skill and foresight,⁶ the utmost care and vigilance,⁷ the utmost care and diligence,⁸ the utmost skill and diligence,⁹ the utmost vigilance,¹⁰ the utmost diligence,¹¹ the utmost foresight and prudence,¹² and the utmost skill, diligence, and human foresight.¹³

§ 2295. **Statements Requiring the "Most Exact" Care, etc.**—In a few cases it is said that passenger carriers must exercise the most exact care and diligence.¹⁴ And it has been said that they are bound to use the most watchful care and the most active diligence.¹⁵

§ 2296. **Statements Requiring the "Highest" or "Greatest" Care, etc.**—In some cases it is said that carriers of passengers are bound to exercise the highest degree of care,¹⁶ the highest degree of care and diligence;¹⁷ the

4. *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, affirming 65 Barb. 32; *Louisville, etc., R. Co. v. McKenna*, 75 Tenn. (7 Lea) 313.

5. *Washington, etc., R. Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233.

6. *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

7. *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258.

8. *California*.—*Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894.

Nevada.—*Murphy v. Southern Pac. Co.*, 101 Pac. 322, 31 Nev. 120, 21 Am. & Eng. Ann. Cas. 502.

New York.—*Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, affirming 46 Hun 486.

Oklahoma.—*Atchison, etc., R. Co. v. Calhoun*, 89 Pac. 207, 18 Okla. 75, 11 Am. & Eng. Ann. Cas. 681.

Pennsylvania.—*Hayman v. Pennsylvania R. Co.*, 118 Pa. 508, 11 Atl. 815; *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533.

Virginia.—*Reynolds v. Richmond, etc., R. Co.*, 92 Va. 400, 23 S. E. 770.

Wisconsin.—*McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

9. *Hazard v. Chicago, etc., R. Co.*, 1 Biss. 503, Fed. Cas. No. 6,275.

10. *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540.

11. *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

12. *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418.

13. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Though a carrier is not an insurer of the safety of passengers beyond what the utmost care, human skill, diligence, and

foresight can provide against, yet the slightest negligence on its part is regarded as gross negligence, rendering it liable for injuries sustained by a passenger in consequence thereof. *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

14. **"Most exact care."**—*Iowa*.—*Kellow v. Central, etc., R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858.

Massachusetts.—*McElroy v. Nashua, etc., R. Corp. (Mass.)*, 4 Cush. 400, 50 Am. Dec. 794.

Virginia.—*Virginia Cent. R. Co. v. Sanger*, 36 Va. (15 Gratt.) 230.

15. *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699.

16. **"Highest" or "greatest."**—*Alabama*.—*Birmingham R., etc., Co. v. Sawyer*, 156 Ala. 199, 47 So. 67, 19 L. R. A., N. S., 717; *Louisville, etc., R. Co. v. Dilburn (Ala.)*, 59 So. 438.

Arkansas.—*St. Louis, etc., R. Co. v. Green*, 85 Ark. 117, 107 S. W. 168, 14 L. R. A., N. S., 1148.

California.—*Bonneau v. North Shore R. Co. (Cal.)*, 93 Pac. 106; *Nilson v. Oakland Tract. Co.*, 10 Cal. App. 103, 101 Pac. 413; *Maxwell v. Fresno City R. Co. (Cal.)*, 89 Pac. 367; *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, 12 Am. & Eng. R. Cas., N. S., 170.

Illinois.—*Chicago City R. Co. v. Shreve*, 128 Ill. App. 462, judgment affirmed in 80 N. E. 1049, 226 Ill. 530.

Indiana.—*Cleveland, etc., R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, reversing judgment in 80 N. E. 636; *Lake Erie, etc., R. Co. v. Huffman (Ind.)*, 97 N. E. 434; *Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303; *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Louisville, etc., Tract. Co. v. Korbe*, 175

17. In *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229, it was said that upon grounds of public policy the carrier of passengers is bound to exercise the highest degree of care and diligence.

highest degree of care and skill;¹⁸ the highest degree of care, diligence and skill;¹⁹ the highest degree of care, diligence, vigilance and skill;²⁰ the highest degree of care and precaution;²¹ the highest degree of care and prudence;²² the highest degree of skill and foresight;²³ and the greatest care and foresight.²⁴ And in a late case the term "highest degree of care" has been defined as such care as a very careful, prudent, and competent person would exercise under similar circumstances.²⁵ The Kentucky court has said that the term "highest degree of care" means the utmost care exercised by prudent and skillful men in the same business.²⁶

§ 2297. Statements Requiring the "Highest Possible" or "Greatest Possible" Care, etc.—In other cases the expression is made somewhat stronger and it is said that passenger carriers must exercise the highest, or greatest, possible care and diligence.²⁷ And this language has been quoted

Ind. 450, 93 N. E. 5, reversing judgment 90 N. E. 483.

Kentucky.—*Chesapeake, etc., R. Co. v. Burke*, 147 Ky. 694, 145 S. W. 370, Ann. Cas. 1913D, 208.

Louisiana.—*Lancon v. Morgan's, etc., Steamship Co.*, 127 La. 1, 53 So. 365.

Minnesota.—*Farrell v. Great Northern R. Co.*, 100 Minn. 361, 111 N. W. 388, 9 L. R. A., N. S., 1113.

Missouri.—*Agustus v. Chicago, etc., R. Co. (Mo. App.)*, 134 S. W. 22; *Cooke v. Springfield Tract. Co. (Mo. App.)*, 129 S. W. 265.

South Carolina.—*Mills v. Atlantic, etc., R. Co.*, 85 S. C. 463, 67 S. E. 565; *Bunch v. Charleston, etc., R. Co.*, 91 S. C. 139, 74 S. E. 363.

Tennessee.—*Southern R. Co. v. Brooks*, 125 Tenn. 260, 143 S. W. 62.

Texas.—*Texas Mid. Railroad v. Griggs (Tex. Civ. App.)*, 106 S. W. 411; *Kirkland v. Texas, etc., R. Co. (Tex. Civ. App.)*, 140 S. W. 505; *Dallas, etc., St. R. Co. v. Gilmore (Tex. Civ. App.)*, 138 S. W. 1134; *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320.

A carrier must exercise the highest degree of care for the safety of its passengers. *Martin v. Missouri Pac. R. Co.*, 119 S. W. 444, 137 Mo. App. 694; *Wills v. Atchison, etc., R. Co.*, 133 Mo. App. 625, 113 S. W. 713.

An instruction that, while a carrier is not an insurer of the absolute safety of its passengers, it does undertake to exercise the highest degree of care, and is responsible for the slightest neglect resulting in injury to a passenger if at the time she was exercising ordinary care, was correct. *Terre Haute Tract., etc., Co. v. Payne*, 45 Ind. App. 132, 89 N. E. 413.

Sight seeing automobile chauffeur.—*McFadden v. Metropolitan St. R. Co.*, 161 Mo. App. 652, 143 S. W. 884.

18. *Moore v. Des Moines, etc., R. Co.*, 69 Iowa 491, 30 N. W. 51, 27 Am. & Eng. R. Cas. 315.

19. *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Alabama,*

etc., R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 47 Am. & Eng. R. Cas. 501, 30 Am. St. Rep. 65.

20. *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Prothero v. Citizens' St. R. Co.*, 134 Ind. 431, 33 N. E. 765.

21. *Southern Bldg., etc., Ass'n v. Dawson*, 97 Tenn. (13 Pickle) 367, 56 Am. St. Rep. 804. See *Nashville, etc., R. Co. v. Elliott*, 41 Tenn. (1 Coldw.) 611, 78 Am. Dec. 506.

22. *Coddington v. Brooklyn Crosstown R. Co.*, 102 N. Y. 66, 5 N. E. 797, 26 Am. & Eng. R. Cas. 393; *Peters v. Rylands*, 20 Pa. 497, 59 Am. Dec. 746; *New York, etc., R. Co. v. Daugherty (Pa.)*, 11 Wkly. Notes Cas. 437, 6 Am. & Eng. R. Cas. 139.

23. *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55, 30 Am. & Eng. R. Cas. 616.

24. *Watson v. St. Paul, etc., R. Co.*, 42 Minn. 46, 43 N. W. 904, 41 Am. & Eng. R. Cas. 114.

25. "Highest degree of care" defined.—*Northern Texas Tract. Co. v. Danforth*, 53 Tex. Civ. App. 419, 116 S. W. 147.

26. See post, "Statement Requiring the Highest Care of Prudent Man in the Same Business," § 2322.

27. "Highest possible" care, etc.—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 296, 23 L. Ed. 898; *Baltimore, etc., R. Co. v. Wightman*, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 73 Va. (32 Gratt.) 394; *Leavenworth Elect. R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

As was said in *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399, "Public policy and safety require that they [carriers of passengers] should be held to the greatest possible care and diligence, and that the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents."

It was not error to instruct that electric railway companies must use the greatest possible care and diligence for their passengers' safety. *Washington,*

with approval in a number of cases.²⁸

§ 2298. Statements Which, in Effect, Require the Greatest Human Care, etc.—Very like the foregoing expression in the respect that they exact an extremely high and possibly excessive degree of care, are the statements of the rule which require the exercise of the utmost or greatest human care and foresight;²⁹ the utmost human skill and foresight;³⁰ the highest degree of care which human foresight can suggest;³¹ all the care and skill which human prudence and foresight can suggest;³² the utmost care and diligence which human foresight can use;³³ the utmost care and diligence which can be bestowed by human skill and foresight;³⁴ the highest degree of care of which human judgment and foresight are capable;³⁵ the utmost diligence which human skill and foresight can effect;³⁶ and every precaution which human skill and foresight can provide.³⁷ It has also been said that carriers of passengers are bound to exercise toward their passengers "the utmost care and diligence in providing against those injuries which can be avoided by human care and foresight"³⁸ that carriers must provide for the safety of their passengers "as far as human foresight and care will go;"³⁹ that carriers of passengers are bound to transport their passengers safely as far as human care and foresight can avail;⁴⁰ and that the obligation of a steam railway carrier to its passengers is, as far as it is capable by human care and foresight, to carry them safely, and that it

etc., *R. Co. v. Vaughan*, 69 S. E. 1035, 111 Va. 785.

In the case of *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502, Mr. Justice Grier, in delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence."

28. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety requires that they should be held to the greatest possible care and diligence, and any negligence or default in such care will make such carriers liable in damages under the statute." *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035; *Baltimore, etc., R. Co. v. Wightman*, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384.

29. "Greatest human" care.—*Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; *Johnson v. Winona, etc., R. Co.*, Gil. 204, 11 Minn. 296, 88 Am. Dec. 83; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323.

A common carrier is bound to use the utmost care and diligence for the safety of its passengers. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

30. *Coddington v. Brooklyn Crosstown R. Co.*, 102 N. Y. 66, 5 N. E. 797, 26 Am. & Eng. R. Cas. 393.

31. *Marker v. Mitchell*, 54 Fed. 637.

Duty to do all that human skill and foresight can suggest.—Although the carrier does not warrant the safety of the passengers, at all events, yet his under-

taking and liability, as to them, goes to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. *Stokes v. Saltonstall* (U. S.), 13 Pet. 181, 10 L. Ed. 115; *Railroad Co. v. Pollard* (U. S.), 22 Wall. 341, 22 L. Ed. 877; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225.

32. *Brown v. New York Cent. R. Co.*, 34 N. Y. 404.

33. *Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

34. *Chicago, etc., R. Co. v. Mehl sack*, 131 Ill. 61, 22 N. E. 812, 41 Am. & Eng. R. Cas. 60.

35. *Goddard v. Grand Trunk Railway*, 57 Me. 202, 2 Am. Rep. 39.

A common carrier should be held to the strictest accountability and be required to exercise the highest degree of care as to passengers of which the human mind is capable. *Quimby v. Bee Bldg. Co.*, 87 Neb. 193, 127 N. W. 118.

36. *George v. St. Louis, etc., R. Co.*, 34 Ark. 613, 1 Am. & Eng. R. Cas. 294.

37. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, affirming 56 Barb. 425.

38. *Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346; *Warren v. Fitchburg R. Co.* (Mass.), 8 Allen 227, 85 Am. Dec. 700; *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208, 97 Am. Dec. 96.

39. *Ramjak v. Austro-American Steamship Co.*, 186 Fed. 417, 108 C. C. A. 339; *Kellow v. Central, etc., R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858.

40. *Baltimore, etc., Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346, 27 Am. & Eng. R. Cas. 194.

is responsible for all injuries resulting to its passengers from any, even the slightest, neglect.⁴¹

§§ 2299-2310. The Correctness of the Statements—§ 2299. In General.—The sufficiency of these statements to express the degree of care required of carriers of passengers is involved in more doubt than is generally supposed. While these statements are often accepted as correct, without question, by courts of recognized authority, the tendency of the later cases is to discountenance their use in instructions to juries, except when accompanied by some appropriate explanation of their meaning, and even to declare them to be erroneous, unless properly limited or explained. And there seems to be good cause for this. Carriers of passengers are neither liable as insurers of the safety of their passengers nor are they bound to exercise the highest care of which the human mind can conceive.⁴² They have never, it has been said, been held responsible for accidents which, by any possible means, could have been prevented.⁴³ For example, the law does not, in the present state of railroading, require the use of steel rails and granite cross-ties, because they are more lasting and less liable to decay than iron and wood.⁴⁴ There are certain dangers, necessarily incident to every mode of transportation, which the passengers must assume; for, in every case, regardless of the mode of conveyance adopted, to require the carrier to employ every conceivable precaution in rendering the business free from danger would be to compel both the employment of such precautions and incurring of such expense as would render the business of carrying passengers impracticable and deter every ordinarily prudent and responsible person from engaging in that character of business, thereby defeating the very purpose of the rule of care which is so often invoked in the interests of travelers.⁴⁵ While the use of such expressions as utmost care, highest, highest possible, and greatest human care, in describing the degree of care exacted of passenger carriers, does not necessarily amount to making them

41. *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

Its duty is to carry them safely, using the utmost care as far as human skill, diligence and foresight can reasonably be required to go. *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337, 23 L. R. A. 758; *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792.

42. **Correctness of statements.**—*United States*.—*Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368.

Arkansas.—*Arkansas Mid. R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, 44 Am. & Eng. R. Cas. 311.

Illinois.—*Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695.

Indiana.—*Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310.

Minnesota.—*Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436.

Pennsylvania.—*Fredericks v. Northern Cent. Railroad*, 157 Pa. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306.

43. *Gilbert v. West End St. R. Co.*, 160 Mass. 403, 36 N. E. 60, wherein it was held that it was not error for the trial court to refuse to rule, in an action for

personal injuries by a passenger against a carrier, that if it was possible for the defendant to prevent the accident, then defendant was negligent.

44. *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368; *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436.

45. *Arkansas*.—*Arkansas Mid. R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, 44 Am. & Eng. R. Cas. 311.

Illinois.—*Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313.

Iowa.—*Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405.

Kentucky.—*Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368, 9 Ky. L. Rep. 22, 3 S. W. 591.

Massachusetts.—*Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83; *Simmons v. New Bedford, etc., Steamship Co.*, 97 Mass. 361, 93 Am. Dec. 99.

Maine.—*Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

Minnesota.—*Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436.

insurers, still it is apprehended that the employment of these expressions, without explanation, has at least a tendency to convey the average mind and to the minds of a jury the impression that carriers of passengers are held to the greatest possible care short of making them liable as insurers. And, as is shown by the authorities cited next above, this is not the law. As has been said, these expressions "are misleading, if not erroneous."⁴⁶

§§ 2300-2303. Cases Upholding the Statements—§ 2300. In General.—Still, there are cases in which the employment of these expressions, without explanation, in instructions to juries has been upheld, although sometimes with apparent reluctance and, at other times, on the ground that the instruction was correct as applicable to the facts of the particular case.

§ 2301. Instructions Exacting the Utmost Care Upheld.—Thus, instructions exacting the utmost care have been held to be correct.⁴⁷ Perhaps the strongest support for the correctness of this instruction is to be found in Iowa.⁴⁸ But in Illinois a similar instruction was sustained with evident reluctance.⁴⁹

§ 2302. Instructions Exacting the Highest Care Upheld.—An instruction requiring the exercise of the highest degree of care has been held to be unobjectionable for the reason that the expression properly measures the care and diligence which a prudent man would exert in the business under like circumstances.⁵⁰ Instructions requiring the exercise of "the highest degree of care and caution" have been upheld, while in some instances the courts

⁴⁶ *Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423. And see *Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240, 90 Am. Dec. 382.

⁴⁷ **Cases upholding statements.**—*Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

⁴⁸ In *Sales v. Western Stage Co.*, 4 Iowa 547, the court below instructed that "carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill, either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe in the exercise of the utmost prudence and foresight." This instruction was approved, the court saying, "a brief examination of the authorities will show most conclusively that the rule laid down is well sustained by the earlier as well as the later cases." This case was approved in *Russ v. The War Eagle*, 14 Iowa 363.

⁴⁹ In *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483, a charge to the effect that it was the duty of the defendant to exercise "the utmost care, skill, and vigilance to carry plaintiff safely, and to protect him against any and all danger from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented," was declared to state the law applicable to the facts of the particu-

lar case with sufficient accuracy but it was said that "it might be that, in another case where the facts are materially different, the instruction would not be applicable, and might be held to impose a degree of care and skill not enjoined by the law."

⁵⁰ *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

In *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, the court, in holding that it was not error for the court below to instruct the jury that the plaintiff, who had been injured while a passenger on the defendant's train, was entitled to demand of the defendant the "highest possible degree of care and diligence," said: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains, air brakes, bell-pulls, and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed. The language used can not mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from."

regarded the phrase as somewhat limited by subsequent instructions.⁵¹ But, as bearing upon the weight of the cases as authority upon this point, it is to be noted that the courts on request in some of them, if not all, instructed the jury that while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers, thus explaining the meaning of the former instruction. While in a Kansas case an instruction requiring "all possible skill, foresight and care" was held to be unobjectionable in connection with the particular facts of the case.⁵²

§ 2303. Instructions in Effect Exacting the Greatest Human Care Upheld.—A great many cases approve the statement that where the danger of loss of life or limb from any defect in the vehicle or negligence in operating it are great, the carrier in those respects is bound to provide for the passenger's safety as far as human care and foresight will go.⁵³ This rule has been applied to

51. *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, 9 Am. & Eng. R. Cas., N. S., 859, 58 Am. St. Rep. 46.

And in *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, the trial court charged the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers. On appeal by the defendant, the appellant contended that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. In answer, Anders, J., in delivering the opinion of the court, said: "We do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence, and caution. The highest degree of care, prudence, and caution in running and operating street cars, so as to prevent injury to passengers, can not be said to mean such a degree of care as will absolutely prevent injury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business. Instruction similar to the above have frequently been approved by the courts."

52. *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

53. *United States v. The New World* (U. S.), 16 How. 469, 14 L. Ed. 1019.

Arkansas v. Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, 48 Am. Rep. 10.

New Hampshire.—*Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

New Jersey.—*Goble v. Delaware, etc., R. Co.*, 3 N. J. L. J. 176, Fed. Cas. No. 5488a.

In *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, an instruction which implied that the defendant railroad was bound to carry the plaintiff safely so far as it was possible to do so by the exercise of "human foresight, skill, and judgment," seems to have been thought not to be open to the objection that it was "too onerous and misleading."

In *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529, the instruction given by the trial court exempted carriers of passengers from liability for those accidents only which occur from circumstances against which human prudence and foresight can not guard. It was contended on the part of the defense that the rule laid down at the trial imposed upon the defendant carrier of passengers the obligations which attach to carriers of goods, and made him practically an absolute insurer of the safety of passengers. But, in delivering the opinion of the court of appeals, Johnson, C. J., said: "This criticism upon the rule is founded upon what I consider a misinterpretation of the language of the judge. He must not be understood to say that if the jury, looking back at the circumstances of an accident, can see that some course of conduct or precaution would have prevented its occurrence, the carrier is liable for having failed to pursue that course or omitted that precaution. In this sense, and in this sense only, is the position of the defendants' counsel accurate, that human prudence and foresight can guard against every danger not resulting from the act of God or public enemies. The judge was speaking of prudence and foresight to be exercised before the accident, and without knowledge that it was about to occur. If any fear was entertained that the jury might

proprietors of stage coaches which ply between different places,⁵⁴ and it has been held that if a railroad could have prevented the accident by the utmost human sagacity or foresight, with respect to the track then it would be liable,⁵⁵ and such an instruction has been held to be correct, especially when accompanied with the important qualification that, in passing upon the question of negligence, "the jury were to have regard to the character of railway transportation."⁵⁶

§§ 2304-2308. Cases Declaring the Statements Erroneous—§ 2304.

In General.—On the ground that the expressions under consideration have a too indefinite and uncertain meaning properly to express the degree of care exacted of carriers of passengers, and that they require a higher degree of care than is imposed by law, it has, in a number of cases, been held that they are erroneous.

§ 2305. Instructions Exacting the Utmost Care Declared Erroneous.—Thus, it has been held to be error to instruct a jury that passenger car-

not correctly apprehend the force of the rule, and understand it to be said, not of prudence and foresight to be exercised before the event, but afterwards, and as affirming that if they could then see that particular precautions would have prevented the particular accident, though its likelihood could not be foreseen and did not, therefore, need to be guarded against, some request should have been made to the judge which would have called his attention to the misapprehension which was thought possible. Under those circumstances he would, we must assume, have called such explanations as limitations as might have been legally required." And see *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378.

In a recent New York case, the trial court, at the request of the plaintiff, charged the jury that a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of its passengers. While the court of appeals held that, under the circumstances of the particular case, the charge was erroneous, in the prevailing opinion by Gray, J., from which O'Brien and Vann, JJ., dissented, it was said that it would be correct in some cases. *Stierle v. Union R. Co.*, 156 N. Y. 70, 50 N. E. 419, affirming 13 Misc. Rep. 134, rehearing denied in 50 N. Y. 834; *Railroad Co. v. Anderson*, 21 O. C. 288, 11 O. C. D. 765. And see *Cincinnati, etc., R. Co. v. Morley*, 4 O. C. 559, 564, 2 O. C. D. 706; *Baltimore, etc., R. Co. v. Wightman*, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 73 Va. (32 Gratt.) 394; *Farish & Co. v. Reigle*, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666; *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. 248, 37 Am. & Eng. R. Cas. 179.

⁵⁴. In *Frink & Co. v. Coe* (Iowa), 4

G. Greene 555, 61 Am. Dec. 141, an instruction "that the proprietors of stage-coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers, which could have been prevented by human care and foresight," was approved, and it was said that it "is quite as moderate towards stage proprietors as the authorities would justify."

And in another case involving the right to recover damages for personal damages sustained by a passenger in a stage-coach, the appellate court approved an instruction that stated "that a stage-coach proprietor, who carries passengers for hire, is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight." *Sawyer v. Sauer*, 10 Kan. 466.

⁵⁵. In *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 1 Am. R. Rep. 548. The defendant sought to have it explained to the jury by requesting the court to tell them "that the utmost human sagacity required of the defendant did not require the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the constructing, operating or maintaining of railroads." This the court refused to do, and the refusal was assigned as error. But the supreme court said: "We know of no reason peculiar to this state why human life and safety are not as valuable as elsewhere; at any rate, it is not the province of courts to cheapen it, by construing away established principles, laid down to make life secure."

⁵⁶. **Charge qualified.**—*Baltimore, etc., R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578.

riers are bound to exercise "the utmost care,"⁵⁷ "the utmost care and prudence,"⁵⁸ and "the utmost care and vigilance."⁵⁹ A common carrier of passengers need not adopt every conceivable precaution, or exercise the utmost conceivable diligence, to prevent injury.⁶⁰ There is a Georgia case which, although decided under a statute declaring the degree of care to be exercised by carriers of passengers, nevertheless seems to throw some light upon the propriety of the use of the expression "utmost care" in defining the care required.⁶¹

§ 2306. Instructions Exacting the Highest Care Declared Erroneous.—And it has been said that, when such general term as "highest degree of care" is employed to define the care required of passenger carriers, the trial court should always explain it so as to show that the care exacted of carriers to their passengers is the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and the practicable operation of the business.⁶² And a charge requiring a defendant railroad company "to operate its cars with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to its passengers" was held to exact a higher degree of care than is imposed by law.⁶³

§ 2307. Instructions Exacting the Greatest Possible Care Declared Erroneous.—The words "utmost possible care" and "greatest possible care and diligence," have been declared to be superlative terms, unsafe and improper to be indulged in, as expressive of the requirement of the law.⁶⁴

57. Cases declaring statements erroneous.—An instruction that the carrier owed a passenger the duty of using the "utmost care" for his safety was erroneous. *Houston, etc., R. Co. v. Keeling*, 51 Tex. Civ. App. 386, 112 S. W. 808.

58. *Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423.

59. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

In *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. R. Rep. 59, a charge which exacted of the defendant railroad, as a carrier of passengers, "the utmost care and skill" was criticised and held to be erroneous on the ground that "the language use would fairly permit the jury to find anything to be negligence which could by any possibility be avoided."

60. Utmost conceivable diligence not required.—*Glennen v. Boston Elevated R. Co.*, 207 Mass. 497, 93 N. E. 700, 32 L. R. A., N. S., 470.

61. In Georgia, carriers of passengers are, by statute (Ga. Code, § 2067), required to exercise extraordinary care and diligence, and "extraordinary diligence" is, by another section of the statute (Ga. Code, § 2062), defined to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." In considering the propriety of a charge requiring railroad companies "to observe the utmost care and diligence" for the safe carriage and delivery of their passengers, the supreme court of Georgia, in an opinion delivered by Lumpkin, J., said: "To the mind of the writer, the term just quoted conveys a stronger and more significant meaning

than the word 'extreme.' This view, however, may not be sound; for there is much reason for holding that, according to the recognized authorities, these two words are synonymous. The mere substitution, therefore, of the word 'utmost' for the word 'extreme' would not, perhaps, render the charge erroneous. Its real vice consists in laying down the doctrine that a railroad company is bound to use the highest possible degree of diligence in caring for the safety of its passengers; this being the real meaning of the words 'utmost diligence' when used alone, and without qualification, whereas, the legal measure of extraordinary diligence recognized by our Code is, as above shown, only that extreme care and caution which every prudent and thoughtful person exercise under like circumstances." *East Tennessee, etc., R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216.

62. *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

63. *Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423.

64. *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

And of the language used by Grier, J., in *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502, to the effect that "when carriers undertake to carry persons by the powerful and dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence," it has been said: "These are very strong, but somewhat indefinite, terms." *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

§ 2308. Instructions in Effect, Exacting the Greatest Human Care Declared Erroneous.—It has been held to be error to charge a jury that carriers of passengers are required to exercise the "utmost human foresight, skill and care,"⁶⁵ the "utmost diligence which human skill and foresight could effect,"⁶⁶ the "highest degree of care known to human skill and foresight,"⁶⁷ or the highest degree of care and diligence of which human judgment and foresight are capable.⁶⁸ In a very late Colorado case the court said that an instruction, without condition or modification, that "they are bound to exercise all the care and skill which human foresight and diligence can suggest," makes a carrier liable as an insurer and is erroneous.⁶⁹

§ 2309. Conflict of Authority in Texas.—Upon the question as to the accuracy of these expressions the Texas cases exhibit such a marked inconsistency as to demand separate consideration. The supreme court of Texas at one time upheld a charge which required a carrier of passengers to use the "utmost care" to provide for the safety of passengers.⁷⁰ But, notwithstanding its previous rul-

65. *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251, reversing 81 Mo. 325, 34 Am. & Eng. R. Cas. 488, 51 Am. Rep. 239.

66. *St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

67. An instruction that it was the duty of defendant carrier to exercise the highest degree of care known to human skill and foresight in the carriage of passengers, and it was liable for the slightest degree of negligence, was erroneous as requiring too high a degree of care. *Birmingham R., etc., Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760.

68. *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652; *Gulf, etc., R. Co. v. Stricklin* (Tex. Civ. App.), 27 S. W. 1093.

An instruction to the effect that a passenger was entitled to all the care which human foresight could furnish her has been held to be clearly erroneous. *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31, 6 N. E. 225.

An instruction which implied that a carrier of passengers is responsible for an accident which could be guarded against by human skill and foresight was held to exact too high a degree of care and to be erroneous. *Texas, etc., R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

In holding that it was error for the trial court to instruct the jury that "the defendant as a carrier of passengers for hire was bound as far as human foresight and care would enable it to carry the plaintiff with safety," the Kentucky court of appeals, in an opinion delivered by Hargis, J., said: "This instruction so defined the care that appellant should have exercised, as to require the driver to use such care to protect her as would have shown after the accident that nothing was left undone which might have contributed to that object and avoided the accident. The utmost care and largest foresight of the most skillful human

belonging to the race was prescribed as the measure of care which the driver was bound to exercise. Such a degree of care and skill is impracticable, and would, if exacted, force the railroads of this class to employ none but persons who were perfect in skill and care so far as any human being may become so. It will be seen at a glance that such a rule would stop the business of the road or force it to become responsible for every accident where it can be seen after it has happened that it might have been avoided." *Louisville City R. Co. v. Weams*, 80 Ky. 420, 8 Am. & Eng. R. Cas. 399, 4 Ky. L. Rep. 287.

In *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695, there is a dictum to the effect that an instruction requiring all the care, vigilance, and foresight of which the human mind is capable would lay down too broad a rule. In the course of the opinion of the court delivered by Walker, J., it is said: "While courts, in announcing the rule governing common carriers of persons, have said that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render its use impracticable. Nor does it require the utmost degree of care which the human mind is capable of inventing. Such a rule would involve the expenditure of money and the employment of hands, etc., in repairing the public highway over which the carrier has necessarily to pass, so as to render it perfectly safe; and would prevent all persons of ordinary prudence from engaging in that character of business."

69. *Colorado, etc., R. Co. v. McGeorge*, 46 Colo. 15, 102 Pac. 747, 17 Am. & Eng. Ann. Cas. 880.

70. *Texas authorities.*—*Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407. And this case was followed by the Texas court

ing by which a charge exacting the "utmost care" was upheld, it has held it to be error for a trial court to charge a jury that a carrier of passengers is bound to exercise "all possible care."⁷¹ The court contended that "all possible care" has a broader and more unlimited meaning than "utmost care." The phrase "utmost care" is defined to mean "all the care and diligence possible in the nature of the case," while the word "possible," as used in the phrase "all possible care," is defined to mean "capable of being done." This was followed by the court of civil appeals in a case wherein it was held that a charge exacting of the defendant carrier of passengers "the greatest possible care" was erroneous.⁷² But the Texas court of civil appeals, in a case which was decided later than either of the above-cited supreme court cases, in commenting upon a charge requiring the "utmost degree of care," said that carriers of passengers are not required to exercise the "utmost degree of care," but only that high degree of care which very cautious and prudent persons would exercise under like circumstances.⁷³ While this case would seem to indicate that the earlier of the two supreme court cases cited at the commencement of this section should be regarded as overruled, a still later case decided by the court of civil appeals is against that view.⁷⁴ These attempts to draw distinctions between such very similar expressions savor of a refinement which is out of place when the propriety of a statement of a rule of law to a jury is concerned. As the supreme court of Texas has said: "The object of giving a charge to the jury is to furnish them a guide by which they can determine from the evidence whether or not the party sought to be charged has done or failed to do the things which by law creates the liability."⁷⁵ Surely the average jury can not be expected to apply the fine distinctions in which the Texas courts have indulged. It is submitted that these different expressions, for all practical purposes, have substantially the same meaning, and that they should all either be rejected as inaccurate, or accepted as correct, statements of the law. But passing over this apparent conflict we will generally state the Texas rule to be that while carriers of passengers are not insurer of the safety of their passengers, yet they are bound to exercise the "highest" or "utmost" degree of care that can reasonably be exercised to secure the safety of their passengers.⁷⁶ In the notes below will be found set out

of civil appeals in Ft. Worth, etc., R. Co. v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61.

Some support is also afforded to this holding by *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074. But in this case, while the expression "utmost care" was used in the instructions of the trial court, in one of the instructions the court said that it was the duty of the defendant to exercise "such care and caution * * * as a very prudent and cautious person, under like circumstances, would have exercised."

71. *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 40 Am. St. Rep. 829, 58 Am. & Eng. R. Cas. 70. The opinion in this case refers to but does not overrule the earlier case of *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407.

72. *Gulf, etc., R. Co. v. Higby* (Tex. Civ. App.), 26 S. W. 737.

A charge instructing the jury that carriers of passengers are held to "the greatest care and diligence" for the safety of passengers and are required "to provide for their safe conveyance as far as human foresight will go," has been held to be erroneous. *Fordyce v. Withers*, 1

Tex. Civ. App. 540, 20 S. W. 766; *Fordyce v. Chancy*, 2 Tex. Civ. App. 24, 21 S. W. 181.

73. *McCarty v. Houston, etc., R. Co.*, 21 Tex. Civ. App. 568, 575, 54 S. W. 421.

74. Thus, in *Houston, etc., R. Co. v. George* (Tex. Civ. App.), 60 S. W. 313, the court upheld a charge which required of a defendant railroad company the exercise of the "highest degree of care" for the safety of its passengers. In so holding the court said the expression "highest degree of care" is synonymous with, and no broader than "the utmost care," and expressed its belief that a jury would understand the two phrases as meaning the same thing. But see *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165, 3 Am. & Eng. R. Cas., N. S., 432; S. C., 3 Tex. Civ. App. 272, 22 S. W. 994.

75. *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829.

76. *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320; *Missouri Pac. R. Co. v. Long*, 81

a few charges which have been held correct,⁷⁷ or incorrect,⁷⁸ according as the case may be.

Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811; Gulf, etc., R. Co. v. Smith, 87 Tex. 348, 28 S. W. 520, reversing (Tex. Civ. App.), 26 S. W. 644.

It is the duty of a carrier to use the highest degree of practical care, diligence, and skill, consistent with its mode of transportation, to protect a passenger from injury. Atchison, etc., R. Co. v. Worley (Tex. Civ. App.), 25 S. W. 478, citing Atchison, etc., R. Co. v. Frier (Tex. Civ. App.), 22 S. W. 6; Boyles v. Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 936.

A carrier is not required to adopt all possible precautions, or to exercise the utmost diligence which human ingenuity can imagine, to avert injury to a passenger. Pecos, etc., R. Co. v. Twichell (Tex. Civ. App.), 145 S. W. 319.

The case of an injury to a passenger by a collision of trains requires the application of the rule of the highest degree of care. Ft. Worth, etc., R. Co. v. Enos (Tex. Civ. App.), 50 S. W. 595, modified in Missouri, etc., R. Co. v. Enos, 50 S. W. 928, 92 Tex. 577.

77. Instructions as to degree of care held correct.—An instruction that a railroad company, in transporting passengers for hire, is bound to exercise the highest degree of care, and explaining what is meant by ordinary care, is without prejudice to defendant. Texas, etc., R. Co. v. Buckalew (Tex. Civ. App.), 34 S. W. 165, 3 Am. & Eng. R. Cas., N. S., 432.

An instruction that a carrier owed to a passenger the "utmost care" for his safety was not objectionable; such care being no more than the highest degree of care which a carrier is bound to exercise. Certified question 51 Tex. Civ. App. 386, 112 S. W. 808, answered. Houston, etc., R. Co. v. Keeling, 102 Tex. 521, 120 S. W. 847.

In an action against a street railroad company for injuries to a passenger, an instruction that "It is the duty of a street car driver to be skillful and prudent and cautious to see that his passengers are not injured in his car, and in case a passenger on the car is injured, by the negligence of the driver, the company is liable in damages for such injury. Negligence in a car driver is the want of such care and prudence as skillful, prudent and careful car drivers observe under similar circumstances," held proper as against the objection that it defined the duties of the driver rather than of the car company. Allen v. Galveston City R. Co., 79 Tex. 631, 15 S. W. 498.

In an action against a railroad company for personal injuries caused by the sudden motion of defendant's train while

plaintiff was alighting therefrom, after being carried past the station to which he had paid his fare, without fault on his part, it is not error to charge that the law requires a railroad in transporting passengers to use the highest degree of practical care, diligence, and skill that is consistent with that mode of transportation, for the protection of passengers from injury. Atchison, etc., R. Co. v. Frier (Tex. Civ. App.), 22 S. W. 6.

In an action for injuries to a passenger, alleged to be due to the negligence of defendant's employees, the court properly instructed that the negligence meant the failure to use the utmost care that would be used by a very prudent person under like circumstances. Contreras v. San Antonio Tract. Co. (Tex. Civ. App.), 83 S. W. 870.

A charge that "carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers," does not exact of a carrier a higher degree of care than the law imposes. Ft. Worth, etc., R. Co. v. Stone (Tex. Civ. App.), 25 S. W. 808.

Plaintiff's wife having been thrown down and injured by the sudden starting of the train while she was trying to get off, there was no error in a charge that, in providing for the safety of passengers, it was the duty of the company "to use such means and foresight as persons of the greatest care and prudence would usually use in similar cases." Texas, etc., R. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

78. Instructions as to degree of care held erroneous or misleading.—A charge which uses the term "proper care" in defining care in a case where the highest degree of care is required is erroneous. Missouri, etc., R. Co. v. Mitchell, 79 S. W. 94, 34 Tex. Civ. App. 394.

In an action against a street railroad for injuries to a passenger, an instruction that defendant owed the duty "to exercise that high degree of care for the reasonable personal safety of passengers which a prudent person would use," etc., was improper by reason of the use of the word "reasonable." Moore v. Northern Texas Tract. Co., 41 Tex. Civ. App. 583, 95 S. W. 652.

In an action for injuries to a passenger while attempting to alight, a requested instruction that if defendant's conductor gave the signal for the train to move under the belief that the passenger had departed from the train, and if, in doing so, he acted as a reasonably prudent person would have acted under the same circumstances, the jury should

Limitation of Rule Requiring Highest Degree of Care.—The rule imposing upon a carrier of passengers the highest degree of care, must be confined to those means and measures of safety which the passenger must of necessity trust wholly to the carrier, and is restricted to the period during which the carrier may be said to be the bailee of the person of the passenger.⁷⁹

Reason for Rule.—The law exacting of carriers a very high degree of care, is not founded upon the permission of railroads to exercise the right of eminent domain and on their receiving land grants,⁸⁰ but is fixed by the existence of the relation of carrier and passenger, by the character of the danger to which the passenger is exposed, and by the exclusive control by the carrier of the agencies by which the danger can be averted. Where the life and health of a passenger is at stake, the care to be exercised is such as would have been used by very cautious and prudent persons.⁸¹

Test as to Exercise of Proper Degree of Care.—The general rule laid down by the Texas courts for determining whether or not a carrier of passengers has exercised due care, is, whether or not such carrier has exercised such a high degree of foresight as to possible dangers and such a high degree of care in guarding against them, as would be used by very cautious, prudent, and competent persons, skilled in the particular business, under similar circumstances.⁸²

find for the defendant, was erroneous, as making the question of negligence depend on the conductor's belief, and as requiring only ordinary care, instead of the care required of carriers of passengers. *St. Louis, etc., R. Co. v. Harrison*, 73 S. W. 38, 32 Tex. Civ. App. 368.

A special charge stated that defendant carrier owed plaintiff, a passenger, the utmost care for his safety, while in the main charge it was stated that defendant owed plaintiff a high degree of care to prevent injury in the operation of the train. Held, that such instructions attempting to define the carrier's duty by the use of an adjective were objectionable in the absence of instruction defining the "utmost" or "highest" degree of care as that which such prudent and skillful carriers employ. *Houston, etc., R. Co. v. Keeling*, 102 Tex. 521, 120 S. W. 847.

79. Limitation of rule.—*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

80. Reason of the rule.—*Campbell v. Cornelius* (Tex. Civ. App.), 23 S. W. 117.

81. St. Louis, etc., R. Co. v. Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.

The duty of the carrier to exercise extreme care results from the contract of carriage, express or implied. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

The duty of the carrier to exercise a high degree of care to avoid injury to passengers arises from the hazardous character of its business and the fact that human life is imperiled by it, and not alone from a contract of carriage, express or implied. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

82. International, etc., R. Co. v. Halloran, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Allen v. Galveston City R. Co.*, 79 Tex. 631, 15 S. W. 498; *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Fordyce v. Chauncy*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68.

The degree of care required of a carrier towards its passengers is proportionate to the nature and risks of the business, and is such as would ordinarily be exercised by persons of great care and prudence under similar circumstances. *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68; *Dallas Consol., etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074; *Texas, etc., R. Co. v. Orr* (Tex. Civ. App.), 31 S. W. 696.

If such care is shown, or if the lack of it does not appear, liability is not established. *Houston Elect. Co. v. Nelson*, 34 Tex. Civ. App. 72, 77 S. W. 978; *Tyler v. Texas, etc., R. Co.* (Tex. Civ. App.), 79 S. W. 1075; *Davis v. Galveston, etc., R. Co.*, 42 Tex. Civ. App. 55, 93 S. W. 222; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *St. Louis, etc., R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879.

Street car companies are carriers of passengers, and held to the highest care and skill, in preventing injuries to passengers, which prudent men would exercise under like circumstances. *El Paso Elect. R. Co. v. Harry*, 83 S. W. 735, 37 Tex. Civ. App. 90. See, also, *International, etc., R. Co. v. Hugen*, 45 Tex. Civ.

Proper Care Dependent on Facts and Circumstances of Particular Occasion.—The amount of care is that which would be suggested to cautious, prudent persons, skilled in the particular business, by the facts and circumstances surrounding the particular occasion.⁸³

§ 2310. Sufficiency of the Statements When Properly Limited or Explained.—The use of these general phrases by the trial court in its charge to the jury will not necessarily render the instructions erroneous; if by qualifying or explanatory words in connection with the objectionable phrase, or even in the course of the charge, the meaning of the phrase is properly limited or defined and the rule as to the care required is correctly stated, the error is avoided,⁸⁴ provided, of course, that the instructions are not inconsistent and misleading.⁸⁵ Where an instruction which required the defendant carrier of

App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op.; *International, etc., R. Co. v. Tasby*, 45 Tex. Civ. App. 416, 100 S. W. 1030; *Gilmore v. Houston Elect. Co.*, 46 Tex. Civ. App. 315, 102 S. W. 168; *Citizens' R. Co. v. Craig* (Tex. Civ. App.), 69 S. W. 239, affirmed in 97 Tex. 628, no op.; *Allen v. Galveston City R. Co.*, 79 Tex. 631, 15 S. W. 498.

83. Defendant upon circumstances.—*Dallas Consol. etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608.

84. When limited or explained.—*Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690, 40 Am. & Eng. R. Cas. 698; *Chicago, etc., R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640.

In *Smith v. Chicago, etc., R. Co.*, 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483, the trial court, at the request of the plaintiff, gave an instruction which exacted of the defendant railroad, as a carrier of passengers, the "utmost care." At the request of the defendant, the court told the jury that railroad companies were not insurers of the safety of passengers, and to entitle a passenger to recover it evolved upon her to show that the injury complained of was occasioned by the negligence of the company or its servants. It was held that, the two instructions being taken together, there was no error in the use of the words "utmost care."

85. When not inconsistent.—*Florida Cent., etc., R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58.

A charge exacting of railroad carriers of passengers "the highest degree of care," followed by a charge which, in effect, exacted the high degree of foresight and prudence as would be used by very cautious, prudent and competent persons under similar circumstances, has been held to be correct. *Missouri, etc., R. Co. v. Scarborough* (Tex. Civ. App.), 51 S. W. 356.

In *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571, the trial court, in charging the jury, exacted the "highest degree of care, diligence and skill,"

but in subsequent instructions, given on motion of the appellant, explained the terms so as to show that the care exacted is the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and the practicable operation of the business. The reviewing court held that there was no occasion to complain of the language employed in the charge.

In *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45, the trial court instructed the jury that the defendant carrier of passengers was bound to "the highest or greatest degree of precaution and care," but, further along in the instructions, defined the meaning of the expression, "the highest and greatest care" as follows: "The law imposes on the carriers of passengers for hire the utmost prudence and care for the safety of the passengers. By this expression is meant that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit. It does not mean that they must, at their peril, adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable, and would impose obligations about things that could not be foreseen, and could not, therefore, be guarded against." On appeal to the supreme court it was held that the instruction, taken as a whole, stated the law correctly.

Where a court instructed the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers, but also, at defendant's request, instructed the jury that while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers, it was held that there was no error. *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081.

In *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep.

passengers to exercise the highest degree of care and proceeded to state hypothetically the facts upon which the plaintiff might recover, it was held that these facts sufficiently qualified the general proposition.⁸⁶ It is, however, doubtful whether a charge exacting the "utmost care" is, under the authorities which hold the expression to be too rigorous, sufficiently qualified by the bare statement that the carrier is not an insurer; for, as has been said, the exemption of passenger carriers from responsibility as insurers is not the only limitation upon their liability; they are not bound to exercise the highest conceivable care, which the expression "utmost care" with no other qualification than the one mentioned, seems to exact.

§ 2311. Statement Requiring the Highest Care Consistent with the Possibility of Injury.—In a case in which the trial court, at the conclusion of a charge discussing the care to be exercised by passenger carriers, used the expression "the highest degree of care consistent with the possibility of injury" to define the reasonable care which it was, in effect, said that the law requires, the United States circuit court of appeals said of the expression "consistent with the possibility of injury" that, while it was not the happiest which might have been chosen, when read with its context and in the light of the particular case it was not erroneous. "To say to a jury that the law requires that the degree of care to be exercised must be such as is 'consistent with the possibility of injury' is only to say that the care must be commensurate with, or in proportion to, the possibility of injury presented by the particular situation."⁸⁸

781, 44 Am. & Eng. R. Cas. 322, the trial court throughout the instructions asserted that the duty owing by a steam-railway carrier to its passengers was to furnish reasonably safe and sufficient roadbed, track, cars, and engine "so far as human skill, diligence, and foresight could provide," and that defendant was "responsible for all injuries resulting from slight negligence" on its part. In another part of the instructions the import of the words "utmost human skill, diligence, and foresight," as used by the court, was explained to be "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." In commenting upon these instructions, the supreme court said: "This is substantially and almost literally the same language as is approved by text-writers of high authority in summarizing the law deducible from all the precedents. * * * The court also told the jury that the defendant, as a common carrier of passengers, did not undertake to insure the safety of plaintiff. Taking the declarations of law together, we think they stated the obligation of defendant to plaintiff as its passenger with great accuracy. To exercise the highest practicable care which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock, and service reasonably fit and sufficient to safely perform the contract of transportation into which the carrier has entered, is the measure of defendant's legal duty in such cases. * * * The instructions of the court go no further than to declare this rule in various forms of

expression, the meaning of which, taken as a whole, is unmistakable."

In *New Jersey R., etc., Co. v. Pollard* (U. S.), 22 Wall. 341, 22 L. Ed. 877, an instruction which held the carrier to the "greatest possible care and diligence" and required it to show that the "injury was unavoidable by human foresight" but which was coupled with the statement that the carrier was bound to use the "best precautions and improvements in known practical use to secure the safety of its passenger" was held to be correct.

In a case brought against a railroad company by a cattleman who had been injured while riding on defendant's freight train in charge of live stock, the trial court instructed the jury that carriers of passengers must exercise the highest degree of care, but qualified this general proposition by the further statement that the jury should enforce the general rule "with sound judgment and clear reference to the facts of the particular case before them," and that they ought not to apply "the general rule as to the transportation of a passenger on a passenger train to a passenger who comes upon a stock train for the purpose of looking after his stock, because the circumstances are entirely, or at least largely, different." It was held the defendant was not entitled to complain of the instruction. *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. C. A. 551.

⁸⁶ *Leslie v. Wabash, etc., R. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229.

⁸⁸ **Consistency with possible injury.**—*Mitchell v. Marker*, 62 Fed. 139, 10 C. A. 306, 25 L. R. A. 33.

§ 2312. Statements Requiring the Care Exercised by Other Similar Carrier.—It has been said that if railroad carriers of passengers “exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them.”⁸⁹ This language, however, occurred, not in an instruction to the jury, but in the opinion of the court in connection with a discussion of the general liability of passenger carriers. But in a case in which the trial court instructed the jury that the servants of defendant railroad company were bound to exercise a high degree of care, “such as practical and skillful railroad men would have exercised under similar circumstances,” it was contended by defendant that the instruction was wrong, especially as there was no evidence in the case as to what care practical and skillful railroad men would have used. It was held that the giving of the instruction was not error.⁹⁰ The supreme court of Iowa, however, has thrown some doubt upon the propriety, in instructions to the jury, of predicated the degree of care upon the practices of other carriers using the same mode of conveyance.⁹¹ And the Missouri court has said that what is required of a carrier in the performance of its duties to use proper care for the safety of its passengers depends in a given case on the facts thereof, and not on the common practice of the carrier.⁹² In a case in which the trial court instructed the jury, in effect, that unless the accident resulted from defects in the appliances which could have been discovered by the usual and ordinary methods adopted and exercised by railroad companies as ordinarily operated, there could be no recovery, the reviewing court, while admitting that the charge, standing alone and considered without reference to other portions of the charge, was erroneous, refused to reverse for the reason that the objection was subsequently explained.⁹³

§ 2313. Statement Requiring the Care Usually Exercised by the Particular Carrier.—Certainly the degree of care can not be predicated upon

89. Care of similar carriers.—Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321. And see Michigan Cent. R. Co. v. Coleman, 28 Mich. 440, 12 Am. R. Rep. 59.

90. “If the testimony for the plaintiff be true that the train, after slowing up, was started again with a sudden jerk or bulge, and threw the plaintiff off, it required no expert testimony to show what a practical or skillful railroad man would have done, for commonsense and the instincts of humanity teach every man that no practical or skillful railroad man, or any other kind of a man, would have operated the train in that manner.” Grace v. St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121.

91. Iowa decisions.—In commenting upon an instruction which exacted of a railroad carrier of passengers the degree of care exercised and required by the best, most carefully, prudently, and skillfully managed, railroads of the country, doing a like business and under like circumstances, Reed, J., in delivering the opinion of the supreme court of Iowa, said: “The doctrine of the instruction is that the degree of care required of defendant in the selection of plans and materials for its roadway, bridges, and appliances was such as was exercised by

the best and most skillfully and carefully managed railroads in the country, under like circumstances. The objection urged against it is that it treats the practices of the class of railroads named, in the matters in question, as affording an absolute standard of duty as to those matters, thus, in effect, making the very practices which are called in question the law of the case. We admit the force of the objection.” Pershing v. Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405.

92. Brady v. Springfield Tract. Co. (Mo. App.), 124 S. W. 1070.

93. In delivering the opinion of the court, Barch, C. J., said: “While, however, the instruction, considered in the abstract, is objectionable, still, when read in connection with that portion of the charge which immediately follows it, and its explanatory of it, where the court stated that ‘it was the duty of the defendant to use the utmost care and skill which prudent men’ in the same kind of business would use under similar circumstances, it is difficult to see how the jury could have been misled thereby. Especially is this so since the charge, considered as a whole, appears to state the law fairly and correctly.” Major v. Oregon, etc., R. Co., 21 Utah 141, 59 Pac. 522.

the usual practices of the particular carrier, and it is error to instruct the jury, in an action to recover damages for injuries sustained in consequence of the alleged negligent starting of defendant's street car upon which plaintiff was a passenger, to the effect that the plaintiff is not entitled to recover unless the car was started in an unusual and dangerous manner, and that if the jury should find that the car was started in the ordinary manner, and without any unusual circumstances attending the same, and that in the course of its experience defendant had found that the manner adopted at the time of the accident was reasonably safe, and in no manner calculated to cause injury to any of its passengers and should further find as a matter of fact that the methods ordinarily and upon the particular occasion adopted were reasonably safe, and not calculated to injure passengers,—then the defendant can not be held liable.⁹⁴

§§ 2314-2322. Statements Making the Care of Prudent Men the Standard—§ 2314. In General.—In defining the degree of care which the law exacts of carriers of passengers, the courts have frequently incorporated in their statements of the rule an important limitation, variously expressed, by which the degree of care required is predicated upon the care exercised by prudent or cautious men. These statements may conveniently be divided into two classes. By one class of the degree of care is declared to be the highest or utmost care of prudent men, or the highest or utmost care of very prudent men. By the other class these expressions are qualified and the degree of care exacted is defined to be the highest care which prudent men, or the highest care which very prudent men, would exercise under the same or similar circumstances.

§ 2315. Statements Requiring the Highest Care of Prudent, or Very Prudent, Men.—Among the statements falling within the first of these classes, are those which hold carriers of passengers to the exercise of "the utmost care and diligence of cautious persons"⁹⁵ and the somewhat stronger expressions, the utmost care and diligence of very cautious persons,⁹⁶ the highest degree of care of a very prudent person,⁹⁷ or the utmost care and prudence of a very cautious person.⁹⁸ It has been said of the statement that carriers of passengers are bound to the utmost care and prudence of a very cautious person, that it does not furnish an exact measure of the care required, but that that diffi-

94. Usual care of particular carrier.—*Dickert v. Salt Lake City R. Co.*, 20 Utah 394, 59 Pac. 95.

95. Care of prudent men.—*Johnson v. St. Joseph R., etc., Co.*, 143 Mo. App. 376, 128 S. W. 243; *Farish & Co. v. Reigle*, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666. See *Mississippi, etc., R. Co. v. Ayres*, 84 Tenn. (16 Lea) 725.

The operator of a passenger elevator must use the highest degree of care which one of ordinary prudence would use. *Howard v. Scarritt Estate Co.*, 144 S. W. 185, 161 Mo. App. 552.

A carrier is liable for the slightest negligence resulting in injury to a passenger, and the utmost care and diligence of cautious persons to prevent such injury is imposed by law. *Washington, etc., R. Co. v. Trimyer*, 67 S. E. 531, 110 Va. 856.

96. Utmost States.—*Lusby v. Atchison, etc., R. Co.*, 41 Fed. 181.

California.—*Nagle v. California, etc., R. Co.*, 88 Cal. 86, 25 Pac. 1106; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Jamison v. San Jose, etc., R. Co.*, 55 Cal. 593, 3 Am. & Eng. R. Cas. 350.

Colorado.—*Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

New York.—*Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378.

Virginia.—*Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792.

Carriers of passengers by their contracts bind themselves to exercise the utmost care and diligence of very cautious persons towards passengers whom they take into their conveyances. *Pelot v. Atlantic, etc., R. Co.*, 60 Fla. 159, 53 So. 937.

97. O'Connell v. St. Louis, etc., R. Co., 106 Mo. 482, 17 S. W. 494. See *Austin v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 385.

Utmost caution characteristic of very careful prudent men.—The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 229.

98. Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

culty is inherent in the nature of the subject and the statement has this advantage that it conforms substantially to the ordinary definition of the highest degree of care required of bailees of goods, and has, therefore, the sanction of long usage.⁹⁹ But, while the statements of this class may not be exactly equivalent to the expression, "utmost care," "highest care," "greatest human care," etc., which have been condemned by a number of the courts, they come dangerously close to exacting a degree of care more onerous than that imposed by law. It has been held, though the case is not exactly in point for the reasons that the language used is somewhat stronger than in the expression under consideration, that a charge exacting the "highest degree of care, skill and diligence by men of extraordinary care, skill and prudence in transporting passengers," requires too great a degree of care and is erroneous.¹ In another case, however, the court seems to have inclined to the opinion that passenger carriers are not bound to exercise the highest degree of skill and care which a careful and vigilant man would observe, in like circumstances, in the management of the business.² In this instance, it is to be noted, the statement is qualified and made less rigorous by the words, "in like circumstances."

§§ 2316-2319. Statements Limiting the Care by the Circumstances

—§ 2316. **In General.**—Of the statements falling within the second of the above-mentioned classes, it may be said that, while they are not particularly explicit or instructive, they have, except in possibly one case,³ been exempt from judicial criticism, and, it is believed, come nearer expressing the degree of care which the law exacts of passenger carriers than any of the statements which have so far been discussed.

§ 2317. **Statements Requiring the Highest Care of Prudent Men under the Circumstances.**—According to some of these statements, the care to be exercised by carriers of passengers is the highest care and skill which a cautious or prudent man would exercise under the circumstances,⁴ the utmost degree of precaution and care which prudent men would employ under similar circumstances,⁵ the utmost care and skill which prudent men would use under similar circumstances,⁶ the utmost care and skill which prudent men would use and exercise in a like business, and under similar circumstances,⁷ that high de-

99. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

1. *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258.

An instruction, in an action for injuries to a passenger by the derailment of the train, that the carrier must exercise the utmost caution characteristic of very careful and prudent men, is erroneous as imposing on the carrier too high a degree of care; the word "very" meaning exceedingly, excessively, and the word "excessive" meaning exceeding what is usual or proper. *Parker v. Boston, etc., Railroad*, 79 Atl. 865, 84 Vt. 329.

2. *Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423.

3. **Care limited by circumstances.**—*Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423.

4. **Prudent man under circumstances.**—*United States*.—*McKoy v. Missouri Pac. R. Co.*, 5 McCrary 538, 18 Fed. 236; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536.

Delaware.—*Baldwin v. People's R. Co.* (Del.), 7 Pen. 81, 76 Atl. 1088.

Missouri.—*Schloemer v. St. Louis Transit Co.*, 204 Mo. 99, 102 S. W. 565.

Vermont.—*Parker v. Boston, etc., Railroad*, 79 Atl. 865, 84 Vt. 329.

Under the law of New Jersey a carrier of passengers is bound to exercise the highest degree of care, which prudent and careful men would under such circumstances exercise to carry the passengers safely. *Thompson v. Green*, 174 Fed. 404, 98 C. C. A. 621.

5. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, rehearing denied in 43 Pac. 713.

6. *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 1 Atl. 9, 21 Am. & Eng. R. Cas. 364.

7. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

A street car company or other carrier of passengers is bound to exercise the highest care and skill for the safety of passengers that a prudent man would exercise in a like business and under like circumstances. *O'Gara v. St. Louis Transit Co.*, 103 S. W. 54, 204 Mo. 724, 12 L. R. A., N. S., 840, 11 Am. & Eng. Ann. Cas. 850; *International, etc., R. Co. v. Hugen*,

gree of care which cautious, prudent persons, skilled in the particular business, would commonly use under like circumstances,⁸ the utmost care and skill which prudent persons would be likely to exercise as to themselves under the like circumstances, and in the conduct of the business,⁹ or the highest or utmost degree of care and skill which prudent men are accustomed to use under like or similar circumstances.¹⁰ But an instruction to the effect that the carrier is bound to use the utmost care and diligence that prudent men should exercise has been held to be erroneous.¹¹ And in a late Minnesota case the court said that the degree of care which would be exercised by the ordinary prudent person under the same circumstances is not adequate.¹²

§ 2318. Statements Requiring the Care of Very Prudent Men under the Circumstances.—What seems to be substantially the same rule as is enunciated in the statements collected in the next preceding section is expressed in a different form by statements which respectively exact of carriers of passengers the same care as would be exercised under the same circumstances by an extremely cautious person,¹³ the care which persons of the greatest care and prudence would usually employ in similar cases,¹⁴ the highest degree of care used by very prudent or careful persons under like circumstances,¹⁵ such a high degree of care as would ordinarily be exercised by per-

45 Tex. Civ. App. 326, 100 S. W. 1000; International, etc., R. Co. v. Tasby, 45 Tex. Civ. App. 416, 100 S. W. 1030; Gilmore v. Houston Elect. Co., 46 Tex. Civ. App. 315, 102 S. W. 168.

8. Dallas Consol., etc., R. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925.

9. Louisville, etc., R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378, 14 S. W. 357.

10. United States. — The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572.

Iowa.—Bonce v. Dubuque, etc., Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221.

Kentucky.—Louisville City R. Co. v. Weams, 80 Ky. 420, 8 Am. & Eng. R. Cas. 399, 4 Ky. L. Rep. 287; Louisville, etc., R. Co. v. Berg, 32 S. W. 616, 17 Ky. L. Rep. 1105.

Montana.—Kennon v. Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45.

11. Meyer v. St. Louis, etc., R. Co., 54 Fed. 116, 4 C. C. A. 221, 58 Am. & Eng. R. Cas. 111. In delivering the opinion of the court, Siras, J., said: "The care that prudent men should exercise is dependent largely upon the relation they occupy towards the person to whom the exercise of care is due. Degrees of care may be predicated of one who is a common carrier, or of one who is not, but can not be of prudent men; for the law does not cast upon prudent men any particular degree of care, nor the duty of exercising any greater care than is imposed upon men in general. The degree of care imposed by the law is determined by the relation existing between the parties, as that of carrier and passenger, master and servant, and the like, but not by the character of the individuals occupying the relations named. The instruction, therefore, wholly fails to give to

the jury the test to be applied in determining the question of negligence on the part of the railway company."

12. Minnesota courts' view.—Hill v. Minneapolis St. R. Co., 112 Minn. 503, 128 N. W. 831.

13. Very prudent men under circumstances.—Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

14. Texas, etc., R. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

15. Bischoff v. People's R. Co., 121 Mo. 216, 25 S. W. 908.

The degree of care required of carriers of passengers upon street cars in securing the safety of passengers entering or alighting is the highest care or the care which a very prudent person would have used under the circumstances. Beattie v. Detroit United Railway, 122 N. W. 557, 158 Mich. 243.

It is the duty of a street railway company to exercise that high degree of care for the safety of passengers that a very careful person would use under like circumstances. Gardner v. Metropolitan St. R. Co., 122 S. W. 1068, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166.

A carrier is not an insurer of the safety of its passengers, but it must exercise the highest degree of care of a very prudent person in view of the circumstances. Rice v. Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

A railroad company owes the highest degree of care that a very cautious, competent, and prudent person would exercise under the same or similar circumstances to protect its passengers from injury. Texas Cent. R. Co. v. Cameron (Tex. Civ. App.), 149 S. W. 709; Pecos, etc., R. Co. v. Trower (Tex. Civ. App.),

sons of great care and prudence under similar circumstances,¹⁶ such a high degree of care as would be used by very prudent and competent persons under similar circumstances,¹⁷ that high degree of care and skill which very cautious persons would use under like circumstances,¹⁸ that high degree of care which very cautious or prudent persons would exercise under like circumstances,¹⁹ that high degree of care that a very prudent person would use, under the same circumstances, about the same matter,²⁰ that high degree of diligence and care which is usually exercised by very prudent persons in their own business under like circumstances,²¹ that high degree of care and skill which very cautious persons generally, in their line of business, are accustomed to use, under similar circumstances,²² and that degree of diligence and care which very careful and prudent men take of their own affairs.²³

§ 2319. Statements Requiring the Utmost Care of Very Prudent Men under the Circumstances.—The rule seems to be more strongly expressed by statements which exact the utmost care and precaution which very prudent men would use and exercise under similar circumstances²⁴ and the "utmost human skill, diligence and foresight, which is such skill, diligence and foresight as is exercised by a very cautious person under like circumstances."²⁵

§ 2320. Statements Requiring the Utmost Caution, or the Caution, Characteristic of Prudent Men.—It has also been said that carriers are required, as to passengers, to observe the utmost caution, characteristic of very careful, prudent men.²⁶ But a charge to the effect that a common carrier of passengers "is liable only for the want of such care and diligence as is characteristic of cautious persons," or "for want of such care and diligence as is characteristic of cautious persons," has been declared to be too narrow, and it has been said that it does not express the full degree of the liability of common carriers of passengers.²⁷

130 S. W. 588; *Houston, etc., R. Co. v. Keeling* (Tex. Civ. App.), 142 S. W. 108.

An instruction imposing on the carrier the absolute duty of furnishing a passenger a reasonably safe place in which to ride was improper, the carrier being only required to exercise that high degree of care to do so which a very cautious and prudent person under similar circumstances would exercise. *Texas, etc., R. Co. v. Maughon* (Tex. Civ. App.), 139 S. W. 611.

16. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68.

17. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

18. *Gulf, etc., R. Co. v. Killebrew* (Tex.), 20 S. W. 182.

19. *San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. 517.

20. *Texas, etc., R. Co. v. Orr* (Tex. Civ. App.), 31 S. W. 696.

21. *Van Deventer v. Chicago City R. Co.*, 26 Fed. 32.

22. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

23. *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621.

In *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382, an action by a passenger against a railroad, it was said that an instruction which told the jury that if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that if the injury complained of was the result of mere accident, then the defendant was not liable, was entirely correct and proper and the request for the instruction should have been granted.

24. **Utmost care of very prudent men, etc.**—*Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

A carrier must exercise the utmost care for the safety of its passengers that would be used by very cautious persons under the same circumstances. *Brady v. Springfield Tract. Co.* (Mo. App.), 124 S. W. 1070.

25. *St. Louis, etc., R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883.

26. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 229.

27. *Galena, etc., R. Co. v. Yarwood*, 15 Ill. 468.

§ 2321. Statements Requiring the Highest Care of Prudent and Skillful Railroad Men.—In a few cases involving the liability of railroad companies as carriers of passengers, it has been said that railroad companies are bound to employ the highest degree of care, diligence and skill exercised by those engaged in the carriage of passengers by railroads, known to careful, diligent and skillful persons engaged in such business.²⁸ And, again, it has been said that they must exercise a high degree of care, such as would be exercised by very prudent, careful, and skillful railroad men under the same or similar circumstances.²⁹

§ 2322. Statements Requiring the Highest Care of Prudent Men in the Same Business.—It has been said that carriers of passengers are bound to exercise the utmost degree of care and skill which prudent persons, engaged in the same business, are accustomed to use and which is consistent with the mode of transportation adopted.³⁰ It is also said that those engaged in the carriage of passengers by a railroad must exercise the highest degree of care, skill and diligence known to careful persons engaged in that business.³¹ And it has been held proper to exact the exercise of the highest degree of care and skill usually exercised by prudent persons in the same business.³²

§ 2323. Statement Requiring the Highest or Utmost Practical Care.—The objection that the expressions "highest care," "utmost care" and "greatest human care" exact a higher degree of care than is imposed by law has sometimes been met by inserting the word "practical" in these expressions. Thus, it has been said that carriers of passengers must exercise the highest practical care,³³ the highest practical degree of care and skill,³⁴ the utmost practical care

28. Highest care of railroad men.—*Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258.

29. *Olsen v. Citizens' R. Co.*, 152 Mo. 426, 54 S. W. 470.

Where a street car passenger paid his fare and received a transfer, and on boarding another car presented the transfer unmutilated, entitling him to ride as a passenger to his destination, the carrier and its servants were bound to safely carry him to his destination if they could do so by the exercise of the high degree of care of careful railroad employees under the same or like circumstances. *Carmody v. St. Louis Transit Co.*, 99 S. W. 495, 122 Mo. App. 338.

30. Men in same business.—*Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455.

Trainmen must exercise the highest degree of care which prudent persons engaged in the like business usually exercise to carry passengers. *Illinois Cent. R. Co. v. Dallas*, 150 S. W. 536, 150 Ky. 442.

The term "negligently," when applied to the failure of a carrier of passengers to perform its duty to safely carry its passengers, means the failure to use the highest degree of care, and the "highest degree of care" means the utmost care exercised by prudent and skillful persons in the management and operation of trains. *Louisville, etc., R. Co. v. Kemp*, 149 S. W. 835, 149 Ky. 344.

31. *Louisville, etc., R. Co. v. Glasgow* (Ala.), 60 So. 103.

In an action for injuries to a passenger while in a Pullman car, caused by a table handled by a porter falling on her hand, a charge that the railroad company owed to its passengers the duty to exercise the highest degree of care, skill, and diligence known to skillful and diligent persons in like business was not erroneous. *Louisville, etc., R. Co. v. Church*, 155 Ala. 329, 46 So. 457.

32. *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 17 Ky. L. Rep. 297, 30 S. W. 1010.

A carrier of passengers is bound to exercise the utmost care and skill which prudent men use and exercise in a like business. *Richardson v. Metropolitan St. R. Co.* (Mo. App.), 147 S. W. 1126.

33. Practical care.—*United States*.—*Illinois, etc., R. Co. v. Davidson*, 76 Fed. 517, 22 C. C. A. 306, certiorari denied in 166 U. S. 719, 17 S. Ct. 994, 41 L. Ed. 1186.

Connecticut.—*Thorson v. Groton, etc., St. R. Co.*, 85 Conn. 11, 81 Atl. 1024.

Delaware.—*Butler v. Wilmington City R. Co.*, 2 Boyce's (25 Del.) 262, 78 Atl. 871.

Indiana.—*Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Louisville, etc., R. Co. v. Thomp-*

34. *Sherley v. Billings* (Ky.), 8 Bush 147, 8 Am. Rep. 451.

and diligence,³⁵ the highest degree of care and skill reasonably practicable,³⁶ the highest degree of care and diligence practicable under the circumstances,³⁷ the highest degree of care and diligence possible, under the particular circumstances,³⁸ the highest degree of care consistent with the practical operation of the business,³⁹ and the utmost care which can be exercised under all the circumstances, short of a warranty of the safety of the passengers.⁴⁰ A carrier of passengers, it has been said, is bound to provide for the safe conveyance of passengers "so far as that is practicable by the exercise of human care and foresight."⁴¹ While it is undoubtedly true, as has been held of the expression "utmost practicable care,"⁴² that these statements of the rule do not require a higher degree of care than the law imposes, it is doubtful whether they are sufficiently explicit to be of much practical value in explaining to a jury the care required. However, that is probably an objection which may be waived by a failure to insist on a more instructive statement of the rule.⁴³

§ 2324. Statements Requiring the Highest Practical Care of Capable and Faithful Railroad Men.—It has been said of railroad companies, as carriers of passengers, that they must employ the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise in similar circumstances."⁴⁴

son, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Missouri.—Willmott v. Corrigan, etc., St. R. Co., 106 Mo. 535, 17 S. W. 490.

A carrier of passengers is bound to exercise the greatest care practicable for their safety, and is responsible for an injury by its negligence concerning conditions of its road, the character of its machinery and cars, the sufficiency of its equipments, and the skill and conduct of its agents and employees. *Lake Erie, etc., R. Co. v. Cotton*, 45 Ind. App. 580, 91 N. E. 253.

The carrier owes to a passenger the duty to exercise the highest practical degree of care, skill, and foresight in the selection and use of suitable cars, motive power, appliances, and servants, and in the proper construction of its roadbed and track, and the operating and running of its train. *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, Ann. Cas. 1914A, 287.

35. *Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 23 Am. & Eng. R. Cas. 492, 54 Am. Rep. 312; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466.

36. *Denver, etc., R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729.

37. *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. See also, *Chicago, etc., R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640.

38. *Citizens' St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014.

39. *Schilling v. Winona, etc., R. Co.*, 66 Minn. 252, 68 N. W. 1083.

An instruction that it is the duty of a

railroad company to use the highest degree of care and caution consistent with a practical operation of its road to provide for the safety and security of passengers while being transported was not erroneous as requiring more care than was "reasonably" consistent with the practical operation of the road. *Chicago City R. Co. v. Pural*, 79 N. E. 686, 224 Ill. 324, affirming judgment 127 Ill. App. 652.

40. *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335.

41. *Shoemaker v. Kingsbury (U. S.)*, 12 Wall. 376, 20 L. Ed. 432; *Ladd v. Foster*, 3 Sawy. 547, 31 Fed. 827.

42. *Keokuk, etc., Packet Co. v. True*, 88 Ill. 608.

43. In a case in which the trial court charged the jury that the defendant was required to use "the utmost practicable care" it was objected that the expression should have been the "utmost care" and not the "utmost practicable care." On appeal, it was held that the charge, as a whole, was correct, and it was said that "if the word practicable required explanation, plaintiff should have requested it by a suitable special charge." *Levy v. Campbell (Tex.)*, 19 S. W. 438.

44. **Highest practicable care of railroad men.**—*St. Louis, etc., R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Richardson v. Metropolitan St. R. Co. (Mo. App.)*, 147 S. W. 1126.

In *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 44 Am. & Eng. R. Cas. 322, 22 Am. St. Rep. 781, the trial court defined the care required of the defendant carrier of passengers as the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances." On appeal, the supreme court refused to pass upon the

§ 2325. Statements Requiring the Highest Reasonable Care.—In a few cases the care exacted of passenger carriers is the strictest care or precaution reasonably within the power of the carrier,⁴⁵ the highest degree of care which is reasonably within the power of the persons engaged in the business,⁴⁶ the highest degree of care that can reasonably be exercised,⁴⁷ or the highest degree of care which may reasonably be exercised in order to prevent those injuries which human foresight can avert.⁴⁸ In other cases it has been said that the care exacted is the highest degree of care which a reasonable man would use,⁴⁹ every degree of care, diligence and skill which a reasonable man would use under similar circumstances,⁵⁰ and the greatest care, diligence, and skill

correctness of the instruction for the reason that it was given without objection, but said that it was satisfied with the soundness of the rulings of the court and that to exercise the highest practical care which capable and faithful railroad men would take, in like circumstances, is the measure of the duty of a railroad company to its passengers.

It is the duty of a carrier to use the utmost care and foresight, which capable and faithful railroad men would take under like circumstances, to keep its tracks and roadbed in a reasonably safe condition for the running of cars over them. Judgment, 107 S. W. 1025, reversed in *Kirkpatrick v. Metropolitan St. R. Co.*, 109 S. W. 682, 211 Mo. 68.

In an action by a passenger for injuries from the overturning of a car, where there was evidence that the tracks were not in a proper condition, defendant requested an instruction that a carrier of passengers is not obliged to foresee and provide against casualties which were not known to occur before, and which may not reasonably be expected, and that, if a carrier availed himself of the best known and most extensively used safeguards against danger, he has done all the law requires, and his liability is not to be ascertained by what appears, for the first time after the disaster, to be a proper precaution against these occurrences; that the defendant and its agents, etc., in the management and operation of its cars, were by the law required to exercise only such care and prudence as was reasonably practicable, and if plaintiff was injured as the result of some occurrence, which careful and prudent men in the situation of defendant's agents would not reasonably have expected, then the occurrence was an accident, and defendant was not liable; that the mere fact that an accident occurred, and plaintiff was injured, does not of itself entitle plaintiff to recover, and if defendant's servants exercised all the care and prudence that were reasonably practicable under all the circumstances, and the accident happened without negligence on their part, then plaintiff could not recover under any circumstances. Held, that the requests were properly refused, as not imposing a sufficiently high

degree of care upon the carrier. Judgment, 107 S. W. 1025, reversed in *Kirkpatrick v. Metropolitan St. R. Co.*, 109 S. W. 682, 211 Mo. 68.

45. Highest reasonable care.—*Seymour v. Chicago, etc., R. Co.*, 3 Biss. 43, Fed. Cas. No. 12,685.

46. *Van Deventer v. Chicago City R. Co.*, 26 Fed. 32.

47. *Mexican Cent. R. Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. 301, 47 Am. St. Rep. 103.

48. *Eaton v. Boston, etc., R. Co.* (Mass.), 11 Allen 500, 87 Am. Dec. 730; *White v. Fitchburg R. Co.*, 136 Mass. 321, 18 Am. & Eng. R. Cas. 140.

49. *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319; *Derwort v. Loomer*, 21 Conn. 245.

A street railway company, as a common carrier, is bound to use the highest degree of care that a reasonable man would use. *Kebbe v. Connecticut Co.*, 84 Atl. 329, 85 Conn. 641, Ann. Cas. 1913C, 167.

50. *Flinn v. Philadelphia, etc., R. Co.* (Del.), 1 Houst. 469; *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369; *Baldwin v. People's R. Co.* (Del.), 7 Pen. 81, 76 Atl. 1088, affirmed in 72 Atl. 979; *Coyle v. People's R. Co.* (Del.), 80 Atl. 638.

A common carrier is required to exercise every degree of care in the preparation, conduct, and management of their cars that a reasonable man would use under like circumstances, and is responsible for any negligence in transporting passengers. *Braunstein v. People's R. Co.*, 2 Boyce's (25 Del.) 55, 78 Atl. 609.

A common carrier of passengers must exercise every degree of care, diligence, and skill which a reasonable man would exercise in the operation and care of the tracks and equipment, and in the selection of competent employees, and is liable for injuries caused by failure to do so. *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369.

A carrier, owes in the management of its means of conveyance, every degree of care, diligence, and skill which a reasonable man would use under the circumstances, and the highest degree of care and diligence reasonably practicable in securing their safety by keeping such

reasonably possible;⁵¹ and similarly it is stated that a carrier must conserve by every reasonable means the passenger's safety throughout the journey,⁵² while it is sometimes said that the passenger shall be carried safely so far as human foresight reasonably exercised can guard against a disaster,⁵³ or as safely as human foresight and reasonable care will permit.⁵⁴

§ 2326. Approved Statements of the Rule.—It is believed that the objections which have been, and might be, urged to the statements of the rule which have been discussed in the preceding pages are avoided by stating the rule as follows: In providing for the safety of, and guarding against injuries to, their passengers, carriers of passengers, independently of their pecuniary ability, must exercise the highest or utmost degree of care and diligence consistent with the practical operation of the business, taking into consideration the mode of conveyance employed.⁵⁵ The books contain a number of expressions of the rule

means of conveyance under the control and management of skilled and competent servants. *Duggan v. New Jersey, etc., Ferry Co. (Del.)*, 7 Pen. 318, 76 Atl. 636.

51. *Freeman v. Wilmington, etc., Tract. Co. (Del.)*, 80 Atl. 1001.

52. Every reasonable means.—*Alabama, etc., R. Co. v. Sampley*, 169 Ala. 372, 53 So. 142.

53. *Indianapolis Southern R. Co. v. Emmerson (Ind. App.)*, 98 N. E. 895.

54. *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, 4 Ky. L. Rep. 151.

In *Central, etc., R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. Rep. 725, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309, the Kentucky court of appeals said that "a common carrier of passengers must exercise the highest degree of care and diligence" and then added: "such care as a reasonable and cautious man would use under the circumstances is the diligence required."

55. Approved statement.—*Alabama.*—*Southern R. Co. v. Cunningham*, 152 Ala. 147, 44 So. 658.

Arkansas.—*St. Louis, etc., R. Co. v. Cobb*, 89 Ark. 82, 115 S. W. 939; *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648.

Colorado.—*Colorado, etc., R. Co. v. McGeorge*, 46 Colo. 15, 102 Pac. 747, 17 Am. & Eng. Ann. Cas. 880.

Connecticut.—*Hinckley v. Danbury*, 81 Conn. 241, 70 Atl. 590.

Illinois.—*Chicago City R. Co. v. Crauf*, 136 Ill. App. 66, judgment affirmed in *Crauf v. Chicago City R. Co.*, 235 Ill. 262, 85 N. E. 235; *Chicago Consol. Traction Co. v. Schritter*, 124 Ill. App. 578, judgment affirmed in 222 Ill. 364, 78 N. E. 820; *Chicago City R. Co. v. Shreve*, 226 Ill. 530, 80 N. E. 1049, affirming judgment, 128 Ill. App. 462; *Pell v. Joliet, etc., R. Co.*, 238 Ill. 510, 87 N. E. 542, affirming judgment, 142 Ill. App. 362; *Chicago Union Traction Co. v. Mee*, 136 Ill. App. 98; *Barnes v. Danville St. R., etc., Co.*, 235 Ill. 566, 85 N. E. 921.

Indiana.—*Indiana Union Tract. Co. v. Keiter*, 175 Ind. 268, 92 N. E. 982; In-

dianapolis Southern, R. Co. v. Tucker (Ind. App.), 98 N. E. 431.

Massachusetts.—*Foley v. Boston, etc., St. R. Co.*, 198 Mass. 532, 84 N. E. 846; *Sawin v. Connecticut Valley St. R. Co.*, 213 Mass. 103, 99 N. E. 952, 43 L. R. A., N. S., 72; *Renaud v. New York, etc., R. Co.*, 210 Mass. 553, 97 N. E. 98, 38 L. R. A., N. S., 689.

Maine.—*Pomroy v. Bangor, etc., R. Co.*, 67 Atl. 561, 102 Me. 497.

Minnesota.—*Hill v. Minneapolis St. R. Co.*, 112 Minn. 503, 128 N. W. 831.

Nebraska.—*Otto v. Chicago, etc., R. Co.*, 87 Neb. 503, 127 N. W. 857, 31 L. R. A., N. S., 632.

"The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron granite cross ties, and hence safer than those of wood; nor, upon freight trains, airbrakes, bell pulls, and a brakeman upon every car; but it does emphatically require every thing necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed." *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 22 L. Ed. 898.

Though a street car company is not an insurer of the safety of passengers it must exercise the highest degree of skill and care which may be reasonably expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities used and the attendant dangers. *Oliver v. Fort Smith Light, etc., Co.*, 116 S. W. 204, 89 Ark. 222.

While a carrier of passengers is not required to exercise the highest degree of care for their protection against dangers not ordinarily incident to the operation of the road, a carrier as to know perils must exercise the highest degree of care, having in view the character of

which approximate more or less closely to this statement. Thus, it has been said, in effect, that carriers of passengers are bound to exercise the highest degree of care consistent with the practical operation of the business,⁵⁶ the highest degree of care that is reasonably consistent with the practical conduct of the business,⁵⁷ the highest degree of care and diligence which can reasonably be exercised and which is consistent with the operation,⁵⁸ or successful operation,⁵⁹ of the business, the highest degree of care consistent with the proper management of the business,⁶⁰ or with a reasonable performance of its duty as a common carrier,⁶¹ the highest degree of care and diligence that is consistent with

conveyance and consistent with its practical operation. *Sandy v. Lake St. Elevated R. Co.*, 85 N. E. 300, 235 Ill. 194, affirming judgment 137 Ill. App. 244.

The "highest degree of care" required of common carriers for the safety of their passengers is the utmost care consistent with the nature of the carrier's undertaking and with a due regard for all other matters that ought to be considered in conducting the business. *Gardner v. Boston Elevated R. Co.*, 90 N. E. 534, 204 Mass. 213.

In an action for injuries to a passenger owing to the sudden starting of the car while she was alighting, the court instructed that defendant was bound to exercise the highest degree of care, skill, and benefits practicable, consistent with the operation of the railway, taking into consideration the circumstances and conditions existing at the time and place in question, in order to prevent injury to plaintiff, and that defendant was liable for the slightest negligence in the operation of the road. Held, that the instruction was proper. *Mueller v. Washington Water Power Co.*, 106 Pac. 476, 56 Wash. 556.

56. Illinois.—*West Chicago St. R. Co. v. Kromshinsky*, 185 Ill. 92, 65 N. E. 1110, affirming 86 Ill. App. 17; *West Chicago, etc., R. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334, affirming 77 Ill. App. 142; *Burgoyne v. Chicago City R. Co.*, 167 Ill. App. 59; *Wayne v. St. Louis, etc., R. Co.*, 165 Ill. App. 353; *Lakin v. South Side Elevated R. Co.*, 148 Ill. App. 268; *Asher v. East St. Louis, etc., R. Co.*, 14 Ill. App. 220.

Minnesota.—*Campbell v. Duluth, etc., R. Co.*, 107 Minn. 358, 120 N. W. 375, 22 L. R. A., N. S., 190; *Oviatt v. Dakota, Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436.

South Carolina.—*Sutton v. Southern Railway*, 82 S. C. 345, 64 S. E. 401.

Washington.—*Fischer v. Columbia, etc., R. Co.*, 52 Wash. 462, 100 Pac. 1005.

Consistent with nature of business.—*Kuhlen v. Boston, etc., R. Co.*, 193 Mass. 341, 79 N. E. 815, 7 L. R. A., N. S., 729.

Elevator.—One who maintains a passenger elevator which the public is invited to use must exercise the highest degree of skill and foresight consistent with its efficient use. *Cabbage v. Youngerman (Iowa)*, 134 N. W. 1074.

57. Pershing v. Chicago, etc., R. Co., 71

Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405.

In an action for injuries to a street car passenger by falling over another passenger's bag, deposited in the aisle, the court properly refused to charge that the carrier was bound to use the highest possible degree of care and caution to keep aisles, entrances, and exits of its cars free from obstructions, and to exercise toward plaintiff the utmost care and diligence in providing against those injuries which could be averted by human foresight; the carrier only being bound to exercise the highest degree of care consistent with the practical operation of its business. *Pitcher v. Old Colony St. R. Co.*, 196 Mass. 69, 81 N. E. 876, 13 L. R. A., N. S., 481, 12 Am. & Eng. Ann. Cas. 886.

A railroad company, operating a train as a carrier of passengers, must exercise the highest degree of care and prudence for the safety of its passengers compatible with the practical performance of the duty of transportation. *Valentine v. Northern Pac. R. Co. (Wash.)*, 126 Pac. 99.

58. Illinois Cent. R. Co. v. O'Connell, 160 Ill. 636, 43 N. E. 704, affirming 59 Ill. App. 463.

59. A street car company is bound to exercise toward its passengers the highest degree of care consistent with the successful operation of its business. *Austin v. Washington Water Power Co.*, 68 Wash. 508, 123 Pac. 775.

60. Jordan v. New York, etc., R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101; *Kearney v. Seaboard, etc., R. Co.*, 158 N. C. 521, 74 S. E. 593.

It is the duty of a carrier to transport passengers so that they shall not suffer physical harm, unless in the exercise of the highest degree of care and skill consistent with the transaction of its business it becomes impossible by reason of unforeseen conditions. *Magee v. New York, etc., R. Co.*, 195 Mass. 111, 80 N. E. 689.

A carrier must exercise such reasonable diligence for the safety of a passenger as the nature of the business allows. *Chaffe v. Consolidated R. Co.*, 196 Mass. 484, 82 N. E. 497.

61. A street railway company must use toward its passengers the highest de-

the mode of transportation adopted and reasonably practicable,⁶² the highest degree of practicable care and diligence which is consistent with the mode of transportation used,⁶³ the highest degree of care, skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted,⁶⁴ the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted,⁶⁵ the highest degree of practicable care and diligence which prudent men would observe in a like business, and under similar circumstances,⁶⁶ the highest degree of care which a prudent and cautious man would exercise, and which is reasonably consistent with their mode of conveyance and the practical operation of their roads;⁶⁷ the highest degree of care required by the circumstances;⁶⁸ the "highest degree of care practicable in carrying passengers;"⁶⁹ and the utmost practicable care and diligence.⁷⁰ In New Jersey it is held that a common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.⁷¹ And it is said that by foresight is meant not foreknowledge absolute nor that exactly such an accident was apprehended, but that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care can prevent.⁷² The Florida court has said that a carrier is required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any time by the conditions and circumstances then affecting the passenger and the carrier.⁷³ This rule is not abrogated by the statute regulating the liability of the railroad companies in certain cases.⁷⁴ Railroad companies, it has been said, are independently of

gree of care consistent with a reasonable performance of its duty as a common carrier. *Doherty v. Boston, etc.*, St. R. Co., 92 N. E. 1026, 207 Mass. 27.

62. *San Antonio, etc., R. Co. v. Long* (Tex. Civ. App.), 26 S. W. 114.

A street railway company, as a common carrier of passengers, while not an insurer of a passenger's safety, is required to exercise the highest degree of care and diligence reasonably practicable. *Smithers v. Wilmington City R. Co.* (Del.), 6 Pen. 422, 67 Atl. 167.

63. *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695.

A railroad company is obligated only to the exercise of the highest degree of practicable care in the operation and management of its road. *Chicago City R. Co. v. Flynn*, 131 Ill. App. 502; *Briggs v. Durham Tract. Co.*, 147 N. C. 389, 61 S. E. 373.

64. *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313.

65. *Southern, etc., R. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45.

66. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

A carrier owes to a passenger the highest degree of care that a prudent person experienced in that business can practicably exercise. *Benjamin v. Metropolitan St. R. Co.*, 151 S. W. 91, 245 Mo. 598.

67. *St. Louis, etc., R. Co. v. Purifoy*, 99 Ark. 366, 138 S. W. 631.

68. A carrier is bound to exercise, in the management of its cars, the highest degree of care required by the circumstances to protect its passengers from in-

jury during transportation. *Steverman v. Boston Elevated R. Co.*, 91 N. E. 919, 205 Mass. 508.

69. *Southern Pac. Co. v. Hogan*, 108 Pac. 240, 13 Ariz. 34, 29 L. R. A., N. S., 813.

70. Utmost practicable care and diligence.—A carrier of passengers is bound to exercise the utmost practicable care and diligence to secure the safety of the passenger, but a duty of reasonable care for his own safety as well rests upon the passenger himself. *Interurban R., etc., Co. v. Hancock*, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

71. New Jersey court's view.—*Rivers v. Pennsylvania R. Co.*, 83 N. J. L. 513, 83 Atl. 883, reversing judgment, 76 Atl. 455, 80 N. J. L. 217.

A common carrier is not charged with the duty of carrying passengers safely, but his duty is limited to the exercise of a high degree of care in that regard. *Olsofom v. North Jersey St. R. Co.*, 79 Atl. 1039, 81 N. J. L. 321.

A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with the express or implied consent of the company. *Trussell v. Morris County Tract. Co.*, 77 Atl. 535, 79 N. J. L. 533, 30 L. R. A., N. S., 351.

72. Foresight defined.—*Rivers v. Pennsylvania R. Co.*, 80 N. J. L. 217, 76 Atl. 455.

73. Florida court's view.—*Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

74. Florida statute.—*Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

their pecuniary ability to do so, required to provide all things necessary to the security of the passenger, reasonably consistent with their business, "and appropriate to the means of conveyance employed by them," and to adopt the highest degree of practical care, diligence, and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same.⁷⁵ And it is said that a carrier having limited capacity to transport passengers, and whose primary business is the transportation of its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances.⁷⁶ And an instruction to the effect that the law requires everything necessary to the security of the passenger, which is reasonably consistent with the business of the carrier and the means and conveyances employed, has been held not to exact too high a degree of care.⁷⁷ It may be noted that these expressions are to be found, for the most part, in very late cases. In yet other cases, some of them recently decided, it has been said that passenger carriers are required to do all that human care, vigilance and foresight reasonably can under the circumstances, and in view of the character and mode of conveyance adopted,⁷⁸ consistent with the practical operation of its road and the exercise of its business as a carrier;⁷⁹ or, in other words, all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers.⁸⁰ But in a very recent Arkansas case the court said that carriers are not bound to exercise the utmost diligence, human skill and foresight can effect, consistent with the mode of conveyance, or, in other words, that they are not liable for the slightest omission.⁸¹ Of the numerous expressions of the care which the law imposes upon passenger carriers formulated by the courts and text-writers, it is believed that these statements express

75. Pecuniary ability.—Arkansas, etc., R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

76. Campbell v. Duluth, etc., R. Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A., N. S., 190.

The standard of care which a carrier is required to exercise for the safety of passengers has proper regard for circumstances. *Campbell v. Duluth, etc., R. Co.*, 120 N. W. 375, 107 Minn. 358, 22 L. R. A., N. S., 190.

77. Delaware, etc., R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368.

78. Character and mode of conveyance adopted.—*Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138.

For the safety of their passengers common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business. *Colorado Springs, etc., R. Co. v. Allen*, 108 Pac. 990, 48 Colo. 4.

79. Ruch v. Aurora, E. & C. R. Co., 150 Ill. App. 329, petition stricken out for certiorari, *Aurora, etc., R. Co. v. Ruch*, 243 Ill. 474, 90 N. E. 924; *Cleary v. Bloomington, P. & J. Electric Ry. Co.*, 150 Ill. App. 418; *Madl v. Chicago, etc., Ry. Co.*, 167 Ill. App. 487.

80. Elliott v. Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208.

A carrier is required to do all that human care, vigilance, and foresight can reasonably do, consistent with the character and mode of conveyance adopted, and the practical operation of its road, to prevent accidents to passengers riding upon its trains. *Huff v. Cleveland, C., C. & St. Ry. Co.*, 138 Ill. App. 89.

A charge which, in effect, required common carriers of passengers to do all that human care, vigilance, and foresight can reasonably do, under the circumstances, consistently with the character and mode of the conveyance adopted and the practical prosecution of the business, coupled with an instruction that carriers of passengers are not insurers, has been held to be unobjectionable. *Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578, 580, affirming 48 Ill. App. 41; *Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

In a late Wisconsin case it was said that passenger carriers must exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical operation of the business. *Wanzer v. Chippewa Valley Elect. R. Co.*, 108 Wis. 319, 84 N. W. 423.

81. Late Arkansas case.—*St. Louis, etc., R. Co. v. Purifoy*, 99 Ark. 366, 138 S. W. 631.

the rule with the greatest accuracy and, at the same time, give a clear and well defined idea of the very high character of the care required together with the proper limitations. But there are a number of expressions which, although similar to those set forth above, are not so satisfactory, chiefly for the reason that they are not well calculated to convey to the minds of the jury a clear conception of the requirements of the law. These state the required care to be the highest or utmost degree of care which is consistent with the nature of the business or undertaking,⁸² the utmost skill, diligence and foresight consistent with the business,⁸³ the utmost care which is consistent with the nature and extent of the business,⁸⁴ the utmost or highest degree of care, skill, and diligence for the safety of the passenger that is consistent with the mode of conveyance employed,⁸⁵ and the strictest care which is consistent with the reasonable performance of the contract of transportation.⁸⁶ To say, in effect, that carriers of passengers are bound to exercise the highest possible degree of care and diligence to which the mode of transportation used is susceptible⁸⁷ is probably putting the matter too strongly according to some of the authorities. The statement would be more satisfactory if the word "reasonably" or "practicably" were inserted before the word "susceptible."

§ 2327. Statutory Rule in California and Other States.—In California, it has been provided by statute which has been copied in certain other states, including Dakota and Montana, that "a carrier of passengers for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill."⁸⁸ Since this statute seems to be merely declaratory of

82. Greatest accuracy.—*Maryland.*—Baltimore, etc., R. Co. v. Swann, 81 Md. 400, 32 Atl. 175, 2 Am. & Eng. R. Cas., N. S., 187, 31 L. R. A. 313; Baltimore, etc., R. Co. v. State, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 44 Am. & Eng. R. Cas. 345, 20 Am. St. Rep. 483, 8 L. R. A. 673.

Massachusetts.—Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Warren v. Fitchburg R. Co. (Mass.), 8 Allen 227, 85 Am. Dec. 700.

Minnesota.—Smith v. St. Paul, etc., R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, 16 Am. & Eng. R. Cas. 310.

Nebraska.—Pray v. Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 2 Am. & Eng. R. Cas., N. S., 222, 48 Am. St. Rep. 717.

83. Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736.

84. Simmons v. New Bedford, etc., Steamship Co., 97 Mass. 361, 93 Am. Dec. 99.

85. North Chicago, etc., R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

86. Knight v. Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

"The law requires common carriers of passengers to do all that human care, vigilance and foresight can, under the circumstances, considering the character and mode of the conveyance, to prevent accident to passengers." Libby v. Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 273, 12 Am. St. Rep.

541, 2 L. R. A. 83, 37 Am. & Eng. R. Cas. 67; Olds v. New York, etc., R. Co., 172 Mass. 73, 51 N. E. 450.

It has been said that it is the duty of a carrier of passengers to exercise "the utmost care consistent with the nature of his undertaking, and with due regard for all the other matters which ought to be considered in conducting the business." And it has been said that every carrier of passengers for hire "is bound to use the utmost care which is consistent with the nature of the business to guard the passenger against all dangers, from whatever source arising, which may reasonably and naturally be expected to occur, in view of all the circumstances and of the number and character of the persons with whom the passenger will be brought in contact." Murray v. Lehigh Val. R. Co., 66 Conn. 512, 24 Atl. 506, 4 Am. & Eng. R. Cas., N. S., 210, 32 L. R. A. 539.

87. Missouri Pac. R. Co. v. Holcomb, 44 Kan. 332, 24 Pac. 467, 44 Am. & Eng. R. Cas. 303.

88. Statutory rule.—Cal. Civ. Code, § 2100; Dak. Comp. L. 1887, § 3838; Mont. Code 1895, § 2790; Roberts v. Sierra R. Co., 14 Cal. App. 180, 111 Pac. 519, rehearing denied in 111 Pac. 527; John v. Northern Pac. R. Co., 111 Pac. 632, 42 Mont. 18, 32 L. R. A., N. S., 85.

A common carrier of passengers must exercise the utmost care, diligence, and foresight of a very cautious person, and is responsible for any injury to a passenger except that occasioned by inevitable casualty or some other cause which human foresight could not prevent. Kline

the common law, the cases, arising in the states where it has been adopted, which declare the degree of care which is exacted of passenger carriers, have been recited in the course of the foregoing discussion of the common-law rule.

§ 2328. Statutory Rule in Georgia.—In Georgia, carriers of passengers are, by statute, required to exercise extraordinary care and diligence to protect the lives and persons of their passengers,⁸⁹ either in the ordinary course of business or under special circumstances;⁹⁰ this care means that extreme care and caution which every prudent and thoughtful person would use under similar circumstances.⁹¹ This degree of care applies as well to the construction of tracks as to the operation of cars thereon.⁹² When a carrier has exercised this degree of diligence in the transportation of passengers, the law relieves it from any liability for injuries sustained by the running of its trains.⁹³ And this is true although it might have been possible for the carrier to have exercised a higher degree of care.⁹⁴ In another section in enumerating the several degrees of care to be expected of bailees, according to the nature of the particular bailment, the Georgia Code defines "extraordinary diligence" to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." It has been said that, under these statutory provisions, the diligence to be expected of railroad companies in caring for their passengers would be "that extreme care and caution which very prudent and thoughtful persons" would observe in discharging that duty, if devolving upon them.⁹⁵ The

v. Santa Barbara Consol. R. Co. (Cal.), 90 Pac. 125.

The instruction that a railroad company engaged as a common carrier in transporting passengers for reward is bound to use the utmost care and diligence for their safety is not incorrect. *Valenti v. Sierra R. Co.*, 111 Pac. 95, 158 Cal. 412.

89. Georgia law.—A carrier of passengers in this state is bound to exercise "extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers;" and this rule applies to the reception, transportation, and discharge of such passengers. Civil Code, § 2266. *Georgia R., etc., Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026; *Bennett v. Central, etc., R. Co.*, 6 Ga. App. 185, 64 S. E. 700; *Turner v. City Elect. R. Co.*, 134 Ga. 869, 68 S. E. 735; *Valdosta St. R. Co. v. Fenn*, 11 Ga. App. 586, 75 S. E. 984; *Wright v. Georgia R., etc., Co.*, 34 Ga. 330; *Brunswick, etc., R. Co. v. Gale*, 56 Ga. 322; *Macon Consolidated St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015.

Under Civ. Code 1895, § 2266, requiring carriers of passengers to exercise extraordinary diligence to protect the lives of passengers, the words "reasonable care and diligence," used in § 2321, declaring that a railroad company shall be liable for any damage done to persons by the running of locomotives, cars, etc., unless the railroad company shows that its agents have exercised all reasonable care and diligence, means extraordinary care and diligence. *Georgia R., etc., Co. v. Gilleland*, 66 S. E. 944, 133 Ga. 621.

Civ. Code 1910, § 2780, providing that a railroad company shall be liable for

damages to persons by the running of the locomotives, cars, or other machinery of such company, unless the company shall make it appear that their agents had exercised all ordinary and reasonable care, and diligence, the presumption in all cases being against the company, must be construed with § 2714, providing that a carrier of passengers is bound to extraordinary diligence to protect its passengers, but is not liable for injuries to the persons after having used such diligence, so that the phrase "reasonable care and diligence," in § 2780, must be deemed to mean "extraordinary" care and diligence. *Douthitt v. Louisville, etc., R. Co.*, 71 S. E. 470, 136 Ga. 351.

90. Central, etc., R. Co. v. Madden, 135 Ga. 205, 69 S. E. 165, 31 L. R. A., N. S., 813, 21 Am. & Eng. Ann. Cas. 1077.

91. Valdosta St. R. Co. v. Fenn, 11 Ga. App. 586, 75 S. E. 984.

92. Wadley Southern R. Co. v. Kennedy, 136 Ga. 440, 71 S. E. 740.

93. Relieved from further liability.—*Wright v. Georgia R., etc., Co.*, 34 Ga. 330; *Brunswick, etc., R. Co. v. Gale*, 56 Ga. 322; *Stiles v. Atlanta, etc., Railroad*, 65 Ga. 370; *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253; *Florida Cent., etc., R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283.

94. Although higher degree of care possible.—*Florida Cent., etc., R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283.

95. Ga. Code, § 2062. *Williamson v. Central, etc., R. Co.*, 127 Ga. 125, 56 S. E. 119.

Georgia.—*Wright v. Georgia R., etc., Co.*, 34 Ga. 330; *Florida Cent., etc., R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283; *Macon Consolidated St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *East Tennes-*

absence of extraordinary diligence has been termed slight neglect.⁹⁶ The care exacted by these provisions is something more than "all ordinary and reasonable care and diligence."⁹⁷ Although it has been said that reasonable care with reference to the duty imposed upon carriers or passengers is the extraordinary care provided for by the Civil Code;⁹⁸ and it has been held that an instruction exacting "extraordinary care and vigilance" is not erroneous;⁹⁹ yet a charge that railroad companies are required to observe the "utmost care and diligence" for the safe carriage and delivery of their passengers has been held to exact a higher degree of care than that prescribed by the statute.¹ And it has been held to be error for a trial court to charge the jury as follows: "The law is laid in wisdom, as human life is at great risk, especially when public carriers employ steam for rapid transit; and too much diligence can not be required at their hands. For slight neglect they are, and ought to be, responsible; and, outside of the provisions of our own statute law, such, it is believed, is the rule everywhere in the civilized world." In commenting upon this instruction the supreme court of Georgia, after referring to the section of the statutes which defines the "extraordinary diligence" required of carriers of passengers, said: "We do not see how the degree of diligence could have been more strongly expressed than by the language used in this charge. It certainly puts upon the carrier the very utmost diligence that it could possibly exercise. The law does not thus define the term

see, etc., *R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216; *Stiles v. Atlanta, etc., Railroad*, 65 Ga. 370; *East Tennessee, etc., R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216.

An instruction that, "the duty of the defendant company in engaging to carry passengers for hire is to exercise extraordinary care and diligence; that is, that extreme care and caution which very prudent persons exercise in securing and preserving their own property," is not erroneous as imposing too high a degree of diligence on the company by the use of the term "extreme care and caution," as the qualification added thereto explains and limits the meaning of the term. *Macon Consolidated St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

96. Slight neglect.—*Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253.

Where a passenger is hurt by reason of the transportation, a slight neglect on the part of the carrier is sufficient to charge it with liability. *City, etc., R. Co. v. Findley*, 76 Ga. 311; *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889. See also, *Holly v. Atlanta St. Railroad*, 61 Ga. 215, 34 Am. Rep. 97.

97. *Crawford v. Georgia Railroad*, 62 Ga. 566.

In regard to the carrier of passengers ordinary diligence is that care which every prudent man takes of his own property of a similar nature; absence of such diligence is termed ordinary neglect; extraordinary diligence is that extreme care and caution which every prudent and thoughtful person uses in preserving his property; absence of such diligence is termed slight neglect. *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253.

That is to say, the company will be liable to passengers for injuries to them unless extraordinary care and diligence be used, and slight neglect on the part of the agents and servants of the company will be sufficient evidence to fix its liability. *Crawford v. Georgia Railroad*, 62 Ga. 566.

98. Reasonable care.—*East Tennessee, etc., R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216.

A carrier of passengers is not liable for the death or injury of the passenger unless there has been an absence of reasonable care and diligence on its part, or on the part of its agents. In such a case reasonable care and diligence is exercised if the carrier has done all that human care and foresight can do. *Wright v. Georgia R., etc., Co.*, 34 Ga. 330.

99. Georgia.—*Central, etc., R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848, 52 Am. & Eng. R. Cas. 473; *Georgia R. Co. v. Homer*, 73 Ga. 251, 27 Am. & Eng. R. Cas. 186.

1. *East Tennessee, etc., R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216.

Greatest possible care not required.—Railroad companies in the transportation of passengers are not bound to take the greatest possible degree of care in the discharge of the duties towards the passengers but are bound to extraordinary care which is defined by the Code, that extreme care and caution which very prudent and thoughtful persons used in and about similar matters. *East Tennessee, etc., R. Co. v. Green*, 95 Ga. 736, 22 S. E. 658.

'extraordinary diligence,' nor has this court ever decided that these words just quoted mean the greatest possible degree of care that could be exercised."² What does or does not amount to extraordinary diligence varies with the circumstances of the particular case and is controlled thereby.³

§§ 2329-2342. Application of the Rule—§§ 2329-2334. Mode of Conveyance Immaterial—§ 2329. In General.—While, as is pointed out in many of the foregoing statements of the degree of care exacted of passenger carriers, the mode of conveyance employed by the carrier is to be taken into consideration in determining whether the high degree of care required by law has been exercised in a given case, this is not equivalent to saying that the degree of care required varies with the mode of conveyance employed; the standard of care is the same whatever may be the mode of conveyance employed, and the mode of conveyance is only to be taken into consideration in determining whether the degree of care which the law exacts has been exercised—whether, in other words, the care employed was the highest practicable care which could be exercised under the circumstances.⁴

§ 2330. Stage and Hackney Coaches.—Very naturally the earliest application of the rule was to carriers by stage coach.⁵ Analogously, the requirement has been exacted of carriers by hackney coaches.⁶

§ 2331. Railroad.—It is of course exacted of carriers by railroad to the fullest extent,⁷ the rule being the same when the railroad is owned and operated by a corporation as when owned and operated by private individuals.⁸

§ 2332. Street Railways.—And the same rule as to the degree of care required of carriers of passengers, which is applicable to ordinary steam railways, applies to street railway companies⁹ even though constructed upon private prop-

2. *Florida Cent., etc., R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283.

3. **What constitutes extraordinary diligence depends on circumstances.**—*Macon Consolidated St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

4. **Rule applied—Mode of conveyance.**—The law imposes upon carriers of passengers the duty of extraordinary diligence in protecting passengers, without regard to the means of transportation employed, whether regular passenger trains, mixed trains or freight trains. It would seem that the more dangerous the means employed, the more vigilant and diligent the carrier should be in guarding against injury to passengers. *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64.

The law, which has but one standard, exacts this degree of care of all carriers of passengers alike, whatever may be the means of transportation employed. *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; *Hardin v. Fort Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

5. **Stage coaches.**—*Stokes v. Saltonstall (U. S.)*, 13 Pet. 181, 10 L. Ed. 115; *Peck v. Neil*, 3 McLean 22, Fed. Cas. No. 10,892; *Maury v. Talmadge*, 2 McLean 157, Fed. Cas. No. 9,315; *McKinney v. Neil*, 1 McLean 540, Fed. Cas. No.

8,865; *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; *Frink & Co. v. Coe (Iowa)*, 4 G. Greene 555, 61 Am. Dec. 141; *Gallagher v. Bowie*, 66 Tex. 275, 17 S. W. 407.

6. **Hackney coaches.**—*Bonce v. Dubuque, etc., R. Co.*, 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

7. **Railroads.**—*Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *Murray v. Lehigh Val. R. Co.*, 66 Conn. 512, 34 Atl. 506, 4 Am. & Eng. R. Cas., N. S., 210, 32 L. R. A. 539.

8. *Gulf, etc., R. Co. v. Warlick*, 1 Ind. T. 10, 35 S. W. 235, 4 Am. & Eng. R. Cas., N. S., 32.

9. **Street railroads.**—*Van Deventer v. Chicago City R. Co.*, 26 Fed. 32.

Colorado.—*Denver Tramway Co. v. Peid*, 4 Colo. App. 53, 35 Pac. 269.

Georgia.—*City, etc., R. Co. v. Findley*, 76 Ga. 311.

Indiana.—*Citizens' St. R. Co. v. Twirame*, 111 Ind. 587, 13 N. E. 55, 30 Am. & Eng. R. Cas. 616.

Kansas.—*Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

Kentucky.—*Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455.

Massachusetts.—*Webber v. Old Colony St. R. Co.*, 210 Mass. 432, 97 N. E. 74.

Minnesota.—*Smith v. St. Paul, etc., R.*

erty.¹⁰

§ 2333. **Carriers by Water.**—The rule is not limited to carriers by land but extends to carriers by water,¹¹ including steamboat¹² and ferry companies.¹³

§ 2334. **Elevators.**—It seems to be well settled that the care and diligence which the law imposes upon passenger carriers generally, rests upon those operating elevators for raising and lowering persons from one floor to another in buildings.¹⁴ Thus, it is said that operators of passenger elevators are bound to

Co., 32 Minn. 1, 18 N. W. 827, 16 Am. & Eng. R. Cas. 310, 50 Am. Rep. 550.

Missouri.—Sullivan v. Jefferson Avenue R. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; Jackson v. Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192; Parker v. Metropolitan St. R. Co., 69 Mo. App. 54.

Nebraska.—Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; Pray v. Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 2 Am. & Eng. R. Cas., N. S., 222, 48 Am. St. Rep. 717; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Washington.—Payne v. Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054; Brown v. Seattle City R. Co., 16 Wash. 465, 47 Pac. 890, 9 Am. & Eng. R. Cas., N. S., 859, 58 Am. St. Rep. 46; Cogswell v. West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

But see dictum to the contrary in Unger v. Forty-Second St., etc., R. Co., 51 N. Y. 497, affirming 6 Robt. 237.

In its conduct of operating electric street cars as a common carrier of passengers, it was bound to use extraordinary diligence to protect the lives and persons of its passengers. Civil Code, § 2266. Savannah Elect. Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 12 L. R. A., N. S., 476.

A street railroad accepting one as a passenger on the footboard of the car is bound to exercise towards him the high degree of care required of carriers of passengers. Math v. Chicago City R. Co., 90 N. E. 235, 243 Ill. 114.

It is the duty of a street railroad company, as a matter of law, to use the highest degree of care and caution consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported. Chicago Consol. Tract. Co. v. Schritter, 78 N. E. 820, 222 Ill. 364, affirming judgment 124 Ill. App. 578.

The duty of a carrier of passengers to exercise the highest degree of care for its passengers consistent with the practical operation of its road applies to street railroads. Louisville, etc., Tract. Co. v. Walker (Ind.), 97 N. E. 151.

A street railway company is bound to exercise such reasonable diligence for the safety of passengers as the nature of its business demands. Egan v. Old Colony

St. R. Co., 195 Mass. 159, 80 N. E. 696.

10. **On private property.**—East Omaha St. R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas., N. S., 300.

11. **Carriers by water.**—Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922.

12. Russ v. The War Eagle, 14 Iowa 363; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83.

13. *California.*—May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Indiana.—Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710.

Massachusetts.—Le Barron v. East Boston Ferry Co., 11 Allen 312, 87 Am. Dec. 717.

New York.—Hazman v. Hoboken Land, etc., Co., 50 N. Y. 53, affirming 2 Daly 130.

Tennessee.—Sanders v. Young, 38 Tenn. (1 Head) 219, 73 Am. Dec. 175.

14. **Elevators.**—United States.—Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; Marker v. Mitchell, 54 Fed. 637.

California.—Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Illinois.—Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Springer v. Ford, 88 Ill. App. 529; Western Union Tel. Co. v. Woods, 88 Ill. App. 375; Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N. E. 117, affirming judgment in 142 Ill. App. 154; Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A., N. S., 911.

Iowa.—Cabbage v. Youngerman (Iowa), 134 N. W. 1074.

Kentucky.—Kentucky Hotel Co. v. Camp, 97 Ky. 424, 17 Ky. L. Rep. 297, 30 S. W. 1010.

Maryland.—Compare People's Bank v. Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403.

Minnesota.—Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

Missouri.—Chambers v. Kupper-Benson Hotel Co. (Mo. App.), 134 S. W. 45.

Nebraska.—Quimby v. Bee Bldg. Co., 87 Neb. 193, 127 N. W. 118.

New York.—Compare Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

While one who owns and controls a

exercise the highest degree of skill and foresight that is consistent with the practicable operation of such elevators to guard against accidents and injuries resulting therefrom to passengers, while they are operating such elevators themselves or by their servants.¹⁵ And it is also held that an owner of a passenger elevator operated in his office building, though not properly a carrier of passengers, must exercise a very high degree of care for the safety of persons carried by the elevator on his implied invitation to use the same.¹⁶ In a New York case, it is said: "It may be that, as to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and that he is in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery."¹⁷ But, as to the surroundings and other structures forming a part of the elevator plant, where less danger is to be apprehended, the rule is less strict. In the latter case the rule is satisfied with that degree of care which a reasonable prudent man would exercise. The requirements of the greater degree of care is dependent not so much upon the actual apprehension of danger as upon the consequences likely to result from a defect in the machinery and appliances. In cases where less serious results are to be expected, and in cases where danger is not to be apprehended, if due and proper care is observed by the passenger, the owner is responsible only for the want of ordinary and reasonable care.¹⁸

§§ 2335-2337. When Passengers Are Carried on Freight Trains—

§ 2335. Assumption of Risk by Passengers.—There are certain dangers necessarily incident to every mode of transportation, regardless of the character of the conveyance employed, which the passenger must be deemed to assume. Applying this reasonable limitation of the carrier's liability to the carriage of passengers by freight, or other similar trains, it may be said that when one takes passage upon a mixed, freight, or other similar train, he does so with the diminution of comfort and the increased risks reasonably and necessarily incident to the operation of trains of that character,²⁰

building used for business purposes and equipped with passenger elevators is not an insurer of the safety of the passengers using the elevators, he is required to exercise the highest degree of care and diligence for their safety. *Munsey v. Webb*, 37 App. D. C. 185.

A proprietor of a hotel in which a passenger elevator is operated for convenience of his guests is held to the same care and diligence for their safety in the elevator as a railway is required to use for safety of its passengers. *Fraser v. Harper House Co.*, 141 Ill. App. 390.

The obligation to passengers on elevators and those attempting to become passengers, is the same as that of common carriers to passengers, and those in charge of elevators are bound to exercise the highest degree of care and precaution. *Southern Bldg., etc., Ass'n v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804.

The owner of an elevator owes to a passenger the high degree of care generally owing by a common carrier. *Farmers', etc., Nat. Bank v. Hanks* (Tex. Civ. App.), 128 S. W. 147.

15. *Sweeden v. Atkinson Improvement*

Co., 93 Ark. 397, 125 S. W. 439, 27 L. R. A., N. S., 124.

While the owner and manager of an elevator, operated in a business building for the purpose of carrying persons having business therein, is not bound to serve the public like a common carrier of passengers, nevertheless the law imposes on such owner the same duty to protect the passengers in the elevator from injury that it has exacted of carriers of passengers by railroad or other means. *Sweeden v. Atkinson Improvement Co.*, 125 S. W. 439, 93 Ark. 397, 27 L. R. A., N. S., 124.

16. **Though not properly passenger carrier.**—*Farmers', etc., Nat. Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120, reversing judgment (Tex. Civ. App.), 128 S. W. 147.

17. **New York court's view.**—*McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265, 47 N. E. 305, 307.

18. *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265, 47 N. E. 305, 307. See *Frahm v. Siegel-Cooper Co.*, 116 N. Y. S. 90, 131 App. Div. 747.

20. **Passengers on freight trains.**—*United States v. Fitchburg R. Co.* v.

when managed by prudent men in a careful manner.²¹ He waives precaution, whether in equipment or operation, which are inconsistent with the ordinary use and conduct of such a train, and assumes the risk of injury from accident incident to such train when equipped and operated in the usual way.²² In view of the known risk incident to such travel it would seem that the duty of caution upon the carrier's part is correspondingly increased.²³ Yet it has been said that where a carrier furnishes a hand car, or other vehicle not adapted to the carriage of passengers, manned by a crew employed simply to work on the track and run the car for their own convenience, the carrier and

Nichols, 85 Fed. 945, 29 C. C. A. 500; Delaware, etc., R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 386; Hazard v. Chicago, etc., R. Co. (U. S.), 1 Biss. 503, Fed. Cas. No. 6,275.

Arkansas.—St. Louis, etc., R. Co. v. Cobb, 89 Ark. 82, 115 S. W. 939; Arkansas Cent. R. Co. v. Janson, 90 Ark. 494, 119 S. W. 648.

Georgia.—Crine v. East Tennessee, etc., R. Co., 84 Ga. 651, 11 S. E. 555; Ball v. Mabry, 91 Ga. 781, 18 S. E. 64; Central R. Co. v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Central, etc., R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Indiana.—Louisville, etc., R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662, 41 Am. & Eng. R. Cas. 89; Woolery v. Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 27 Am. & Eng. R. Cas. 210, 57 Am. Rep. 114; Indiana, etc., R. Co. v. Masterson, 16 Ind. App. 323, 44 N. E. 1004.

Maine.—Dunn v. Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

Massachusetts.—Olds v. New York, etc., R. Co., 172 Mass. 73, 51 N. E. 450; Heyward v. Boston, etc., R. Co., 169 Mass. 466, 48 N. E. 773, 10 Am. & Eng. R. Cas., N. S., 260.

Minnesota.—Schilling v. Winona, etc., R. Co., 66 Minn. 252, 68 N. W. 1083; Oviatt v. Dakota Cent. R. Co., 43 Minn. 300, 45 N. W. 436; Rosenbaum v. St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 34 Am. & Eng. R. Cas. 247, 8 Am. St. Rep. 653.

Missouri.—Wait v. Omaha, etc., R. Co., 165 Mo. 612, 65 S. W. 1028; Wagner v. Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; McGee v. Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706; Tickell v. St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 727; Allison v. St. Louis, etc., R. Co. (Mo. App.), 137 S. W. 896; Brssell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613.

North Carolina.—Wallace v. Western, etc., R. Co., 98 N. C. 494, 4 S. E. 503, 34 Am. & Eng. R. Cas. 553, 2 Am. St. Rep. 346; Usury v. Watkins, 152 N. C. 760, 67 S. E. 926.

Tennessee.—Felton v. Horner, 97 Tenn. 579, 581, 37 S. W. 696.

Texas.—Missouri, etc., R. Co. v. Schroeder, 44 Tex. Civ. App. 47, 100 S. W. 808, affirmed in 102 Tex. 588, no op.; Trinity Valley R. Co. v. Stewart (Tex. Civ. App.),

62 S. W. 1085; Mullen v. Galveston, etc., R. Co. (Tex. Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.; Hardin v. Fort Worth, etc., R. Co., 33 Tex. Civ. App. 448, 77 S. W. 431; San Antonio, etc., R. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584.

A passenger accepts transportation on a freight train subject to the ordinary inconveniences and discomforts incident to the careful operation of such a train, and, if injured by the ordinary and usual movements of the train under its careful management and operation, can not recover. Herring v. Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed in 102 Tex. 100, 113 S. W. 521. And, see Texas, etc., R. Co. v. Bump, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.

In an action against a carrier for injuries received by the shipper of a horse, in consequence of being kicked by it while in the car with it, the shipper testified that he told an employee of the carrier that he would not remain in the car while it was being moved from the place of loading to a railroad yard a short distance away, and that the employee stated that he would go with him. Another witness testified to the same effect. Held, that the evidence authorized a charge that, if the shipper entered the car for the purpose of fastening the horse and that he agreed with the carrier's employee that they would carry the car to the yard with the horse untied and that he and the employee would hold the horse while it was being so transported, the shipper would assume the risk ordinarily resulting from carrying the horse not properly tied, authorizing a verdict for defendant. Houston, etc., R. Co. v. Wilkins (Tex. Civ. App.), 98 S. W. 202.

Such charge was not erroneous because limiting the assumption of risk to a risk ordinarily incident to the carrying of the horse untied. Houston, etc., R. Co. v. Wilkins (Tex. Civ. App.), 98 S. W. 202.

21. Marable v. Southern R. Co., 142 N. C. 557, 55 S. E. 355.

22. Lawrence v. Kaul Lumber Co., 171 Ala. 300, 55 So. 111.

23. Extra caution on passenger's part.—Felton v. Horner, 97 Tenn. 579, 581, 37 S. W. 696.

its servants are bound to exercise no greater degree of care than is required in carrying passengers for hire on regular trains.²⁴ The question as to whether or not the risk is incidental to the mode of traveling is one for the jury, if the evidence relating thereto is in conflict.²⁵ Instructions which properly recognize this assumption by passengers of the increased risks incident to travel by freight trains are not objectionable. It has been held proper to instruct a jury "that in taking passage on a freight train the intestate took upon himself the additional risks, if any, in excess of the risks incident to a passage on the same road in a passenger train."²⁶ It is even the duty of the trial court, in a proper case, to call the attention of the jury to this limitation of the carrier's liability.²⁷ But

²⁴. *International, etc., R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

²⁵. *International, etc., R. Co. v. Cruse-turner*, 44 Tex. Civ. App. 181, 98 S. W. 423.

²⁶. *Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 21 S. W. 244, 14 Ky. L. Rep. 611, 58 Am. & Eng. R. Cas. 418, 40 Am. St. Rep. 211, 19 L. R. A. 310.

In an action to recover damages sustained by the plaintiff while a passenger upon a freight train of the defendant, the trial court instructed the jury in substance as follows: A man who voluntarily takes passage upon a train which is not a passenger train, but only an ordinary freight train, is only entitled to look for such security as that mode of conveyance is reasonably expected to render. In that case, if he receives an injury while he is seated inside of the cab, and such injury is caused by a jolt or a jar such as is usual and necessary in coupling the cars of a freight train, he can not recover. When a passenger train is provided for the transportation of passengers on a railway, and one voluntary takes passage on a freight train rather than wait for the passenger train, a railway company would not be liable to him for injuries received from a jolt or jar in the coupling of their cars, if it was such as was usual and necessary, the burden being upon the railroad to establish the necessity of the same. If, notwithstanding the exercise of extraordinary diligence on the part of the railway company, such injury resulted, the plaintiff would not be entitled to recover. But, unless such diligence was established on their part, if the plaintiff received injuries in consequence of the negligent acts of the defendant described in the declaration, he would be entitled to recover. And, further, that the jury were authorized to inquire whether it was such an injury as might reasonably be expected to occur under the circumstances; and, if they found that such injury was reasonably to be expected, then it was the duty of the company to carefully guard against a jolt in coupling the cars which would produce such an injury. But if, on the contrary, it was an injury of a character never before known to oc-

cur, and therefore not an injury which might reasonably have been expected, under the circumstances; and if, in coupling and uncoupling, the machinery was handled as machinery of like character would be handled by a prudent and thoughtful person in the exercise of extreme care and caution, and the jolt was no greater than the jolt usual under such circumstances—then, even if the plaintiff was injured thereby, the jury would be authorized to find for the defendant. On error, the charge was sustained, the court saying that, under the facts of the case it was a fair charge, and presented the law correctly. *Crine v. East Tennessee, etc., R. Co.*, 84 Ga. 651, 11 S. E. 555.

To a charge that "a person taking passage on or riding on freight trains, where the railroad runs passenger trains on its road for the benefit of travelers, assumes the extra danger, if any, as is necessarily incident to traveling on freight trains," it was objected that "ordinarily" should have been substituted for "necessarily." But the Texas court of civil appeals said that "The charge given was not incorrect, and, if appellant desired any further and more favorable instruction, it should have requested it." *Ft. Worth, etc., R. Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. 61.

²⁷. A trial court instructed the jury that when a railroad company admits passengers into a way car attached to a freight train, for the purpose of carrying passengers to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of passengers as though they were in regular passenger coaches at the time of the occurrence of the injury. The responsibility of the railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried. If the passenger is lawfully on the cars, the company is bound to carry him safely. In commenting upon this instruction the supreme court of Michigan said: "The propositions that, if the passenger is lawfully on the cars, the company is bound to carry him safely, and that 'the responsibility of the company for the safety of its passengers does not depend on the kind of cars in which they are carried,' are broad,

in a federal case the trial court refused to give an instruction, requested by the defendant company, "that a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and, if it is managed with the care requisite for such a train, it is all those who embark upon it have a right to demand. The passenger can only expect such security as the mode of conveyance affords." ²⁸

§ 2336. Degree of Care Exacted of the Carrier.—Subject to the above-stated limitation, which, indeed, though more obviously applicable, is not specially peculiar, to the carrying of passengers by freight trains, the same high degree of care is to be exercised by the carrier when passengers are carried by mixed, freight, construction, and other similar trains as when carried by regular passenger trains. ²⁹ The rule of law that the standard of duty on the part of a car-

and, in our judgment, would lead the average juror to understand that the railroad company was an insurer of the safety of the passengers, and that the same degree of protection is requisite upon a freight train as upon the best-equipped passenger train." *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103, 72 N. W. 1112.

In a case in which the trial court charged the jury broadly to the effect that whether a person boards a freight train, mixed train, or passenger train, does not make any difference so far as the liability of the carrier is concerned, the law fixing upon a carrier, who undertakes to convey passengers by freight trains, that degree of care which attaches to common carriers of passengers, and refused a charge, requested by the defendant, that "in boarding a freight train, passengers assumed the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and requisite for such trains, it is all that those who voluntarily board them have a right to expect," the supreme court of South Carolina said that the general charge given should have been modified substantially in accord with the defendant's request. "A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train with all reasonable skill and caution as a freight train. Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of care in all cases, but, in applying this rule, the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train, the highest degree of care may require the use of a bell cord, or a brakeman on each car, or automatic brakes, but in the management of a freight train the same de-

gree of care may not require these things." In conclusion the court said that, since it could not be sure "that the jury may not have found the issue of negligence against defendant because of the absence of some safeguard against danger which the highest degree of care would require in the management of a regular passenger train," there should be a new trial under unequivocal instructions. *Steele v. Southern R. Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756.

²⁸. In sustaining the refusal of the trial court to give the instruction, *Shiras*, District Judge, in delivering the opinion of the court, said: "It is possible to imagine or suggest cases in which the facts would be such as to make the request above quoted entirely proper, and also to require a more full statement of the abstract rule of law given by the court in its charge; but there was nothing developed in the evidence in this case that called upon the court to instruct the jury in regard to any increased risks of discomforts attending a passage in the caboose of a freight train, as compared with a passage in a drawing-room car forming a part of a passenger train. The injury to the defendant in error did not grow out of a risk peculiar to a freight train. It might just as easily have occurred if the train had been composed of passenger coaches, for the injury resulted from the passenger leaving the car when in motion, which may occur as readily with passenger as with freight trains." *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435.

²⁹. **Degree of care in case of freight trains.**—*United States*.—*Sprague v. Southern R. Co.*, 92 Fed. 59, 34 C. C. A. 207, 14 Am. & Eng. R. Cas., N. S., 356; *Dela-*
ware, etc., R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368; *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435; *Lusby v. Atchison, etc., R. Co.*, 41 Fed. 181; *Hazard v. Chicago, etc., R. Co. (U. S.)*, 1 Biss. 503, Fed. Cas. No. 6,275.

Alabama.—*Southern R. Co. v. Crowder*, 130 Ala. 256, 30 So. 592; *Southern R. Co. v. Burgess*, 143 Ala. 364, 42 So. 35.

Arkansas.—*St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587; *St.*

rier of passengers should be according to the consequences that may ensue from carelessness, applies as well to freight trains as to passenger trains. It is founded

Louis, etc., R. Co. *v.* Brabbzson, 87 Ark. 109, 112 S. W. 222; Arkansas Cent. R. Co. *v.* Janson, 90 Ark. 494, 119 S. W. 648; St. Louis, etc., R. Co. *v.* Cobb, 89 Ark. 82, 115 S. W. 939; St. Louis, etc., R. Co. *v.* Hastung, 95 Ark. 220, 128 S. W. 1025.

California.—Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; Fisher *v.* Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894.

Georgia.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64. See also, Garland *v.* Southern R. Co., 111 Ga. 852, 36 S. E. 595, 18 Am. & Eng. R. Cas., N. S., 759; Smith *v.* Central R., etc., Co., 80 Ga. 526, 5 S. E. 772, 34 Am. & Eng. R. Cas. 456; Central R. Co. *v.* Smith, 76 Ga. 209, 2 Am. St. Rep. 31.

Illinois.—New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174; Chicago, etc., R. Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, 58 Am. & Eng. R. Cas. 411; Ohio, etc., R. Co. *v.* Muhling, 30 Ill. 9, 81 Am. Dec. 336.

Indiana.—Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas. 454; New York, etc., R. Co. *v.* Doane, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157; White Water R. Co. *v.* Butler, 112 Ind. 598, 14 N. E. 599, 34 Am. & Eng. R. Cas. 467; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 27 Am. & Eng. R. Cas. 210, 57 Am. Rep. 114. See also, Indiana, etc., R. Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004; Indianapolis Southern R. Co. *v.* Tucker (Ind. App.), 98 N. E. 431.

Iowa.—Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523, 34 Am. & Eng. R. Cas. 545.

Kansas.—Missouri Pac. R. Co. *v.* Holcomb, 44 Kan. 332, 24 Pac. 467, 44 Am. & Eng. R. Cas. 303. See Chicago, etc., R. Co. *v.* Frazer, 55 Kan. 582, 40 Pac. 923, 2 Am. & Eng. R. Cas., N. S., 206.

Kentucky.—Ohio Valley R. Co. *v.* Watson, 93 Ky. 654, 14 Ky. L. Rep. 611, 21 S. W. 244, 58 Am. & Eng. R. Cas. 418, 40 Am. St. Rep. 211, 19 L. R. A. 310.

Maine.—Dunn *v.* Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

Maryland.—Baltimore, etc., R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 2 Am. & Eng. R. Cas., N. S., 187, 31 L. R. A. 313.

Minnesota.—Schilling *v.* Winona, etc., R. Co., 66 Minn. 252, 68 N. W. 1083; Oviatt *v.* Dakota Cent. R. Co., 43 Minn. 300, 45 N. W. 436; Campbell *v.* Duluth, etc., R. Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A., N. S., 190.

Missouri.—Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409; Wag-

ner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706; Allison *v.* St. Louis, etc., R. Co. (Mo. App.), 137 S. W. 896; Tickell *v.* St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 727; Tinkle *v.* St. Louis, etc., R. Co., 212 Mo. 445, 110 S. W. 1086; Hawk *v.* Chicago, etc., R. Co., 130 Mo. App. 658, 108 S. W. 1119; Mitchell *v.* Chicago, etc., R. Co., 132 Mo. App. 143, 112 S. W. 291; Russell *v.* Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613; Green *v.* Missouri, etc., R. Co., 121 Mo. App. 720, 97 S. W. 646.

New York.—Edgerton *v.* New York, etc., R. Co., 39 N. Y. 227, affirming 35 Barb. 389.

North Carolina.—Wallace *v.* Western, etc., R. Co., 98 N. C. 494, 4 S. E. 503, 34 Am. & Eng. R. Cas. 553, 2 Am. St. Rep. 346; Kearney *v.* Seaboard, etc., R. Co., 158 N. C. 521, 74 S. E. 593.

South Carolina.—Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756.

Tennessee.—Felton *v.* Horner, 97 Tenn. 579, 581, 37 S. W. 696.

Texas.—Missouri, etc., R. Co. *v.* Schroeder, 44 Tex. Civ. App. 47, 100 S. W. 808, affirmed in 102 Tex. 588, no op.; Chicago, etc., R. Co. *v.* Buie, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; Dillingham *v.* Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074; Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error denied by supreme court in 102 Tex. 100, 113 S. W. 521; Mullen *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.; Trinity Valley R. Co. *v.* Stewart (Tex. Civ. App.), 62 S. W. 1085; Mexican Cent. R. Co. *v.* Lauricella (Tex. Civ. App.), 26 S. W. 301, 47 Am. St. Rep. 103, affirmed in 87 Tex. 277; International, etc., R. Co. *v.* Irvine, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518; Ft. Worth, etc., R. Co. *v.* Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61; Texas Mex. R. Co. *v.* Wilson (Tex. Civ. App.), 136 S. W. 565; Lewis *v.* Texas, etc., R. Co. (Tex. Civ. App.), 124 S. W. 1006; Pecos, etc., R. Co. *v.* Trower (Tex. Civ. App.), 130 S. W. 588.

As was said by Mr. Justice Swayne in Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898, "Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains; the same dangers are common to both. Such care

deep in public policy and is approved by experience, and sanctioned by the plainest principles of reason and justice.³⁰ But what is extraordinary diligence with

and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise."

If the carrier receives a passenger on one of its freight trains, his liability is not fixed by the character of the train, but by the relation of carrier and passenger. *Central, etc., R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64.

It is the duty of a railroad company, when it carries passengers in the car attached to a local freight train, to use the highest possible degree of care to protect the passengers to which such train is susceptible, considering its construction, equipment, and use as a carrier of freight. *Chicago, etc., R. Co. v. Ralston* (Kan.), 93 Pac. 592.

A passenger on a freight train, to which a passenger coach is attached, is entitled to the highest degree of care of which such trains are susceptible, and while the difference in the character and purpose of the trains should be given due consideration, in reference to their proper management, there is no relaxation as to the degree of care required towards a passenger. *Suttle v. Southern R. Co.*, 64 S. E. 778, 150 N. C. 668.

A carrier must exercise the same degree of care as to passengers on freight trains as required in the operation of passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance. *St. Louis, etc., R. Co. v. Gosnell*, 23 Okla. 588, 101 Pac. 1126, 22 L. R. A., N. S., 892.

Whatever the character of the train when the company undertakes to carry one as a passenger, it assumes the duty towards him of exercising a high degree of care in its operation, so as not to injure him. *Trinity Valley R. Co. v. Stewart* (Tex. Civ. App.), 62 S. W. 1085.

If a railroad company permits one paying fare to ride on a freight train, he becomes a passenger, and is entitled to the same degree of care as though the train were a passenger train. *International, etc., R. Co. v. Irvine*, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518.

In an action against a railroad company for personal injuries received while a passenger on defendant's freight train, there was evidence that plaintiff was ordered out of the caboose, and, with defendant's knowledge, was riding on a buggy on a flat car, and that the train was derailed on account of the negligence of defendant's employees, seriously injuring him. Held, that a verdict for

plaintiff was supported by the evidence. *Mexican Cent. R. Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. 301, 47 Am. St. Rep. 103.

Mixed trains.—*St. Louis, etc., R. Co. v. Hastung*, 95 Ark. 220, 128 S. W. 1025.

Plaintiff, a passenger on a mixed train, assumed the risk of necessary and usual jolts and jars; but this did not relieve defendant from exercising the same high degree of care in handling its train to avoid injuring her as if she was riding on a regular passenger train; and the risk of usual jolts and jars was the risk incident to the mode of conveyance, and did not relax the rule as to the high degree of care to be exercised to avoid injuring passengers, and the verdict should be for plaintiff if she was without fault and would not have been injured if defendant's servants had exercised such high degree of care. *Arkansas, etc., R. Co. v. Wingfield*, 94 Ark. 75, 126 S. W. 76.

The duty of a carrier of passengers to carry a passenger safely to destination is not limited by the character of the train on which the passenger is invited to travel, and a passenger taking passage on a mixed train on a branch line does not assume the risk of negligence of trainmen in making couplings. *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

30. Founded on public policy.—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.

In an action against a railroad company for injuries received by a passenger upon its road, it is not error for the court to instruct the jury "that a person taking a cattle train is entitled to demand the highest possible degree of care and diligence regardless of the kind of train he takes." *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.

"Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so." *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

respect to a freight train is different in many respects from that which is such diligence with regard to passenger trains; the standard of diligence is the same but the manner of its exercise must depend upon the circumstances of the case taken into consideration, the character of its train and the manner in which it is usually made up and run. It is well known that jolts and jars are necessary in the running of freight trains much more so than in the running of passenger trains, but where a carrier takes a passenger on a freight train he must use extraordinary care in preventing any unusual and unnecessary jolts and jars so as to protect the passenger just as he is required to do to prevent any jolts and jars on a passenger train which would be likely to injure the passenger.³¹ A passenger on a railway carriage does not assume the risks due to the negligence of trainmen in making couplings, though he may have taken passage on a mixed train on a branch line. The duty of the carrier to carry him safely to destination is not limited by the character of the train on which the passenger is invited to travel.³² Thus, it is said that the carrier must exercise as high care for their safety as is compatible with the management of such trains.³³ Accordingly, a passenger who accompanies cattle, or other live stock, upon a freight train is entitled, subject to the different conditions of the service, to the same high degree of care on the part of the railroad company as it owes to passengers upon its regular passenger trains.³⁴ Where one took passage upon an accommodation train and, at an intermediate station, the coach in which he was riding was

31. Different standards of diligence.—

Ball v. Mabry, 91 Ga. 781, 18 S. E. 64.

32. Risks due to employee's negligence not assumed.—

Kennedy v. Chesapeake, etc., R. Co., 68 W. Va. 589, 70 S. E. 359.

A carrier of passengers on its regular passenger train or mixed train or freight train must exercise a high degree of care for the safety of its passengers, except in so far as the duty is modified by the circumstance of the different character of the train, and a passenger does not take the risk of a carrier's negligence in breaching the obligation of high care for his safety. *Allison v. St. Louis*, etc., R. Co. (Mo. App.), 137 S. W. 896.

A passenger who voluntarily seeks to be transported on a freight train takes the risk of the usual and necessary jolts and jars which occur in the operation of such a train. This does not, however, relieve the carrier from the duty of exercising extraordinary diligence to prevent unusual and unnecessary jolts and jars. *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31; *Crine v. East Tennessee*, etc., R. Co., 84 Ga. 651, 11 S. E. 555; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64; *Central*, etc., R. Co. *v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

A passenger who enters a mixed passenger train composed of a passenger coach and a number of freight cars with knowledge of its peculiar structure and movements, assumes the risks consequent upon its unavoidable jerks when starting, and the degree of diligence which he should exercise should have reference to such necessary movements of the train. But he has also the right to rely on an exercise of extraordinary diligence by the railroad company in its management of the train so as to avoid

danger of injury to its passengers. When he has used ordinary diligence for his safety under the circumstances, the carrier is liable for damages to him even though they result from slight neglect on its part. *Macon*, etc., R. Co. *v. Moore*, 108 Ga. 84, 33 S. E. 889.

33. *Leach v. St. Louis*, etc., R. Co. (Mo. App.), 118 S. W. 510.

A passenger riding in the caboose of a freight train assumes the ordinary risks incident to travel on such trains; but the carrier owes him the duty of exercising the highest degree of care consistent with the practicable operation of such trains. *St. Louis*, etc., R. Co. *v. Jackson*, 93 Ark. 119, 124 S. W. 241.

34. *United States*.—*Indianapolis*, etc., R. Co. *v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500; *Delaware*, etc., R. Co. *v. Ashley*, 67 Fed. 209, 14 C. C. A. 386. Compare *Chicago*, etc., R. Co. *v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551.

Florida.—*Florida R.*, etc., Co. *v. Webster*, 25 Fla. 394, 5 So. 714.

Illinois.—*New York*, etc., R. Co. *v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174; *Lake Shore*, etc., R. Co. *v. Brown*, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510. See also, *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas., N. S., 163, 66 Am. St. Rep. 253, 43 L. R. A. 210.

Indiana.—*Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas., 454.

Nebraska.—*Otto v. Chicago*, etc., R. Co., 87 Neb. 503, 127 N. W. 857, 31 L. R. A., N. S., 632.

switched upon a side track and a freight train backed upon the side track for the purpose of coupling to and carrying the car to the passenger's destination, the railroad company, it was held, was bound to exercise that extraordinary diligence which is required of every carrier of passengers.³⁵

Effect of Custom.—The fact that it was customary for the employees of a carrier, in the operation of its freight trains, to act as was done at the time a passenger on a freight train was injured did not relieve the carrier of the duty of exercising the degree of care imposed on it by law, under the circumstances existing at that time.³⁶ The statutory rule in California as to carriers of passengers requiring them to use utmost care, etc., applies to a carrier accepting for reward a passenger on a special freight.³⁷

§ 2337. Statutory Rule in Mississippi.—It is provided by statute in Mississippi that "for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for gross negligence or carelessness of its servants."³⁸ Under this statute to charge a railroad company with liability to a passenger who is carried on a train which is only designed for the transportation of freight and not for the transportation of passengers as well, it must appear that the company has been guilty of gross negligence.³⁹ A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, can not be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose,⁴⁰ or a way car attached, with compartments for passengers, baggage, trainmen, tools, etc.⁴¹ A mixed or accommodation train is a train equipped to carry passengers as well as freight.⁴²

35. A railroad company, in coupling a freight train to a passenger car having passengers already in it to be carried by the train, is bound to exercise extraordinary diligence—that is, such diligence as very prudent persons would use with a like train under like circumstances, and the court may instruct the jury that the rarity of an injury will furnish no excuse to the company for omitting that degree of diligence in the particular instance. That the charge given on this question was somewhat obscure will not vitiate the verdict, for when construed in the light of the whole charge it could be understood by the jury. *Chatanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848, 52 Am. & Eng. R. Cas. 473.

36. **Effect of custom.**—*International, etc., R. Co. v. Cruseturner*, 44 Tex. Civ. App. 181, 98 S. W. 423.

37. **California a statute—Special freight.**—*Roberts v. Sierra R. Co.*, 14 Cal. App. 180, 111 Pac. 519, rehearing denied 111 Pac. 527.

38. **Statute of Mississippi.**—Miss. Code, 1886, § 1054; Miss. Ann. Code, 1892, § 3557.

39. *Reber v. Bond*, 38 Fed. 822.

40. *Perkins v. Chicago, etc., R. Co.*, 60 Miss. 726, 21 Am. & Eng. R. Cas. 242.

An ordinary local freight train, carrying a caboose, is not a "train for both passengers and freight," within Code 1906, § 4054, limiting the liability of car-

riers for injuries to passengers on freight trains not so intended. *Illinois Cent. R. Co. v. White*, 97 Miss. 91, 52 So. 449.

41. A regular local freight train, to which is attached a way car, with compartments for passengers, baggage, trainmen, tools, etc.; is not a "train for both passengers and freight," within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on freight trains not so intended. *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593; *Thacker v. Illinois Cent. R. Co.* (Miss.), 55 So. 595.

A "freight train," not intended for both passengers and freight, within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on such trains, is one on which passenger business is subordinated to the carriage of freight. *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593.

42. **A "mixed or accommodation train."**—In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business so far as necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress

§ 2338. When Passengers Are Carried on Freight Elevators.—In analogy with the rule applied when railroad companies carry passengers by freight trains, it has been held that a person who rides in a freight elevator, knowing that it is not designed to carry passengers, assumes the risks incident to riding thereon, and the owner is not liable simply because the elevator is not equipped with the appliances and safeguards which experience has shown to be the most effective in securing the safety of passengers.⁴³

§§ 2339-2342. When Passengers Are Carried Free—§ 2339. General Rule.—The law always imposes upon every one who attempts to do anything, even gratuitously, for another an obligation to exercise some degree of care and skill in the performance of what he has undertaken.⁴⁴ The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it.⁴⁵ When, therefore a carrier of passengers voluntarily undertakes to transport passengers, without compensation, he owes them a duty to exercise care for their safety and, at least in the absence of an express contract to the contrary, is liable for negligence. But while there can be no doubt that when passengers are voluntarily carried free, the carrier, in the absence of contract limiting the liability, owes them a duty to exercise care for their safety, the courts, for a long time, hesitated to define the degree of care required.⁴⁶ In some of these early cases, although frequently cited to the proposition that a passenger carried gratuitously is entitled to the same care as one paying fare, the courts went no further than to hold that the carrier is liable to a free passenger at least for gross negligence, i. e., for a failure to exercise slight care.⁴⁷ But, while the question as to the degree of care due passengers

and egress of passengers. *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593.

"Trains intended for both passengers and freight" and "mixed or accommodation trains" are synonymous. *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593.

43. Freight elevators.—*Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

44. Passengers carried free.—*Coggs v. Bernard*, Ld. Raym. 909.

45. 1 Sm. Lead. Cas. 95, quoted, with approval, in *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502. But compare *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623, affirming 10 How. Pr. (N. Y.) 97.

46. In *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623, affirming 10 How. Pr. (N. Y.) 97, it was held that railroad companies are liable for injuries resulting from negligence in carrying passengers over their roads, whether with or without compensation, but added that "the matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question however does not arise here."

And in *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281, in which the question was how far it was competent for a carrier of persons to contract for an exemption from liability for injuries caused by negligence, the court incidentally remarked that a carrier undertaking to carry one gratuitously "must do it carefully, as with other passengers," but did not say that the carrier

must exercise the same degree of care as in other cases.

In *Todd v. Old Colony, etc., R. Co.* (Mass.), 3 Allen 18, 80 Am. Dec. 49; *S. C.*, 7 Allen 207, 83 Am. Dec. 679, the court recognized the obligation of a carrier to observe due and reasonable care for the safety of one who is carried gratuitously, but expressly said that it did not appear that the facts proved at the trial rendered it material to consider whether a less degree of care was demandable than in cases where fare is paid.

47. Thus, in *Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502, which is frequently cited as a leading case on this question, the facts were that plaintiff, who was a stockholder in defendant railroad company, was, by invitation of its president, given free transportation in a small locomotive car used for the convenience of the officers of the company, and while so riding was injured in a collision. The jury found the injury to have been the result of gross negligence, and the court expressly said that it was not called upon to express an opinion whether the care demandable by one who is being carried gratuitously is the same that is due to those carried for hire.

And in *The New World* (U. S.), 16 How. 469, 14 L. Ed. 1019, plaintiff, who had been given a free pass on a steamboat in accordance with a custom to permit persons whose usual employment is on board of such boats to go from place to place free of charge, brought suit to recover for injuries sus-

carried free is not determined in these early cases, the later cases, though frequently very unsatisfactory for the reason that the rule is expressed in vague and uncertain language, and the cases which have been discussed above are cited as authority, show clearly that the general tendency of the courts now is to hold that a person whom a public carrier of passengers carries free, the free passage having been legally and properly obtained, is entitled to the same degree of care as if he were a passenger for hire.⁴⁸ It has been said, in a recent case,⁴⁹ that a carrier owes the duty of exercising ordinary care to a person gratuitously riding on a train with the conductor's consent, in the absence of collusion between him and the conductor to defraud the company. The general rule previously stated has frequently been applied to the case of employees and ex-employees of railroad companies riding free. Thus, an employee of a railroad company who is given free transportation to and from his place of work is, it has been held, entitled to the same care as if he pays his fare.⁵⁰ It has also been

tained during the journey, in consequence of the explosion of the boiler flue through the negligence of defendant. It was held that defendant had been guilty of gross negligence, within the meaning of that term as it is usually employed, and the court expressly said that it was not necessary to determine whether precisely the same obligations in all respects on the part of the master and the owners and their boats existed in the particular case as in that of an ordinary passenger paying fare.

48. *United States*.—*Waterbury v. New York, etc., R. Co.* (U. S.), 21 Blatchf. 314, 17 Fed. 671; *In re California Nav., etc., Co.*, 110 Fed. 670. See *Chamberlain v. Pierson*, 87 Fed. 420, 31 C. C. A. 157. But compare *Hospes v. Chicago, etc., R. Co.*, 29 Fed. 763.

Georgia.—*Metropolitan St. R. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730, 41 Am. & Eng. R. Cas. 240.

Illinois.—*Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

Indiana.—*Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339; *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101. See *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

Iowa.—See *Rose v. Des Moines Val. R. Co.*, 39 Iowa 246, 9 Am. R. Rep. 7, 20 Am. R. Rep. 326, which, however, turned wholly, or in part, on the construction of an Iowa statute.

Maine.—See *Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299.

Maryland.—*Abell v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Massachusetts.—See *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 20 N. E. 103, 37 Am. & Eng. R. Cas. 54, 2 L. R. A. 502.

Michigan.—See *Flint, etc., R. Co. v. Wier*, 37 Mich. 111, 26 Am. Rep. 499.

Minnesota.—*Gradin v. St. Paul, etc., R. Co.*, 30 Minn. 217, 14 N. W. 881, 11 Am. & Eng. R. Cas. 644; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, Gil. 110, 18 Am. Rep. 360.

Missouri.—*Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315, 28 Am. & Eng. R. Cas. 157; *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Buck v. People's St. R., etc., Co.*, 108 Mo. 179, 18 S. W. 1090, 52 Am. & Eng. R. Cas. 512; *Dorsey v. Atchison, etc., R. Co.*, 83 Mo. App. 528.

Tennessee.—*Washburn v. Nashville, etc., R. Co.*, 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

Texas.—*Gulf, etc., R. Co. v. McGowan*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274. See *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

49. *Southern R. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678.

50. *Abell v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

And an employee of a railroad company while engaged in bridge building was directed by the company to go to another point on the road to assist in loading timber for the bridge. He was given free transportation. In an action which he brought to recover damages for injuries received during the journey, the company was held to the exercise of the same care for his safety as it owed to passengers generally. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101.

An employee of the railroad company left his work without permission, and was received on board of one of the company's trains without objection on the part of the conductor, who was charged with the duty of excluding persons not lawfully entitled to be on the train. In an action by the servant to recover for in-

broadly held that the fact that a person who accompanies live stock is carried free does not relieve the carrier of the obligation to exercise the same high degree of care which it owes to passengers who pay fare.⁵¹ But while the courts which hold that persons riding on drover's passes are entitled to all the care that is due to passengers paying fare, quite generally advert to the principle that the fact that no fare is paid makes no difference in the care required, they usually place the responsibility of the carrier upon the additional ground that, since a drover's pass is a part of a transaction beneficial to the carrier, the drover is not merely a gratuitous passenger but is, in effect, a passenger for hire.⁵² The reason for holding that persons riding on drover's passes are entitled to the same degree of care as regular passengers, has been applied in the case of a United States mail clerk, and it has been held that a mail clerk is entitled to the same care as other passengers.⁵³ So, too, it has been suggested that an employee of a palace or sleeping-car company should be considered, not as a licensee carried gratuitously, but as a person whose fare is paid by his employer when entering into the contract with the railroad company.⁵⁴

§ 2340. Kansas Decisions.—The supreme court of Kansas has rendered some decisions which, although not against the general rule that the liability of passenger carriers to passengers carried free is the same as to those paying fare, make what seems to be a peculiar application of the limitation that the free passage must have been legally and properly obtained. Thus it has been held that a railroad company does not owe to a person riding on one of its trains without payment of any fare, merely by sufferance of the conductor in charge of the train, that high and extraordinary degree of care for his personal safety that is due to an ordinary passenger paying the customary fare, but is liable only in such case for injuries occasioned by the ordinary negligence of its employees.⁵⁵ In an earlier case it was held that a railroad company is not bound to exercise that extraordinary care due to passengers carried for hire for the safety of a person on a construction train with the consent of the conductor, but that it is bound to ordinary care for his safety.⁵⁶ It is believed that these cases are not in line with the authorities in other jurisdictions. In most of the states the plaintiffs in these cases would have been held to be either passengers, entitled to a high degree of care, or trespassers, entitled to no care, accordingly as the employees extending the privilege of free passage did or did not have authority, real or apparent, to do so.

§ 2341. Montana Statute.—Under the Montana law, Rev. Codes, § 5299, which requires a carrier of persons without reward to use ordinary care for their safety, and § 5300, which requires a carrier for reward to use the utmost

injuries sustained in a collision, it was held that the liabilities of the company as a carrier of passengers attached, and that he was entitled to recover, although he was at the time of the injury riding free. *Washburn v. Nashville, etc., R. Co.*, 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

A person who had been an employee of a railroad company was injured while riding on a construction train of the company. He had paid nothing for his passage. But it was held that the fact that the company was carrying him gratuitously could make no difference; the company was nevertheless bound to exercise the full measure of care due passengers for his safety. *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

^{51.} *Waterbury v. New York, etc., R. Co. (U. S.)*, 21 Blatchf. 314, 17 Fed. 671.

^{52.} *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, 48 Am. Rep. 10; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

^{53.} *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339.

^{54.} *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 23 Am. & Eng. R. Cas., N. S., 601, 55 L. R. A. 253, 87 Am. St. Rep. 214.

^{55.} *Kansas, etc., R. Co. v. Berry*, 53 Kan. 112, 36 Pac. 53, 42 Am. St. Rep. 278.

^{56.} *St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461, 26 Am. & Eng. R. Cas. 173.

care and exercise a reasonable degree of skill, it has been held that a carrier owes a higher degree of diligence to one carried for a reward than to one carried without a reward, and was only bound to exercise ordinary care for the safety of a passenger carried without reward.⁵⁷

§ 2342. Care Varying with Conditions and Circumstances.—What is due care on the part of a carrier of passengers depends upon environing condition and sometimes involves custom and knowledge actual or attributable to one or the other of the parties.⁵⁸ A motorman on a street car must exercise that degree of care proportionate to the danger to passengers which would result from his negligence, which is a high degree of care.⁵⁹ Thus, drivers, gripmen, and motorman of street cars are obliged to exercise a more exacting attention when they approach street crossings in a crowded city where vehicles and pedestrians may always be expected in front of them.⁶⁰ And where no seats are furnished and the carrier permits a passenger to ride on the footboard, the carrier assumes the duty of exercising the care demanded by the circumstances; that is to say, the highest degree of care, vigilance, and foresight for the safety of the passenger which it could reasonably do in view of the character and mode of conveyance adopted consistent with the practical operation of its cars at the place where the collision occurred.⁶¹

Liability as Affected by Age, Sex, and Physical Disability.—While the duty of the carrier to all passengers is the same in degree, the amount of care may vary with the age, sex, or bodily infirmity of the passenger.⁶² It is said that carriers are under a peculiar obligation to children traveling alone in their vehicles.⁶³ And with reference to woman and children it is said that it is the duty of conductors not to direct them to go into places of danger without furnishing such assistance as will prevent accident.⁶⁴ The duty of care which a railroad company owes to members of the public is dependent on the relation between itself and the person injured and may be affected by the mental or physical incapacity of such person and in some cases by the circumstance under which the injury is inflicted,⁶⁵ if the carrier have sufficient notice of the pas-

^{57.} *Montana statute.*—*John v. Northern Pac. R. Co.*, 42 Mont. 18, 111 Pac. 632, 32 L. R. A., N. S., 85.

^{58.} *Care varies.*—*Sorenson v. Illinois Cent. R. Co.*, 155 Ill. App. 606.

A carrier of passengers must exercise the care of a careful man in the same circumstances, and the degree of care required in a particular case must be commensurate with the circumstances calling for the exercise of care. *Parker v. Boston, etc., Railroad*, 84 Vt. 329, 79 Atl. 865.

^{59.} *Winona, etc., R. Co. v. Rousseau*, 48 Ind. App. 248, 93 N. E. 34, rehearing denied 93 N. E. 1028.

^{60.} *Lazer v. Chicago City R. Co.*, 152 Ill. App. 319.

^{61.} *Madl v. Chicago, etc., R. Co.*, 167 Ill. App. 487.

^{62.} *Dependent upon age, sex, or physical condition.*—*St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Toledo, etc., Tract. Co. v. McFall*, 8 O. C. C., N. S., 271, 18-28 O. C. D. 362.

A carrier must use such precautions as may be necessary to prevent danger to passengers which can be anticipated by extraordinary diligence, and is required to anticipate that children of tender years will not act with the prudence of maturity, and to exercise a very high degree of care for the safety of those who may be

injured by the thoughtlessness of children. *Valdosta St. R. Co. v. Fenn*, 75 S. E. 984, 11 Ga. App. 586.

"We think that circumstances involving the consideration of age, sex, or physical infirmity may bring that within the scope of the conductor's duty toward a passenger which would otherwise be beyond the limit of such obligation. *Hutchinson on Carriers*, § 670; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266." *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

A railroad company owes care toward old, feeble and decrepit passengers proportionate to their disability. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 315, 6 S. W. 834; *St. Louis, etc., R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, affirmed in 95 Tex. 685, no op.; *Pecos, etc., R. Co. v. Williams*, 34 Tex. Civ. App. 100, 78 S. W. 5. And see *Driess v. Friederick*, 73 Tex. 460, 11 S. W. 493.

^{63.} *Children travelling alone.*—*South Covington, etc., R. Co. v. Quinn*, 33 Ky. L. Rep. 534, 110 S. W. 404.

^{64.} *Woman and children.*—*Cleveland, etc., R. Co. v. Manson*, 30 O. St. 451.

^{65.} *Mental or physical incapacity.*—*Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

Instances demanding exercise of care

senger's condition.⁶⁶ The care to which a traction company should be held, with reference to a passenger who is alighting from a car, is that degree of care which is commensurate with the circumstances and the danger to be apprehended; and where an aged and infirm man, who is unattended, notifies the conductor as to the point at which he wishes to get off, and adds a caution against starting the car before he is off, more attention is demanded and should be given for his protection than in the case of passengers not so aged and infirm.⁶⁷

Intoxication of Passenger as Affecting Degree of Care Required.—Partial intoxication does not excuse want of ordinary care and prudence on the part of a passenger, and a carrier need exercise no higher degree of care towards a person partially intoxicated than is required in case of sober persons.⁶⁸ Where a passenger requires assistance on account of helpless condition of intoxication while the relation of passenger exists, it seems the railroad company would be negligent if it refused it.⁶⁹ And it has been said that a carrier is only liable for wanton or willful neglect on the part of its employees of the duty of caring for the safety of a passenger who is intoxicated, even to the extent of insensibility.⁷⁰

Position Occupied.—When a passenger by invitation of the conductor, or with his assent, or from necessity rides on the platform or in an otherwise dan-

proportionate to condition of passengers.

—In an action against a carrier for wrongful treatment of plaintiff and her invalid daughter, the court properly instructed that it was the duty of the carrier's servants to exercise such a degree of care as would reasonably insure the safety of the passengers in view of their physical condition, and a failure to discharge the duty was negligence. *Gulf, etc., R. Co. v. Coopwood* (Tex. Civ. App.), 96 S. W. 102, affirmed in 101 Tex. 639, no op.

If a passenger was suffering from some disability such as deafness which was known to the company's train employees a greater degree of care and attention was due her than those not affected. *Texas Mid. Railroad v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697.

Where a passenger is subject to a physical infirmity, such as hardness of hearing, it is only where this is known to the carrier or its servants in charge of the train that such passenger is entitled to a greater degree of care and attention than those not so affected. *Texas Mid. Railroad v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697.

Physical condition.—It is relevant and pertinent to plaintiff's case, in an action against a railway company for injuries sustained, to state the fact that he was so unfortunate as to be in such physical condition as to require extraordinary diligence at the hands of the carrier. It is immaterial how this condition of physical weakness and suffering originated; but the fact is material that he had previously been injured and thereby his safety was more easily endangered and his suffering, if he should receive an injury would likely be more acute. *Douglas, etc., R. Co. v. Swindle*, 2 Ga. App. 550, 59 S. E. 600.

Passenger in helpless condition.—If a

passenger who is known to be in a helpless condition, mentally and physically, is removed from a train by the conductor and placed in charge of a station agent of the company, and the latter, knowing his condition and without effort to prevent it, permits him to wander off alone in a deep snow, when the weather is severe and night rapidly approaching, and die of exposure, the company is liable. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593.

66. Notice of condition.—Where a porter on a train who was acting also as a brakeman was informed that a passenger, because of a recent surgical operation, was weak and debilitated, and would require special care and attention, this was sufficient notice to the railway company of the condition of the passenger. *Gulf, etc., R. Co. v. Redeker*, 100 S. W. 362, 45 Tex. Civ. App. 312.

67. Toledo, etc., Tract. Co. v. McFall. 8 O. C. C., N. S., 271, 18-28 O. C. D. 362.

It is the duty of those in charge of a street car to give greater care and consideration to aged and infirm passengers, whose age or infirmities are apparent, than to other passengers, and, if necessary, to assist such passengers to alight from the car when they arrive at their destination. *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713. See also, *Railroad v. Mitchell*, 98 Tenn. 27, 31, 40 S. W. 72.

68. Intoxicated passenger.—*Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476.

69. Rozwadosfskie v. International, etc., R. Co., 1 Tex. Civ. App. 487, 492, 20 S. W. 872.

70. Wanton or willful negligence.—*Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, 369, 9 S. W. 325, 1 L. R. A. 476.

gerous place he is entitled to the same diligence to protect him from dangers as are other passengers.⁷¹

§§ 2343-2349. Liability as Affected by Statutes—§ 2343. In General.—While the statutes of Georgia, California, and other states, to which reference has already been made, merely define the degree of care to which is exacted of passenger carriers, statutes have been enacted in some states which go farther, and deal with the general nature of the carrier's liability.

§ 2344. Texas Statute Expressly Adopting the Common Law.—In Texas, the common law on the subject has been expressly adopted by a statute which provides that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law, and the remedies against them shall be the same, except where otherwise provided by this title."⁷²

§§ 2345-2349. Nebraska Statute Making Railroads Liable as Insurers—§ 2345. Provisions of the Statute.—But in Nebraska it is provided by the Act of June 22, 1867, that every railroad company "shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."⁷³

§ 2346. Constitutionality of the Statute.—The constitutionality of this statute has frequently been challenged, particularly on the ground that it tends to deprive railroad companies of their property without due process of law. But the validity of the statute has not only been expressly decided in quite a number of cases⁷⁴ but assumed in many others.⁷⁵

§ 2347. Effect of the Statute.—In view of the present state of the authorities the precise effect of this statute is involved in some doubt. In a number of Nebraska cases it is broadly asserted, although not necessarily held, that the statute makes railroad companies insurers of the safety of their passengers, save in the cases falling within one or the other of the exceptions mentioned in the statute.⁷⁶ But the recognition of these as the only cases in which railroads are not liable would be to give the statute the effect of extending the liability of railroad companies as carriers of passengers beyond their liability as carriers of goods, and make them liable for the act of God and public enemies. It seems

71. Position occupied.—*Renney v. Webster, M., B. & F. City St. Ry. Co.*, 50 Pa. Super. Ct. 579. See post, "Allowing or Compelling Passengers to Expose Themselves to Danger," §§ 2511-2514.

72. Texas statute.—*Sayles' Civ. St. Tex.*, art. 277.

73. Nebraska statute.—*Neb. Comp. Stat.* 1895, ch. 72, art. 1, § 3.

74. Constitutionality of statute.—*Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541; *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441, 22 Am. & Eng. R. Cas., N. S., 26; *Chicago, etc., R. Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343; *Omaha, etc., R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *Union Pac. R. Co. v. Porter*, 38 Neb. 226, 56 N. W. 808.

75. Chollette v. Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; *S. C.*, 33 Neb. 143, 49 N. W. 1114; *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Chicago, etc., R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000, 4 Am. & Eng. R. Cas., N. S., 476; *Chicago, etc., R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8, 4 Am. & Eng. R. Cas., N. S., 40; *Fremont, etc., R. Co. v. French*, 48 Neb. 638, 67 N. W. 472, 4 Am. & Eng. R. Cas., N. S., 365.

76. Effect of statute.—*Chicago, etc., R. Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610; *Fremont, etc., R. Co. v. French*, 48 Neb. 638, 67 N. W. 472, 4 Am. & Eng. R. Cas., N. S., 365; *Chicago, etc., R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000, 4 Am. & Eng. R. Cas., N. S., 476; *St. Joseph, etc., R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Union Pac. R. Co. v. Porter*, 38 Neb. 226, 56 N. W. 808.

unreasonable to suppose that any such effect was intended by the legislature and it is believed that the courts should not be required to give the statute so rigid an interpretation. Probably the purpose and true effect of the statute is to do away, as to railroads, with the distinction existing at the common law between passenger carriers and carriers of goods, and to make railroad carriers of passengers insurers of the safety of passengers against everything but the act of God and the public enemies and, at the same time, to recognize the difference between passengers and goods, and relieve railroads from liability in the cases mentioned in the concluding part of the statute. This view is hinted at in a federal case arising in Nebraska.⁷⁷ And the application of the statute seems to have been altogether ignored in an early Nebraska case wherein it was held that a passenger could not recover damages for injuries sustained in consequence of the train, upon which he was riding, being blown from the track by a sudden gust of wind.⁷⁸ In one of the Nebraska cases which involve the interpretation of this statute, it is said that "the purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurers against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passengers receiving injury under the circumstances contemplated. Under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant, when damages were inflicted upon the person of such passenger, to entitle a recovery of whatever amount of damages may be established by the evidence; in other words, these facts being shown, any damage resulting from the operation or management of the train is, without more, presumed to be entirely attributable to the negligence of the railroad company, and to avoid liability it then devolves upon such company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of said road actually brought to his or her notice."⁷⁹ But in the federal cases cited above⁸⁰ the court, in response to the claim that the right of action which accrued to the plaintiff under the Nebraska statute could not be asserted in the courts of any other jurisdiction, said: "The contention is not sound. This is not a penal, but a remedial, statute, and the plaintiff's action is not for the recovery of a penalty, but for the recovery of compensation for an injury for which the statute gives the right of action. It is not a statute establishing a rule of evidence, but a statute giving a substantive right of action. It extends the common-law liability of carriers of passengers by rail, and augments the rights of action of the injured passenger, in the exact proportion that the common-law liability of a railroad company is enhanced."

§ 2348. Application of the Statute.—The application of the statute is not restricted to actions by the passengers injured; it is also to be applied in actions by third persons to recover damages sustained in consequence of an injury to a

77. In *Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541, in which the application of the Nebraska statute was involved, Caldwell, J., in delivering the opinion of the court, after stating the reasons for the adoption of the statute, added that "they are quite as forcible as any that are given for the adoption of the rule that made a common carrier an insurer of the goods intrusted to him for carriage. It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and, where the rule has not been changed by statute, we have this anomalous condition, that, when a passenger and his baggage are injured in the same wreck,

the railroad is liable for damages done to the baggage irrespective of its negligence, but is not liable to the injured passenger without proof of negligence. The Nebraska statute does away with this anomaly, and puts the passenger and his baggage on very much the same footing." See, also, *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441, 22 Am. & Eng. R. Cas., N. S., 26.

78. *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

79. *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913.

80. *Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541.

passenger, as, for example, in an action by a husband to recover damages for an injury to the wife.⁸¹ And the statute is applicable in cases of injuries causing the death of a passenger.⁸² But the application of the statute must be restricted to railroads, in the strict sense of the term, and can not be applied to extend the liability of street railway companies beyond their common-law liability.⁸³

§ 2349. Enforcement of the Statute by Other Than Nebraska Courts.

—It has been held that the statute is neither a penal statute nor a statute establishing a rule of evidence, but a remedial statute giving a substantive right of action, and that, therefore, a right of action accruing thereunder may be asserted in any jurisdiction, if the court has jurisdiction of the subject-matter and can obtain jurisdiction of the parties.⁸⁴

§ 2350. Exercise of Proper Care Question for Jury.—As a general rule, whether or not a carrier of passengers has exercised the proper degree of care to secure the safety of its passengers is a question for the jury.⁸⁵ Negligence, whether by the plaintiff or defendant, is generally a question of fact and becomes a question of law to be decided by the court only when the act done is in violation of some law, or when the facts are undisputed and admit of but one inference regarding the care of the party in doing the act in question. In other words, to authorize the court to take the question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.⁸⁶ It may be better to say that unless the law declares an act to be negligence, it is a fact to be found by the jury on evidence.⁸⁷ It follows that an instruction as to the particular acts the carrier must

81. Application of statute.—*Omaha, etc., R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921.

82. *Chicago, etc., R. Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26. 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343.

83. *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

84. Extraterritorial force of statute.—*Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541.

85. Question for jury.—*Lake Shore, etc., R. Co. v. Hotchkiss*, 14 O. C. D. 431, affirmed in 69 O. St. 557, 70 N. E. 1125; *Eames v. Texas, etc., R. Co.*, 63 Tex. 660; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *San Antonio, etc., R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811; *Gulf, etc., R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 248, 59 S. W. 874, 55 L. R. A. 497; *Cruseturner v. International, etc., R. Co.*, 38 Tex. Civ. App. 466, 486, 86 S. W. 778; *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *Galveston, etc., R. Co. v. Morrison*, 46 Tex. Civ. App.

186, 102 S. W. 143, affirmed in 102 Tex. 582, no op.; *Missouri, etc., R. Co. v. Enos*, 92 Tex. 577, 50 S. W. 928; *St. Louis, etc., R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039; *International, etc., R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679; *Missouri, etc., R. Co. v. Dill* (Tex. Civ. App.), 40 S. W. 347.

"In the nature of things the law must leave it to the juries in the exercise of a sound judgment, from their knowledge of men and the ordinary course of human affairs, to determine whether or not a carrier of passengers has exercised the degree of care required by law, and for that reason the charge should be such as to give the best direction to their investigation." *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829.

86. When properly taken from jury.—*Choate v. San Antonio, etc., R. Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319, reversing 35 S. W. 180, quoting *Lee v. International, etc., R. Co.*, 89 Tex. 583, 36 S. W. 63, reversing 34 S. W. 160; *San Antonio Tract. Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op. And see *Ft. Worth, etc., R. Co. v. Spear* (Tex. Civ. App.), 107 S. W. 613; *Campbell v. Alston* (Tex. Civ. App.), 23 S. W. 33.

87. *Houston, etc., R. Co. v. Miller*, 51 Tex. 270; *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356, 26 Am. St. 272.

"It will be seen by a perusal of the authorities that the cases are compara-

perform to discharge its duty of exercising the degree of care required of it, infringes on the province of the jury.⁸⁸

§§ 2351-2385. As to Stations and Stopping Places—§ 2351. General Rule.—The duty of carriers of passengers is not at an end when they have provided safe means of transportation; they must also exercise care to furnish safe and convenient means of getting on or off the vehicle or vessel. As long as the passenger relation continues, the carrier is under the legal duty of maintaining its premises in a reasonably safe condition for the uses to which they are adapted.⁸⁹

§§ 2352-2381. Railroads—§ 2352. General Rule.—The duty of a railway carrier is not at an end when it furnishes a safe roadbed and track, cars, engines and appliances; it must also exercise care in providing safe and suitable means and appliances for taking on and letting off passengers, including safe ways by which to approach and leave its trains, safe places to get on and off, and, when necessary, suitable platforms or other conveniences for boarding and alighting from its cars.⁹⁰ Independent of statute, the duties of a carrier of

tively rare in which the question of negligence is declared to be one of law; the general rule being that negligence is a question of fact to be determined by the jury." *San Antonio, etc., R. Co. v. Long*, 4 Tex. Civ. App. 497, 22 S. W. 499.

88. Invading province of jury.—*Christie v. Galveston City R. Co.* (Tex. Civ. App.), 39 S. W. 638; *International, etc., R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679. See post, "Actions," chapter 27.

Violation of duty imposed by statute negligence as matter of law.—When, by statute, a specific duty is imposed on a railway company, in regard to the running and management of its train, a breach of such duty, by which one receives personal injury, may be declared, in a charge of the court, as matter of law, to be wrongful or negligent. *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272.

89. Tuten v. Atlantic, etc., R. Co., 4 Ga. App. 353, 61 S. E. 511; *Toledo, etc., R. Co. v. Stevenson*, 122 Ill. App. 654; *Merryman v. Chicago, etc., R. Co.*, 135 Iowa 591, 113 N. W. 357.

90. Duty to provide safe station facilities.—*United States—Bennett v. Louisville, etc., R. Co.*, 102 U. S. 577, 26 L. Ed. 235; *Pennsylvania R. Co. v. Green*, 140 U. S. 49, 35 L. Ed. 339, 11 S. Ct. 650; *Robostelli v. New York, etc., R. Co.*, 33 Fed. 796, 34 Am. & Eng. R. Cas. 515.

Georgia—Georgia R., etc., Co. v. Usry, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140; *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253; *Central R., etc., Co. v. Perry*, 58 Ga. 461.

Illinois—Lake Shore, etc., R. Co. v. Ward, 135 Ill. 511, 26 N. E. 520; *Toledo, etc., R. Co. v. Stevenson*, 122 Ill. App. 654.

Indiana—Louisville, etc., R. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Pennsylvania Co. v. Marion*, 123 Ind.

415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687.

Iowa—McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114; *Merryman v. Chicago, etc., R. Co.*, 135 Iowa 591, 113 N. W. 357.

Louisiana—Peniston v. Chicago, etc., Co., 34 La. Ann. 777, 44 Am. Rep. 444.

Massachusetts—Keefe v. Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874, 27 Am. & Eng. R. Cas. 137.

Michigan—Burnham v. Wabash, etc., R. Co., 91 Mich. 523, 52 N. E. 14.

Missouri—Eichhorn v. Missouri, etc., R. Co., 130 Mo. 575, 32 S. W. 993.

New Jersey—Falk v. New York, etc., R. Co., 56 N. J. L. 380, 29 Atl. 157, 58 Am. & Eng. R. Cas. 191; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 41 Am. & Eng. R. Cas. 187, 19 Am. St. Rep. 442, 7 L. R. A. 435.

Pennsylvania—Neslie v. Second, etc., R. Co., 113 Pa. 300, 6 Atl. 72, 27 Am. & Eng. R. Cas. 180.

South Carolina—Brodie v. Carolina, etc., R. Co., 46 S. C. 203, 24 S. E. 180; *Madden v. Port Royal, etc., R. Co.*, 41 S. C. 440, 19 S. E. 951, 20 S. E. 65; *S. C.*, 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855.

Texas—Galveston, etc., R. Co. v. Thornsberry (Tex.), 17 S. W. 521; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753, 2 Am. & Eng. R. Cas. 497; *Texas, etc., R. Co. v. McLane* (Tex. Civ. App.), 32 S. W. 776.

Virginia—Alexandria, etc., R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289.

Wisconsin—McDermott v. Chicago, etc., R. Co., 82 Wis. 246, 52 N. W. 85.

The rule of extraordinary diligence in the carriage of passengers applies only to receiving, keeping, carrying and discharging of passengers. *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253;

passengers require that it should furnish reasonable station facilities for the accommodation of travelers upon its lines,⁹¹ and keep the same in a safe condition,⁹² and it is said that a passenger has the right to presume that the carrier will provide him with a reasonably safe place to alight from the train,⁹³ as well as a reasonably safe passage from the place of alighting.⁹⁴

Degree of Care Required.—In most cases a carrier of passengers is not held to so high a degree of care in the matter of keeping and maintaining station facilities as in the act of transportation. It is the duty of a carrier to see that all reasonable precautions are adopted to insure both the safety and comfort of persons who are on the premises as passengers. The carrier must exercise at least ordinary care and caution with respect to such matters.⁹⁵ The gen-

Southern R. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015; *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889; *Central R., etc., Co. v. Perry*, 58 Ga. 461.

Relatively to passengers and their baggage, the duty of a railway company, in its capacity as a common carrier, begins with affording to them, and to all of them alike, proper and suitable facilities for entering depots to purchase tickets and take passage, and for checking baggage, and ends with affording to them like facilities for leaving such depots and obtaining their baggage on presenting the checks therefor. The rights which the law in these respects secures to passengers may be exercised by them either in person or through their chosen agents. *Kates v. Atlanta, etc., Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

Plaintiff, unable to find a vacant seat, was standing on the platform of the front car of a train, waiting for another car to be added, and as soon as the cars came together the conductor called, "All aboard," and plaintiff passed forward to the platform of the car which had been brought up, but, in doing so, she fell between the cars, which had come apart because of the failure of the automatic coupling to work. There was a verdict for plaintiff which was sustained. *Lent v. New York, etc., R. Co.*, 120 N. Y. 467, 24 N. E. 653, 44 Am. & Eng. R. Cas. 373, affirming 54 N. Y. Super. Ct. 317.

91. Duty as to station facilities.—*Missouri, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 32 S. W. 42; *Texas, etc., R. Co. v. Mays*, 4 Texas App. Civ. Cas., § 159, 15 S. W. 43; *International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 2 Am. & Eng. R. Cas. 497, 37 Am. Rep. 753.

92. *Toledo, etc., R. Co. v. Stevenson*, 122 Ill. App. 654.

Safe condition.—*Texas, etc., R. Co. v. Mays*, 4 Texas App. Civ. Cas., § 159, 15 S. W. 43. And see *Davis v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 42, 68 S. W. 733; *Texas, etc., R. Co. v. McLane* (Tex. Civ. App.), 32 S. W. 776, affirmed in 93 Tex. 741, no op.

93. *Texas, etc., R. Co. v. Reid* (Tex.

Civ. App.), 74 S. W. 99.

94. A passenger is entitled to the exercise of the requisite care due him from the time he enters the station to take passage, and may assume that in going to the train and entering the cars, he will be vigilantly protected from danger by the carrier's agent. *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338.

95. Degree of care at stations, etc.—*Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015; *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041.

A railway company is only bound to exercise ordinary care to protect passengers waiting at the stations; the extraordinary care being exacted only during the time which the passenger is actually in the care of the carrier. *St. Louis, etc., R. Co. v. Woods*, 96 Ark. 311, 131 S. W. 869, 37 L. R. A., N. S., 855.

The company must exercise at least ordinary and reasonable care in the maintenance of its station house and the floor thereof to afford a passenger a safe place to alight from its care without injury. If it is negligent and fails to discharge this duty it becomes liable for damages sustained by the passenger by reason thereof, unless there is some fault attributable to her or the injury is occasioned by her own neglect and want of care. *Wilkes v. Western, etc., R. Co.*, 109 Ga. 794, 35 S. E. 165, 16 Am. & Eng. R. Cas., N. S., 826; *Central Railroad v. Thompson*, 76 Ga. 770; *Daniels v. Western, etc., R. Co.*, 96 Ga. 786, 22 S. E. 956; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015; *Georgia R., etc., Co. v. Usry*, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140.

A common carrier owes to a passenger the duty of exercising reasonable care to keep its platform—the approach from its depot to its train—in good and safe condition, free from obstructions. *Toledo, etc., R. Co. v. Stevenson*, 122 Ill. App. 654.

Ordinary care only is exacted of a carrier in the maintenance of its stations; but, as the public is invited to use them, they must be kept free from traps such as are likely to cause injury to those having business with the carrier, or to persons attending them. *McNaughton v.*

erally accepted rule is that it is the duty of a railway company to use reasonable care to maintain its station platform in safe condition for use, and free from anything of a character to endanger the safety of those who are or intend to become passengers upon its trains.⁹⁶ It has been said in respect to its stations and grounds, and in matters where no serious consequences are to be apprehended, the duty resting upon the carrier is to exercise ordinary care—that is, such care as prudent men are accustomed to exercise under similar circumstances—⁹⁷ while other courts say that it is the duty of the railroad company transporting passengers for hire to furnish a reasonably safe place for them to alight from its train;⁹⁸ so it would seem that a carrier's duty as to its station

Illinois Cent. R. Co., 136 Iowa 177, 113 N. W. 844.

Where doors in a passenger waiting room were respectively labeled "Basement" and "Toilet," and plaintiff, a passenger, intending to enter the toilet, by mistake opened the basement door, and was injured by falling downstairs, the door and stairs being necessary for the convenient use of the station, the carrier was not negligent in failing to keep the door locked. *McNaughton v. Illinois Cent. R. Co.*, 136 Iowa 177, 113 N. W. 844.

A railroad company is bound to exercise such care as persons of ordinary prudence would have exercised under the same circumstances to keep its station safe for the use of passengers or persons lawfully using the same. *Trinity, etc., R. Co. v. O'Brien*, 46 S. W. 389, 18 Tex. Civ. App. 690.

96. Degree of care.—*Minnesota*.—*Hull v. Minneapolis, etc., R. Co.*, 116 Minn. 349, 133 N. W. 852.

Missouri.—*Munro v. St. Louis, etc., R. Co.* (Mo. App.), 135 S. W. 1016; *Chase v. Atchison, etc., R. Co.*, 134 Mo. App. 655, 114 S. W. 1141.

North Carolina.—*Mangum v. North Carolina R. Co.*, 145 N. C. 152, 58 S. E. 913, 13 L. R. A., N. S., 589; *Roberts v. Atlantic, etc., R. Co.*, 155 N. C. 79, 70 S. E. 1080.

Maine.—A carrier should exercise all ordinary care to maintain its premises in such a reasonable and suitable condition that passengers may, in the exercise of ordinary care, use them in safety. *Rodick v. Maine Cent. R. Co.*, 85 Atl. 41, 109 Me. 530.

It is the duty of a carrier of passengers to maintain a stairway used by outgoing passengers in making an exit to the street in a reasonably safe condition for travel; and if it allows the steps to become covered with a thin coating of mud, whereby the steps become slippery and unsafe, it fails to perform its duty. *MacLaren v. Boston Elevated R. Co.*, 83 N. E. 1088, 197 Mass. 490.

A carrier is bound to provide a station platform suitable in area and construction and sufficiently lighted for the accommodation and safety of passengers while waiting for trains upon which they

intend to take passage, and, in the performance of the duty, the care exercised must be commensurate with the nature of the carrier's undertaking. *Savageau v. Boston, etc., Railroad*, 96 N. E. 67, 210 Mass. 164.

A carrier must exercise ordinary and reasonable care in the construction and maintenance of station platforms, including a railing extending from the end of a platform parallel with the track across a viaduct. *Joyce v. Metropolitan, etc., R. Co.*, 118 S. W. 21, 219 Mo. 344.

97. Care required.—*Railroad Co. v. Anderson*, 21 O. C. C. 288, 11 O. C. D. 765.

Accommodations safe for persons using ordinary care.—It is not the duty of a common carrier of passengers to exercise the highest degree of care in the matter of station accommodations for the safety of its passengers, but only to provide such as are reasonably safe for persons exercising ordinary care. *Railroad Co. v. Anderson*, 21 O. C. C. 288, 11 O. C. D. 765.

A railroad company is not liable for injuries occasioned by its buildings or structures being blown down by storms, where it has used that care and skill in their structure and maintenance which men of ordinary prudence and skill employ; and it is error in such cases to charge the jury that the company is bound to guard against all storms which can reasonably be anticipated. *Pittsburgh, etc., R. Co. v. Brigham*, 29 O. 374, 23 Am. Rep. 751.

Evidence as to absence of previous accidents.—In an action to recover damages from a common carrier of passengers, for injuries received in alighting from a train at a station, on the ground of negligence in not providing reasonably safe accommodations, it is error, where the danger was not obvious, to exclude testimony that in the use for a long time, in the same condition, no similar accident had happened. *Railroad Co. v. Anderson*, 21 O. C. C. 288, 11 O. C. D. 765.

98. International, etc., R. Co. v. Clark, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op; *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *International, etc., R. Co. v. Smith (Tex.)*, 14 S. W. 642.

platforms is to use the care of persons of ordinary prudence under like circumstances to see that the construction adopted will render the platform as safe as the exigencies of its business will permit, and the adoption of a platform construction like that in general use by well-regulated railroads and approved by experience, is sufficient.⁹⁹ However, there is some authority for the statement that the high degree of care generally required of railroad companies to prevent injuries to their passengers would seem to apply as well to keeping their platform and usual approaches to depots and cars in reasonably safe condition as to other incidents and instrumentalities of transportation.¹ And it has been held that it is charged with a high degree of care in furnishing the safest appliances for use by passengers in alighting,² yet it can not be said that a carrier insures

99. Carrier's duty as to platform that of man of ordinary prudence.—*Feil v. West Jersey, etc., R. Co.*, 77 N. J. L. 502, 72 Atl. 362.

The duty of a carrier to care for the safety of its passengers, so far as the furnishing of appliances is concerned, is fully performed when the appliances furnished are of a standard character and in proper repair, and it is not obliged to call passengers' attention to the method of construction of platforms, stations, or other appliances, provided the method is that generally adopted by other well-regulated carriers. *Feil v. West Jersey, etc., R. Co.*, 72 Atl. 362, 77 N. J. L. 502.

Plaintiff, after purchasing and depositing an elevated railroad ticket, in order to reach the platform, approached a locked door made partly of glass. Plaintiff placed his hand on the glass to open the door, and pushed his hand through the glass, and injured himself. It did not appear that the door was not properly constructed, nor the glass of insufficient strength to resist ordinary pressure to open the door when unlocked, and it also appeared that there were other doors leading to the platform that were open. Held, that defendant was not negligent. Judgment, 113 N. Y. S. 1006, 61 Misc. Rep. 601, reversed. *McCormick v. Interborough Rapid Transit Co.*, 117 N. Y. S. 532, 132 App. Div. 703.

1. Authority requiring high degree of care.—*Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op., citing *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737; *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753, 2 Am. & Eng. R. Cas. 497; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.; *Missouri, etc., R. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94. See ante, "Degree of Care Required," §§ 2290-2342.

Carriers are held to extraordinary care in the management of their stations, as well as in the operation of their cars. *Brackett v. Southern Railway*, 70 S. E. 1026, 88 S. C. 447, Ann. Cas. 1912C, 1212; *Dilleshaw v. Charleston, etc., R. Co.*, 85 S. C. 334, 67 S. E. 304.

A carrier owes to its passengers the duty of furnishing a suitable and safe platform and steps, sufficiently lighted, upon which to leave the car, so far as it can reasonably do so by the exercise of the highest degree of care and diligence; and for any defect therein or absence of light, causing an injury, which human care, vigilance, and forethought reasonably exercised could have discovered and guarded against and provided for, consistent with the practical operation of its road, the law holds the carrier responsible, but such rule does not require the carrier to foresee and provide against accidents never before known and not reasonably to be apprehended. *McFadden v. Chicago, etc., R. Co.*, 149 Ill. App. 298.

Defendant was liable for injuries caused by a passenger slipping on a banana peel on the station platform; the carrier being bound to the exercise of the highest degree of care, skill and diligence for the safety of the passenger consistent with the mode of conveyance employed. *Lapin v. Northwestern Elevated R. Co.*, 162 Ill. App. 296.

The duty of a carrier to exercise a high degree of care extends to the time of passage by the passenger from the depot to the train. *Merrill v. Michigan Cent. R. Co.*, 158 Ill. App. 38.

A carrier owes to a passenger the exercise of the highest degree of care for his safety consistent with the practical operation of its road, and, if lighting its platform and premises is necessary to the exercise of such degree of care, it is the duty of the carrier so to do. *Ardison v. Illinois Cent. R. Co.*, 155 Ill. App. 274, judgment affirmed in 94 N. E. 501.

A carrier of passengers, though not bound to have its depot platform absolutely safe, is bound to use more than ordinary care and precaution in making it reasonably safe. *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583.

An instruction that a railroad is bound to keep its station platforms and approaches in safe condition requires a degree of diligence not demanded by the law. *Gulf, etc., R. Co. v. Gross* (Tex. Civ. App.), 21 S. W. 186.

2. *Missouri, etc., R. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500; *Mis-*

an absolutely safe place for its passengers to alight.³

Assumption of Risk.—The rule that, as long as there is no latent danger in the construction or maintenance of appliances, a servant assumes the risk of injury from the obvious character of such appliances, has no application between carrier and passenger; and hence, in an action against a railroad by a passenger for injuries in a baggage room, that the construction of the baggage room was a "question of engineering," meaning a question of judgment in the construction of the appliance, was not a defense; it being the duty of defendant to have the room reasonably safe.⁴

The test of liability is not whether the premises have been placed in a safe condition, but whether the company has used due diligence to so maintain them.⁵

Application to All Portions of Premises Where Proper for Passenger to Go.—The rule of care, which a carrier of passengers must use in maintaining its depot in a safe condition for passengers, applies to any part of its premises where by the acts of the carrier it is made necessary or proper for the passenger to go to board a train.⁶ A railway company, inviting a passenger to alight after dark at a freight depot, instead of a regular passenger depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights, if necessary to his safety.⁷

souri, etc., *Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368, 37 Am. & Eng. R. Cas. 82.

If a person alighting from a railroad car is injured by stepping on a box provided for passengers to step on while alighting, and without negligence on his part, a right of action exists, though such a box had been safely used by others, if such appliance was less safe than the safest which had been used and tested. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368.

3. Carrier not an insurer as to absolute safety of alighting place.—A railroad company is required to furnish passengers only a reasonably safe place to alight from trains, and not an absolutely safe place. *Texas, etc., R. Co. v. Woods*, 40 S. W. 846, 15 Tex. Civ. App. 612. See, also, *Dilleshaw v. Charleston, etc., R. Co.*, 85 S. C. 334, 67 S. E. 304.

Where plaintiff was injured in alighting from a car, and the evidence showed that the step box was too small, and was placed too far under the car steps, on slanting and uneven ground, an instruction to the jury to find for plaintiff if they believed that defendant's servants were negligent in failing to furnish plaintiff a safe means for alighting from the train was not erroneous, as making defendant an insurer of the safety of its passengers. *Missouri, etc., R. Co. v. White*, 55 S. W. 593, 22 Tex. Civ. App. 424.

4. Assumption of risk.—*Bates v. Chicago, etc., R. Co.*, 140 Wis. 235, 122 N. W. 745.

5. Use of diligence the question.—*Texas, etc., R. Co. v. Huffman*, 83 Tex. 286, 18 S. W. 741; *Gulf, etc., R. Co. v. Wells*, 81 Tex. 685, 17 S. W. 511; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App.

309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.

6. What portion of premises.—*San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256. And see *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 2 Am. & Eng. R. Cas. 497, 37 Am. Rep. 753. See post, "Premises Contiguous to, Though Not Strictly Part of, Station Grounds," § 2375.

Where plaintiff's evidence tended to show that he was injured by falling into a ditch while being led or directed by defendant's servant to a train which he desired to board, which had stopped some distance from the depot, it was not error to refuse to instruct that, if the place where plaintiff was injured was a portion of defendant's depot grounds where the public did not or would not ordinarily resort, defendant would not be required to keep said ditch or ravine covered, and its failure so to do would not constitute negligence. *San Antonio, etc., R. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

Where plaintiff testified that defendant's conductor waited at the station until plaintiff got his transportation, and then said: "Hurry up. Let's go"—and that he started to accompany the conductor, who pointed out his train, but fell in a ditch and was injured, the testimony warranted a charge as to plaintiff's acting under the direction of defendant's conductor. *San Antonio, etc., R. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

In *Davis v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 42, 68 S. W. 733, the evidence was held insufficient to show an express invitation by an authorized agent of the company.

7. Alighting at freight depot on invitation.—*Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753, 2 Am. & Eng. R. Cas. 497.

Delegation of Duties.—As a carrier of passengers, a railway company is bound to have facilities for reception and discharge of passengers; its duty being a general one to the traveling public, and, if another attempts to perform the duty for the railroad, it still remains a duty to the traveling public due them from the third person.⁸

Interurban Railways.—See post, "When Carrier Responsible for Conditions," § 2384.

§ 2353. Duty to Provide Station Houses and Platforms.—It has been said, in effect, that it is the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars and passengers safely to alight when they have accomplished their journey.⁹ And, again, that "the carrier owes to its passengers, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains."¹⁰ Undoubtedly the due performance of the general duty to provide safe and convenient modes of ingress to and egress from the trains may in some cases, as, for example, where the traffic is extensive or the stopping place would otherwise be unsuitable for the purpose of receiving and discharging passengers, require the carrier to construct station houses and platforms or suitable substitutes. But there is no absolute duty imposed upon the carrier to establish station houses and platforms at every stopping place; the obligation of the carrier is discharged when passengers are afforded reasonably safe and suitable means for getting on and off trains. And in some cases it is not necessary to construct a platform or other means for the ingress or egress of passengers if the ground at the place of taking on and setting down passengers affords a safe means of alighting from and boarding trains.¹¹ Thus, it has been held that a railroad which is in the process of construction owes no duty to one who takes passage upon a construction train, with knowledge of the unfinished state of the road to have a suitable depot and platform at the place of his destination.¹² And it has been held that "at a mere way station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers."¹³ Notwithstanding that a street railway has provided regular stations at convenient intervals on its roads, if its trains are stopped at other places, although not especially for the purpose of taking on and setting down passengers, but for any other reason, as for convenience or necessity in operating the trains, or in compliance with a statutory duty to stop when approaching the track of an intersecting railroad, and if it is customary for the public to enter and quit the cars at such places, without objection from the company's agents or servants, the customary use of such places receiving and discharging passengers may become so generally known and well established as to impose upon the carrier the duty of maintaining such places in as safe and convenient condition as the regular stations.¹⁴

8. *Delegation of duties.*—Union, etc., R. Co. v. Londoner, 114 Pac. 316, 50 Colo. 22, 33 L. R. A., N. S., 433.

9. New York, etc., R. Co. v. Doane, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157.

10. Conroy v. Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 8 Am. & Eng. R. Cas., N. S., 714, 38 L. R. A. 419.

11. Alabama, etc., R. Co. v. Stacey, 68 Miss. 463, 9 So. 349.

12. Chicago, etc., R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923, 2 Am. & Eng. R. Cas., N. S., 206.

13. Cincinnati, etc., R. Co. v. Peters, 80 Ind. 168.

A passenger who was set down at a flag station, where there was no station house or platform, no agent, and no tickets for sale, was denied recovery for injuries alleged to have been sustained through getting her feet wet in consequence of the ground where she alighted, though ordinarily in good condition, being wet from much rain. Alabama, etc., R. Co. v. Stacey, 68 Miss. 463, 9 So. 349.

14. North Birmingham St. R. Co. v. Liddicoat, 99 Ala. 545, 13 So. 18.

§ 2354. Duty as to Stopping Places Unprovided with Platforms and Station Houses.—Although it may not be necessary in a particular case to construct a platform and station house for the reception and discharge of passengers, the place must nevertheless be rendered reasonably safe and convenient.¹⁵ Thus, a railroad company has been held liable for injuries sustained by a passenger while attempting to board a train from the ground, the distance from the ground being thirty inches or three feet.¹⁶ But where a gravel and cement platform which was built on a level with the track and was no more than eighteen inches below the lowest steps of the cars, had been provided for the accommodation of passengers in getting on and off trains, and the conductors of the trains and a man employed for that purpose assisted passengers to get on and off, it was held that it was not necessarily negligent for the carrier to fail to have a box or stool upon which passengers could step in alighting.¹⁷

§§ 2355-2376. Duties as to Safety of Station Houses, Platforms, and Grounds—§ 2355. General Rule.—The general rule is that all railroad companies must keep in a reasonably safe condition all parts of their platforms and approaches thereto to which the public does or would naturally resort and all parts of their station grounds reasonably near the platform where passengers would naturally or ordinarily go to board cars or after alighting.¹⁸

§§ 2356-2357. Approaches to Stations—§ 2356. General Rule.—It is an integral part of the duty of railroad companies with respect to their station facilities to exercise care to provide safe and convenient means of approaching and departing from their stations; they must exercise care that not only the ways which have been provided, but also those which passengers naturally and ordinarily use in entering and leaving stations, are rendered duly safe.¹⁹ Thus, it is held that where a passenger, after leaving the station, is

15. A railroad which for many years allowed passengers to board and alight from trains at an unlighted coal chute near the track, the conductors receiving fares from those boarding there, was negligent in not maintaining a railing across the mouth of the chute to keep passengers from falling into it. *Credle v. Norfolk, etc., R. Co.*, 151 N. C. 50, 65 S. E. 604.

16. *Eichhorn v. Missouri, etc., R. Co.*, 130 Mo. 575, 32 S. W. 993.

Where plaintiff's wife, while attempting to get aboard a train, was compelled to step from the ground to steps on the train, a distance of about thirty to thirty-five inches, in which act she was injured, it is held that the company was liable for such injuries, in absence of contributory negligence. *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

17. *Texas Mid. R. Co. v. Frey*, 25 Tex. Civ. App. 386, 61 S. W. 442.

18. *United States—Green v. Pennsylvania R. Co.*, 36 Fed. 66.

Alabama—Alabama, etc., R. Co. v. Godfrey, 156 Ala. 202, 47 So. 185.

General rule.—*Arkansas—St. Louis, etc., R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034; *Arkansas, etc., R. Co. v. Robinson*, 96 Ark. 32, 130 S. W. 536.

Indiana—Louisville, etc., R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

Iowa—McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114.

Kansas—Missouri Pac. R. Co. v. Neiswanger, 41 Kan. 621, 21 Pac. 582, 39 Am. & Eng. R. Cas. 471, 13 A. N. St. Rep. 304.

Kentucky—Cincinnati, etc., R. Co. v. Giboney, 30 Ky. L. Rep. 1005, 100 S. W. 216.

Maine—Rodick v. Maine Cent. R. Co., 109 Me. 530, 85 Atl. 41.

Minnesota—Buenemann v. St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379, 18 Am. & Eng. R. Cas. 153.

Nebraska—Union Pac. R. Co. v. Sue, 25 Neb. 772, 41 N. W. 801.

Texas—Stewart v. International, etc., R. Co., 53 Tex. 289, 2 Am. & Eng. R. Cas. 497, 37 Am. Rep. 753.

Virginia—Alexandria, etc., R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289.

A station must be made safe for a passenger coming to take a train. *Illinois Cent. R. Co. v. Daniels*, 96 Miss. 314, 50 So. 721, 27 L. R. A., N. S. 128.

19. *United States—Green v. Pennsylvania R. Co.*, 36 Fed. 66.

Delaware—Wallace v. Wilmington, etc., R. Co. (Del.), 8 Houst. 529, 18 Atl. 818.

Illinois—Chicago, etc., R. Co. v. Sykes, 96 Ill. 162, 2 Am. & Eng. R. Cas. 254, reversing 1 Ill. App. 520.

Louisiana—Abney v. Louisiana, etc., R. Co., 127 La. 437, 53 So. 678.

Massachusetts—Cazneau v. Fitchburg R. Co., 161 Mass. 355, 37 N. E. 311.

Michigan—Cross v. Lake Shore, etc., R. Co., 69 Mich. 363, 37 N. W. 361, 35 Am.

compelled to walk along a dark path very close to the track, and is injured by a passing train, he may recover if he uses reasonable care to avoid injury.²⁰ If the imperfections in a passageway from a railroad station were trifling, the company was not guilty of failing to provide a reasonably safe passageway, but if the defect in the opinion of the jury was serious, and the hole dangerous, there was a breach of its duty.²¹ When it is necessary for passengers to cross several tracks to reach the station the company must exercise care in the movement of trains on the intervening tracks, and will be liable for negligence in the operation of trains thereon.²² But a railroad company whose depot platform is

& Eng. R. Cas. 476, 13 Am. St. Rep. 399; *Cole v. Lake Shore, etc., R. Co.*, 81 Mich. 156, 45 N. W. 983.

South Carolina.—*Johns v. Charlotte, etc., R. Co.*, 39 S. C. 162, 17 S. E. 698, 58 Am. & Eng. R. Cas. 175, 39 Am. St. Rep. 709, 20 L. R. A. 520.

Texas.—*Gulf, etc., R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

Virginia.—*Chesapeake, etc., R. Co. v. Mathews*, 114 Va. 173, 76 S. E. 288.

It is the duty of a railroad company to keep in a reasonably safe condition a road provided by it for the use of passengers or persons accompanying them. *Chesapeake, etc., R. Co. v. Meyer (Ky.)*, 119 S. W. 183.

It is a carrier's duty to furnish such a way of exit from the depot over its right of way that the passenger may go away from the place at which he is invited to get on and off, without danger to life or limb; but it is not its duty to see him safe and secure in his exit from the track and over its right of way. The carrier is not bound to insure him a safe exit from the depot, but to insure only a safe way for him to use for an exit. *Central Railroad v. Thompson*, 76 Ga. 770.

A railroad company has been liable for failing to keep the central entrance to a station free from the violent act of one of its servants in ejecting a drunken man. *Gray v. Boston, etc., Railroad*, 168 Mass. 20, 46 N. E. 397, 8 Am. & Eng. R. Cas., N. S., 481.

A station was approached from the highway by a bridge across a railway track and thence by a flight of stairs leading down to the platform. At or about the head of the flight of stairs there was an opening in the railing on the side of the bridge. Through this opening plaintiff fell and was injured. In an action to recover for the injuries sustained a judgment in his favor was affirmed. *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. 375, 25 Atl. 774, 56 Am. & Eng. R. Cas. 279.

The due performance of the duty which the carrier owes to a passenger who is leaving its station may, under some circumstances, require that the station and approaches be adequately lighted and kept lighted until the passenger has had a reasonable opportunity, by the exercise

of due diligence, to reach a public highway or other place of safety. *Wallace v. Wilmington, etc., R. Co. (Del.)*, 8 Houst. 529, 18 Atl. 818; *Gulf, etc., R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

An approach, which was for many years generally used by passengers in going to and from defendant's depot, ran along the right of way between a spur track, and an unprotected hole eighteen feet wide and twelve to twenty feet deep on the property of another; the hole being about twenty-five feet from the station and twelve feet from the edge of the track. A passenger got off a train in the night-time at the station, and started along the approach to the street with which it connected, and, in stepping to one side to permit a person with a lantern to pass, fell into the hole, and was injured. Held, that the facts warranted a finding of negligence in not protecting the approach by a fence. *St. Louis, etc., R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034.

Where there was evidence that there was a hole in a passageway from a railroad station from five to seven inches wide, and from four to five inches deep, which had existed for two weeks, the verdict against the company in an action for injuries was not contrary to the evidence. *Chesapeake, etc., R. Co. v. Mathews*, 114 Va. 173, 76 S. E. 288.

20. *Powell v. Philadelphia, etc., R. Co.*, 220 Pa. 638, 70 Atl. 268, 20 L. R. A., N. S., 1019.

21. *Imperfections trifling*.—*Chesapeake, etc., R. Co. v. Mathews*, 114 Ga. 173, 76 S. E. 288.

22. *Louisville, etc., R. Co. v. Hirsch*, 69 Miss. 126, 13 So. 244, 56 Am. & Eng. R. Cas. 291. See post this note, II, D, 6, b.

Where a path leading from a highway to defendant's station across a side track or switch, was in constant use by intending and departing passengers and employees as an approach to the station, without anything being said by defendant's agents or employees to convey to the public the idea that it should not be so used, and it was the invariable custom of the station agent to part freight cars standing on the side track so as to leave the pathway unobstructed, a verdict in favor of plaintiff, who was injured while passing through the gap in the cars, while

near its yards performs its full duty to prevent passengers and others from crossing through the yards by posting warning notices and frequently warning pedestrians not to do so, and by providing a safe approach over its tracks to its depot, so that a passenger takes the unsafe way through the yards at his own risk.²³ A carrier should not permit its trains to stand across the highway in front of its station for an unreasonable time, thereby preventing plaintiff from going into the station, and compelling her to remain in the cold.²⁴ In order to hold a railway company responsible for the exercise of care in the maintenance of an approach to its station in a safe condition it is not necessary that the approach should have been constructed by, or that it should be on ground belonging to, the company.²⁵ Where the sidewalk of a carrier around its station, which gave an ample entrance and exit was of concrete, and there was grass plots between the sidewalk and the street, the carrier was not bound to see that a beaten path across these plots, which did not belong to the carrier occasionally used by patrons of the railroad company, was safe, and so it was not liable for the act of third persons in the stringing of a wire across the path.²⁶

§ 2357. More than One Way.—A railroad carrier is required to furnish only one way by which to approach and leave a station. And ordinarily when a railroad company has provided a way, open to the sight of passengers, by which they may approach and leave its station and platform, it has discharged its duty, and is under no obligation to exercise care in rendering another way, which passengers may choose to use, safe for the purpose.²⁷ But under some circumstances if there be two ways by which passengers may approach or leave the station, one of which is faulty in construction or repair, a passenger using it and injured by its faulty condition, will not be debarred of his action, although the other, which he might have used, was safe.²⁸ If a carrier maintain or suffer the

so standing on the side track, by the sudden coming together of the cars, was sustained. *Nichols v. Washington, etc., R. Co.*, 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257.

23. Platform near yard—Duty toward passenger.—*Perego v. Lake Shore, etc., R. Co.*, 122 N. W. 535, 158 Mich. 225.

24. Blocking passage way with train.—*Louisville, etc., R. Co. v. Daugherty*, 32 Ky. L. Rep. 1392, 108 S. W. 336, 15 L. R. A., N. S., 740.

25. In an action to recover for injuries sustained in consequence of the alleged unsafe condition of a sidewalk which formed an approach to defendant's station platform, defendant contended that it should not be held liable for the reasons that the sidewalk on which the accident occurred was not in the first instance built, and was not on ground owned, by defendant. But the sidewalk was so constructed with reference to defendant's main platform as to constitute an implied invitation to passengers as a means of ingress and egress, was in constant use by passengers for that purpose, and had for years been held out by defendant as an approach to the platform of its station. It was held that, under these circumstances, defendant was liable for negligence in the maintenance of the sidewalk. *Gulf, etc., R. Co. v. Glenk* 9 Tex. Civ. App. 599, 30 S. W. 278.

26. Stringing wire across walk way.—*Clyde v. Brooklyn, etc., R. Co.*, 148 App. Div. 705, 133 N. Y. S. 1.

27. *Sturgis v. Detroit, etc., R. Co.*, 72 Mich. 619, 40 N. W. 914. See *Clyde v. Brooklyn, etc., R. Co.*, 148 App. Div. 705, 133 N. Y. S. 1.

Where the carrier performed its full duty in providing a safe way for passengers to approach and leave its depot, without crossing the tracks in its yards, it would be liable for injury to one going in a way not provided only if caused by its gross negligence. *Perego v. Lake Shore, etc., R. Co.*, 122 N. W. 535, 158 Mich. 225.

28. *Longmore v. R. Co.*, 19 C. B., N. S., 183. See *Gulf, etc., R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563, 2 Am. & Eng. R. Cas., N. S., 574.

Although a railway company has provided a safe way by which passengers may reach and leave its station, if it has permitted another way, which has such an appearance of a passageway as that passengers of reasonable judgment and discernment would conclude it to be the means of entrance and egress, to be constructed by private persons, the company will be responsible for defects in such way at least to passengers who have no notice of the private character of the way. *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 11 Am. & Eng. R. Cas. 187, 19 Am. St. Rep. 442, 7 L. R. A. 435.

maintenance of several ways of ingress and egress to and from its stations, it must keep each in a reasonably safe state of repair.²⁹ Or if the company permits and recognizes the use of a natural pathway leading to its station by passengers in leaving or approaching the station, it must exercise care to render the way safe, notwithstanding that it has provided and maintains another approach.³⁰

Approaches to Toilet.—Where there are two ways of reaching a toilet at a railway station, a passenger may choose either way; and the railroad company must keep them both safe, or warn the public not to use the unsafe way.³¹

§ 2358. Station Houses.—Care must be exercised to maintain all parts of the station house set aside for the use of passengers, or where passengers would naturally go, in a safe condition.³² A railroad company should exercise ordinary care to keep its waiting room in a safe condition, and it is inaccurate to instruct the jury that a carrier must keep its waiting room in a reasonably safe condition.³³ The duty of a railroad company with respect to providing a safe waiting room is not discharged when it negligently fails to remove or repair a defective chair but permits it to remain in such a position as to invite passengers to make use of it.³⁴ A person injured at a depot or terminal of a carrier by stepping into an opening in the depot floor, negligently suffered to exist by the railroad company, and the existence of which was unknown to him, is entitled to recover.³⁵ A passenger has been held entitled to recover for injuries sustained by falling through the opening in the floor of a toilet room adjoining the waiting room.³⁶ If a passenger is invited to wait at a place other than the regular waiting room, care should be exercised that the passenger's safety is not endangered.³⁷ A railroad company is even bound to exercise care to see that a baggage room at a station, into which passengers are invited or permitted to go when it is open for the reception and delivery of baggage, shall be rendered a safe place.³⁸

Duty to Provide for Comfort.—The waiting room, being especially intended for the accommodation of passengers, should be made reasonably comfortable.³⁹

29. Several ways maintained or suffered.—*Carter v. Rockford, etc., R. Co.*, 147 Wis. 86, 132 N. W. 598.

30. Arkansas.—*St. Louis, etc., R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034.

Massachusetts.—*Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208, 97 Am. Dec. 96.

Michigan.—*Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 37 N. W. 361, 35 Am. & Eng. R. Cas. 476, 13 Am. St. Rep. 399.

Virginia.—*Nichols v. Washington, etc., R. Co.*, 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257.

31. Approaches to toilet.—*Cassady v. Texas, etc., R. Co.*, 131 La. 626, 60 So. 15.

32. Wilkes v. Western, etc., R. Co., 109 Ga. 794, 35 S. E. 165, 16 Am. & Eng. R. Cas., N. S., 826.

33. Ordinary care required.—*St. Louis, etc., R. Co. v. Grimsley*, 90 Ark. 64, 117 S. W. 1064.

34. Texas, etc., R. Co. v. Humble, 38 C. C. A. 502, 97 Fed. 837.

35. Liability for injury due to hole in depot floor.—*Bennett v. Louisville, etc., R. Co.*, 102 U. S. 577, 26 L. Ed. 235.

36. Jordan v. New York, etc., R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101.

37. Plaintiff, while waiting for her train, was invited by the station agent to wait

in some empty cars standing beside the platform while the waiting room was being cleaned, and assured that the cars would not be moved. She seated herself in the rear car but had not been there long, when, without signal or notice, the cars began to be moved, by an engine, out of the station. Startled by the sudden and unexpected movement, plaintiff jumped from the rear end of the car to the platform and was injured. A verdict for plaintiff was sustained. *Shannon v. Boston, etc., R. Co.*, 78 Me. 52, 2 Atl. 678, 23 Am. & Eng. R. Cas. 511.

38. Illinois Cent. R. Co. v. Griffin, 80 Fed. 278, 25 C. C. A. 413.

39. McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114; S. C., 29 Iowa 170.

It is the duty of a railroad company to furnish comfortable waiting rooms at its depots, and the custom of the agent in charge of a depot to invite passengers, when the weather was disagreeable, to come into the office in the depot, does not relieve it from liability for failing to maintain a proper waiting room. *Missouri, etc., R. Co. v. McCutcheon*, 77 S. W. 232, 33 Tex. Civ. App. 557.

Evidence, in an action against a railway company for maintaining a waiting room in such condition that plaintiff, while

The common-law duty of a carrier requires him to use reasonable care for the protection of passengers at stations and stopping places,⁴⁰ and to this end it is the duty of a carrier, in proper cases, to furnish heat and light, and to ventilate to a reasonable degree the passenger stations and stopping places.⁴¹ And where two railroad companies maintain and keep a common passenger station, they are jointly bound to keep the same comfortably heated while passengers are reasonably authorized to occupy the same.⁴² In some states the statutes require railroads to have their passenger stations properly and comfortably furnished, heated, lighted and ventilated, and in such condition open for the reception of passengers for a certain time before and after the arrival of each passenger train,⁴³ but these statutes impose a special duty and do not relieve the carrier from its common-law duty of using reasonable care for the protection of passengers and other persons rightfully on its premises in connection with the transaction of its business.⁴⁴ For example, when a train is delayed it may become the duty of the company to keep the waiting room properly heated for a longer time than that specified in the statute.⁴⁵ And in one instance a statute

waiting for a delayed train, contracted pneumonia, held to sustain a verdict for plaintiff. *St. Louis, etc., R. Co. v. Hook*, 104 S. W. 217, 83 Ark. 584.

40. *Drummy v. Minneapolis, etc., R. Co. (Iowa)*, 133 N. W. 655; *Cincinnati, etc., R. Co. v. Mounts*, 31 Ky. L. Rep. 1162, 104 S. W. 748.

41. *Drummy v. Minneapolis, etc., R. Co. (Iowa)*, 133 N. W. 655; *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *Texas, etc., R. Co. v. Mayes*, 4 Texas App. Civ. Cas., § 159, 15 S. W. 43.

In an action against a railroad company to recover damages for a violent cold contracted while waiting in the depot for a train, evidence examined, and held sufficient to sustain a verdict that the company was negligent in failing to have its waiting room in a reasonably safe and comfortable condition for passengers. *Cincinnati, etc., R. Co. v. Mounts*, 104 S. W. 748, 31 Ky. L. Rep. 1162.

Where the negligence of a carrier in failing to properly warm a waiting room produced a condition of health in a passenger obliged to wait in such room rendering the passenger susceptible to tuberculosis, and as a natural and probable consequence she became affected with the disease and died thereof, the carrier was liable. *Chicago, etc., R. Co. v. Groner*, 95 S. W. 1118, 43 Tex. Civ. App. 264.

42. *International, etc., R. Co. v. Doolan*, 56 Tex. Civ. App. 503, 120 S. W. 1118.

43. *Drummy v. Minneapolis, etc., R. Co. (Iowa)*, 133 N. W. 655. Under Ky. St. 1903, § 784, providing that railroad companies shall keep their waiting rooms comfortably warm in cold weather. *Cincinnati, etc., R. Co. v. Mounts*, 31 Ky. L. Rep. 1162, 104 S. W. 748.

44. *Drummy v. Minneapolis, etc., R. Co. (Iowa)*, 133 N. W. 655.

Code 1906, § 4867, requiring railroads to keep rooms open and heated at stations at least an hour before the arrival

of trains, held to fix a minimum time, which does not bar a recovery where the facts show that rooms should have been open for a longer period. *Williams v. Southern R. Co. (Miss.)*, 59 So. 850.

The common-law duty to keep the waiting room properly heated, when necessary for the comfort and safety of passengers, is not limited by a statute providing that a railroad company shall keep its depots or passenger stations warmed for a time not less than one hour before the arrival and after the departure of trains. *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

Violation of carriers' common-law duty to keep passenger stations heated during the time passengers are reasonably authorized to use the same may give rise to an action for damages for illness to a passenger, proximately resulting therefrom. *International, etc., R. Co. v. Doolan*, 120 S. W. 1118, 56 Tex. Civ. App. 503.

45. **Where train delayed.**—Statute imposing penalty for railroad's failure to keep stations heated for a stated time before and after the arrival of trains, does not affect the company's duty to use reasonable care to keep the station reasonably warm for the comfort of passengers waiting for a delayed train. *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720, affirmed in 93 Tex. 674, no op.

Act March 6, 1891, imposes a penalty on a railroad company failing to keep its passenger depots open, lighted, and warmed "for a time not less than one hour before the arrival and after the departure of all trains carrying passengers." Held, that the time so fixed was not the limit of the company's legal duty, as regards a passenger injured by the failure to warm the waiting room of the depot while she was waiting for a delayed train. *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

requiring rooms in stations to be kept open and heated at least an hour before the arrival of passenger trains, has been held not to apply to union stations, in so far as the minimum time may be taken as a guidance to the jury in arriving at what is a reasonable time.⁴⁶

The Texas statutes expressly provide that carriers shall keep their depots lighted, warm and open to all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all passenger trains.⁴⁷ Such a provision is constitutional.⁴⁸ This statute only requires that the depots be lighted and warmed for a period not less than an hour before the actual arrival and departure of passenger trains, and not for an hour before the time such trains are scheduled to arrive.⁴⁹

Purpose of Statute.—Irrespective of the statute it is the carrier's duty to provide a suitable station to accommodate its passengers departing and arriving, and the purpose of the statute is to fix a time that the stations should be warm, lighted and open.⁵⁰

Liability for Violation.—A penalty is imposed for failure to comply with article 4521.⁵¹ And the statute also provides that the company "shall be liable to the party injured for all damages by reason of such failure."⁵² A railroad company can not escape liability for failure to light its depot, by contracting with another company to light it.⁵³

Liability for Resulting Injury.—Where injury to a passenger is the proximate result of the carrier's breach of this statutory duty, it is liable in damages.⁵⁴ The fact that a passenger was cold when she entered the depot would

46. Not applicable to union stations.—*Williams v. Southern R. Co.*, 102 Miss. 617, 59 So. 850.

47. Statutory requirement as to heating, etc.—Rev. Stat. 1895, § 4521, International, etc., *R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; Texas, etc., *R. Co. v. Moore* (Tex. Civ. App.), 41 S. W. 499; Gulf, etc., *R. Co. v. Turner* (Tex. Civ. App.), 93 S. W. 195; St. Louis, etc., *R. Co. v. Lowe* (Tex. Civ. App.), 97 S. W. 1087, affirmed in 102 Tex. 592, no op.; St. Louis, etc., *R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581; Texas Mid. Railroad *v. Griggs* (Tex. Civ. App.), 106 S. W. 411; Texas Mid. Railroad *v. Little* (Tex. Civ. App.), 77 S. W. 958.

Under Sayles' Ann. Civ. St. 1897, art. 4521, requiring every railroad to keep its depots lightened and warmed and open to all passengers not less than one hour before the arrival of all passenger trains, and making it liable for damages sustained by its failure to do so, a company would be liable for injuries to a passenger caused by not having its depot open within the required time at a flag station where it sold tickets and maintained a depot for passengers. St. Louis, etc., *R. Co. v. Rumfield*, 55 Tex. Civ. App. 73, 118 S. W. 810.

48. Such provision constitutional.—Acts 1889, Ch. 23, p. 19, requiring railroad companies to keep their passenger depots lighted and warmed and open to passengers a reasonable time before the arrival and after the departure of passenger trains, is not violative of constitution Art. 3, § 35. Texas, etc., *R. Co. v. Mayes*, 4 Texas App. Civ. Cas., § 159, 15 S. W. 43.

49. Southern Kansas R. Co. v. Caylor (Tex. Civ. App.), 135 S. W. 1087.

50. Purpose of statute.—International, etc., *R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

It is the duty of carriers to keep their passenger stations comfortably heated during all the time passengers are reasonably authorized to use the same, irrespective of Sayles' Ann. Civ. St. 1897, art. 4521, requiring the depots to be kept warm for at least an hour before the arrival and after the departure of trains, and imposing a penalty for failure to do so. International, etc., *R. Co. v. Doolan*, 56 Tex. Civ. App. 503, 120 S. W. 1118.

51. Liability for violation.—International, etc., *R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

52. Liable for damages.—International, etc., *R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; St. Louis, etc., *R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581.

53. Effect of contract with another to light.—Texas, etc., *R. Co. v. Reich* (Tex. Civ. App.), 32 S. W. 817.

54. Liability for resulting injury.—International, etc., *R. Co. v. Johnson*, 43 Tex. Civ. App. 147, 95 S. W. 595; St. Louis, etc., *R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581; St. Louis, etc., *R. Co. v. Lowe* (Tex. Civ. App.), 97 S. W. 1087, affirmed in 102 Tex. 592, no op.

An instruction is objectionable which leads the jury to understand that they can award damages for cold suffered while in the depot, due to the combined effect of her ride thither and of defendant's negligence in failing to have its

not affect the right to recover for suffering from continued or increased cold hereafter occasioned by its unwarmed condition.⁵⁵ But where a railroad opens its station in compliance with the requirements, it is not liable to a prospective passenger for injuries and suffering resulting to the passenger from exposure before the station is opened.⁵⁶

§§ 2359-2369. Station Platforms and Alighting Places—§ 2359. General Rule.—The general duty of railroad carriers of passengers as to their station facilities requires them to exercise care to provide safe and suitable platforms, appliances and places to alight, at stations,⁵⁷ and for the proper and diligent use of such appliances by its servants.⁵⁸ It is the duty of such companies to keep in a safe condition all portions of their platforms and approaches thereto, to which the public resort;⁵⁹ as well as all portions of their station

waiting room warm. *Texas Mid. Railroad v. Little* (Tex. Civ. App.), 77 S. W. 958.

Evidence insufficient to show liability.—*International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

55. *Texas Mid. Railroad v. Little* (Tex. Civ. App.), 77 S. W. 958.

56. *Texas Mid. Railroad v. Griggs* (Tex. Civ. App.), 106 S. W. 411.

57. *Indiana*.—*Lucas v. Pennsylvania Co.*, 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687.

Massachusetts.—*Keefe v. Boston, etc., R. Co.*, 142 Mass. 251, 7 N. E. 874, 27 Am. & Eng. R. Cas. 137.

Nebraska.—*Union Pac. R. Co. v. Sue*, 25 Neb. 772, 41 N. W. 801.

A railroad company is under obligation to take due care to secure the safety of a passenger who is on its platform to board its train. *Pennsylvania R. Co. v. Stockton*, 184 Fed. 422, 106 C. C. A. 433.

On the outer edge, and along the whole length, of a platform was a narrow platform or step, four feet wide and nine inches high. Plaintiff was injured in stepping off this elevation down to the main platform, but was denied recovery, because, however, the facts showed that she did not exercise ordinary care. *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 47 Am. & Eng. R. Cas. 522, 12 L. R. A. 293.

It is the duty of a railroad company to provide reasonably safe and suitable platforms to allow passengers to get on and off cars at stations with safety. *Texas, etc., R. Co. v. McLane* (Tex. Civ. App.), 32 S. W. 776, affirmed in 93 Tex. 741, no op.

A carrier must provide a safe place for its passengers to alight. *Murray v. Seattle Elect Co.*, 97 Pac. 458, 50 Wash. 444.

Wisconsin.—A carrier of passengers must furnish a reasonably safe place for passengers to alight from trains; and, where it fails to do so, and thereby proximately causes injury to a passenger

exercising due care, it is liable. *Skow v. Green Bay, etc., R. Co.*, 123 N. W. 138, 141 Wis. 21.

58. Proper use of appliances.—*St. Louis, etc., R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039. See post, "Assisting Passengers to Board or Alight," § 2477.

In an action against a railroad company for injuries received by a passenger in alighting from a train wherein it appeared that she was obliged to step down onto a box, 11 inches square at the top, and somewhat larger at the bottom, and that the box was standing on rough stones, and tipped as she stepped on it, a charge, requested by defendant, that if the stepping stool was a reasonably safe appliance, and was properly placed on ground sufficiently smooth to prevent it from turning by the use of due care by passengers, the jury should find for defendant, was properly qualified by adding the condition that defendant should not be guilty of negligence in using it, nor otherwise guilty of negligence. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

59. *Arkansas*.—*Arkansas, etc., R. Co. v. Robinson*, 96 Ark. 32, 130 S. W. 536.

North Dakota.—*Messenger v. Valley, etc., R. Co.*, 21 N. Dak. 82, 128 N. W. 1023, 32 L. R. A., N. S., 881.

Texas.—*Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753; *Texas, etc., R. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.; *Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op.; *Houston, etc., R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805; *Harrison v. Missouri, etc., R. Co.*, 49 Tex. Civ. App. 467, 109 S. W. 442; *Dillingham v. Teeling* (Tex. Civ. App.), 24 S. W. 1094; *Texas, etc., R. Co. v. Reich* (Tex. Civ. App.), 32 S. W. 817; *Texas, etc., R. Co. v. McKenzie* (Tex.), 2 Posey 307, 308.

It is the duty of a railroad company to anticipate that passengers will use its depot platforms and adjacent grounds to walk on while waiting for the arrival of trains, and to take reasonable precautions

grounds reasonably near the platform, where passengers or those who have purchased tickets, with a view to taking passage on the cars, would naturally go.⁶⁰ The cases are numerous where passengers have recovered for injuries received after alighting from the cars, the railroads having failed to exercise due care in providing means for safe egress.⁶¹ But if a platform for the accommodation of passengers in getting on and off trains is sufficient in dimensions to accommodate the passengers safely, and constructed according to the opinion of persons skilled in such matters, the fact that one might have been constructed making it more convenient for persons to get on and off the cars will not make the company liable; a railroad company, in building its structures must look to the safety rather than the convenience of its passengers.⁶²

Duty as to Platform Built and Controlled by Stranger.—A railroad is bound to use ordinary care to keep and maintain in a reasonably safe condition a platform used by it, or by its passengers, with its knowledge and consent, to get on or off of trains, although the platform was built by, and is under, the control of a stranger.⁶³

Duty as to Walk Maintained and Used Jointly with Other Companies.—In an action against a railroad company for injuries caused by a defective walk leading from a union depot on defendant's land, the fact that defendant did not authorize its construction or maintenance will not relieve it from liability, where it appears that it maintained the walk jointly with other companies, and knew that it was used by passengers after leaving its trains, and was defective.⁶⁴

Negligence Proximate Cause of Injury.—The general rule that the carrier's negligence must be the proximate cause of the injury applies to injuries attributed to defective appliances for alighting passengers, platforms, approaches, etc.,⁶⁵ and to the negligent use of such appliances by the carrier's servants.⁶⁶

so that they will not be injured by defects in the carrier's premises while so doing. *Drummy v. Minneapolis, etc., R. Co.* (Iowa), 133 N. W. 655.

60. *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.

Plaintiff, not being familiar with the surroundings, was put off the train on a low platform, and attempted to leave at the end in the direction he desired to go, and, on account of the absence of light, was unable to see that there were no steps there. The way prepared by the company was zigzag in direction, and up several steps, and across a higher platform. Held, that the court properly charged that it was the duty of the company to provide good and safe places of egress from its platform at such places as persons would naturally or ordinarily go. *Texas, etc., R. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034.

61. *England.*—*Martin v. G. N. R. Co.*, 81 Eng. Com. Law 179; *Nicholson v. Lanchashire, etc., R. Co.*, 3 Hurlstone & Colman 534; *Caterham R. Co. v. London R.*, 87 Eng. Com. Law 410.

Indiana.—*Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408.

Iowa.—*McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 95 Am. Dec. 114.

Massachusetts.—*Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208, 97 Am. Dec. 96.

New York.—*Osborne v. Union Ferry Co.* (N. Y.), 53 Barb. 629.

Texas.—*Stewart v. International, etc., R. Co.*, 53 Tex. 289, 37 Am. Rep. 753.

Wisconsin.—*Patten v. Chicago, etc., R. Co.*, 32 Wis. 524; *Imhoff v. Chicago, etc., Co.*, 20 Wis. 344.

62. *Harkey v. Texas, etc., R. Co.*, Fed. Cas. No. 6,065.

63. **Platform built by and controlled by third person.**—*Houston, etc., R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805.

64. **Walk maintained and used jointly.**—*Gulf, etc., R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

65. **No liability where neglect not proximate cause of injury.**—In an action for injuries caused by being struck by a train while about to board another train, it was error to submit the question whether defendant's failure to provide a proper platform was the proximate cause of the injury, where the ground was level on both sides of the train, and it was not shown that the failure to have such a platform was the cause of plaintiff's going on the side of the train not usually used by passengers in getting on and off trains. *St. Louis, etc., R. Co. v. Caseday* (Tex. Civ. App.), 40 S. W. 198. See ante, "Liability Based on Negligence," §§ 2269-2273.

66. *St. Louis, etc., R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162.

Effect of Knowledge by Passenger of Defective Condition of Platform.—Although a station platform is in a defective condition, a passenger has the right to use the same by going upon it to signal an approaching train and take passage upon that train, but he is obliged to use the platform with care proportioned to the risk arising from its defective condition.⁶⁷ Generally as to the effect of contributory negligence upon the right of a passenger to recover for injuries resulting from the negligence of a carrier, see post, "Contributory Negligence," chapter XXIV.

§ 2360. Defects in Floor.—A railroad company may be liable to a passenger for injuries received in consequence of a loose plank being negligently allowed to remain in the platform.⁶⁸ But in accordance with the general rule that a railroad company is only bound to use ordinary care to keep its platforms and approaches in a safe condition for passengers, if a defect in a platform is not directly caused by its servants, it must be shown that it or its servants knew, or by the exercise of ordinary care could have known, of the defect, in time to have had reasonable opportunity to repair it, and failed to do so, in order to make the company liable for injuries to a passenger resulting therefrom.⁶⁹ A railroad company may be liable for allowing a hole in the platform to remain unrepaired,⁷⁰ and it is not only liable for injuries sustained by reason of defects in the walks in the yards of which it has actual knowledge, but also by reason of a patent defect which has existed so long that notice of it may be reasonably inferred.⁷¹

§ 2361. Length, Width and Elevation.—The platform should, generally speaking, be of sufficient length and width, and of such height with reference to the car steps, as to make it a suitable agency in getting on and off trains. The

67. Knowledge of defective condition of platform.—An intending passenger on a railroad train has as much right to go upon a station platform for the purpose of flagging the train as for taking passage on it when it arrives. *Houston, etc., R. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

Liability as affected by contributory negligence of passenger.—In an action against a carrier for injuries to a passenger caused by a defective station platform, where the answer alleged and the evidence showed that the defects of the platform were apparent and obvious, a requested charge that if the platform was in an obviously dilapidated or unsafe condition, so that plaintiff should have known of the same, he would be presumed to have known thereof, and could not recover if he was in any way negligent in moving about or stepping upon the platform, should have been given, and it was not sufficient to charge that if plaintiff knew the defective condition of the platform, and a person of ordinary prudence having such knowledge would not have gone upon it, he could not recover, and to give a general charge on contributory negligence. *Houston, etc., R. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

68. *St. Louis, etc., R. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

A railroad company must keep the platform at a station on which it invites passengers to alight in good condition,

and is liable for accidents to passengers alighting from its train by reason of a defect in the platform. *McClanahan v. St. Louis, etc., R. Co.* (Mo. App.), 126 S. W. 535.

69. Must know of defect.—*Munro v. St. Louis, etc., R. Co.* (Mo. App.), 135 S. W. 1016.

70. *Texas Mid. Railroad v. Brown* (Tex. Civ. App.), 58 S. W. 44. See *James v. Missouri Pac. R. Co.*, 107 Mo. 480, 18 S. W. 31.

It has been declared to be gross negligence for a railroad to allow a hole, eight inches wide and six feet long, to remain in the floor of that part of a platform commonly used by passengers, for the period of four days after knowledge thereof by its agents. *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 10 Am. & Eng. R. Cas., N. S., 729, 42 Am. St. Rep. 516.

Where a hole over three feet long six inches wide, and twelve inches deep had remained in a depot platform for three or four weeks, it had existed long enough for the carrier, in the exercise of the care it owed to its passengers, to have discovered and repaired it, and the carrier was guilty of gross negligence where its agent had actual knowledge of the presence of the hole and it was not repaired. *Biggie v. Chicago, etc., R. Co.*, 140 S. W. 602, 159 Mo. App. 350.

71. Patent defects.—*Atchison, etc., R. Co. v. Allen*, 88 Pac. 966, 75 Kan. 190, 10 L. R. A., N. S., 576.

platform should be of sufficient width so that passengers thereon will not be injured by passing trains. In a case in which a passenger was injured, while on a platform between two tracks, in consequence of being caught between two trains passing on either side, a recovery by him was sustained.⁷² It has been said that a railroad company, "is not required by law to construct a depot platform of sufficient length to furnish suitable means to enable passengers to get off the train at both ends of every passenger car on the train;" passengers must ascertain at what end of the cars they must get off.⁷³ A passenger who, in the daytime, elected to alight from the rear end of a car to the ground when, by passing through the car to the front end, she could have stepped from the car steps to the platform, was denied recovery against the carrier.⁷⁴ But in a case in which it appeared that plaintiff was injured while alighting, in the dark, from the rear end of a car, the front end only of which was opposite the platform, and that the passengers had not been warned against leaving the car by the rear, or directed to leave by the front door, a judgment for plaintiff was sustained.⁷⁵ For cases involving the right of passengers to recover for injuries received in consequence of trains not being stopped alongside station platforms see ante, "Receiving and Discharging Passengers," § 2285. The platform should not be so far below the level of the car steps as to render it difficult or dangerous to board and alight from the cars,⁷⁶ and the question is usually one for the jury.⁷⁷ But it is not negligence per se to have a platform eighteen inches below the lowest step of the cars.⁷⁸ Where a station platform was on a level with the platforms of the cars and two feet higher than the lowest step of the cars, it was held to be a question of fact for the jury whether the construction was or was not dangerous.⁷⁹ But it has been held to be negligent for a railroad company to have a station platform higher than the car steps, and to require passengers to board a train by entering the baggage coach.⁸⁰ A railroad company can not be required to have the platforms at its various stations of the same height, and the mere fact that the platform at one station is higher than at other stations does not tend to show a breach of the carrier's duty to passengers.⁸¹

⁷² *Illinois, etc., R. Co. v. Davidson*, 22 C. C. A. 306, 76 Fed. 517.

⁷³ *Gulf, etc., R. Co. v. Warlick*, 1 Ind. T. 10, 35 S. W. 235, 4 Am. & Eng. R. Cas., N. S., 32.

⁷⁴ *Eckerd v. Chicago, etc., R. Co.*, 70 Iowa 353, 30 N. W. 615, 27 Am. & Eng. R. Cas. 114.

⁷⁵ *McDonald v. Illinois Cent. R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263.

⁷⁶ *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477, 58 Am. & Eng. R. Cas. 232.

⁷⁷ **Question for jury.**—Where, in an action for injuries sustained by plaintiff's wife in attempting to board defendant's train, she testified that it was "quite a high step" from the platform to the steps of the coach, and defendant's employees testified that the distance was twelve or fourteen inches, the question of defendant's negligence in not providing a better platform was for the jury. *Ft. Worth, etc., R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962.

⁷⁸ Where the distance from the step of a railroad passenger car to the platform provided for passengers to alight was not more than eighteen inches, the

fact that the company did not provide a stool or box for passengers to use in alighting to such platform, as an additional step, was not such negligence as would authorize a recovery for injuries sustained by a fall of a passenger while alighting. *Texas Mid. R. Co. v. Frey*, 61 S. W. 442, 25 Tex. Civ. App. 386.

⁷⁹ **Negligence in construction a question for jury.**—*Gulf, etc., R. Co. v. Fox* (Tex.), 6 S. W. 569, 33 Am. & Eng. R. Cas. 543.

⁸⁰ The court said: "We have no hesitation in holding that a railroad company which affords no greater facilities to passengers in boarding their trains than the alternative to step down to the ground from a platform, and thence to climb up the car steps into the proper passenger coach, or to step into a baggage car and thence to walk to the rear, crossing over car platforms while the train is in motion, is guilty of gross negligence, and is responsible in damages for injuries in their attempt to perform this unjustly imposed feat." *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514.

⁸¹ *Nichols v. Dubuque, etc., R. Co.*, 68 Iowa 732, 28 N. W. 44, 27 Am. & Eng. R. Cas. 183.

§ 2362. Proximity of Platform to Track.—The platform should not be constructed so close to the track that passing cars or locomotives project over, and make it dangerous for passengers to stand on, the platform.⁸² On the other hand it should be constructed sufficiently close to the track as not to leave a dangerous space between the platform and cars.⁸³ If the platform is necessarily constructed on a curve so that the cars in passing the platform touch it at a tangent, producing an unusually wide space between the platform and the ends of the cars, the space so left should be sufficiently lighted and otherwise properly guarded.⁸⁴ Whether or not a carrier exercises due care and diligence in maintaining a platform so near the track that one occupying a position on the edge is in danger on account of the overhanging of certain portions of the locomotive and cars, is to be settled by the jury.⁸⁵ But where a platform was necessarily constructed upon a curve so as to be convex toward the cars, and it was shown that the unavoidable opening between the platform and the ends of the cars was greater than necessary and so great as to be dangerous to passengers, it was held error to leave the question of the defendant's negligence to the jury.⁸⁶ And in a case in which there was no proof that the platform was not constructed in the ordinary way, or that the space between it and the car was greater than the exigencies of the business or the operations of the railroad required, but it was, on the contrary, shown that the platform had been in use for many years and that no one, other than the plaintiff, had ever been injured, or had suffered any inconvenience on account of the distance of the platform from the cars, it was held as a matter of law that plaintiff could not recover for injuries sustained, while alighting, in consequence of falling between the car and platform.⁸⁷

82. *Archer v. New York, etc., R. Co.*, 106 N. Y. 589, 13 N. E. 318; *Dobiecki v. Sharp*, 88 N. Y. 203, 8 Am. & Eng. R. Cas. 485.

The allegations in the petition showing that the plaintiff, while sustaining the relation of a passenger to the defendant company, and at a time when he was on a platform constructed and maintained by the defendant for the use of its passengers at a station on its line, received a physical injury from the running of the defendant's locomotive and train, the petition was not subject to general demurrer. *Georgia R., etc., Co. v. Adams*, 127 Ga. 408, 56 S. E. 409.

In *Houston, etc., R. Co. v. Reason*, 61 Tex. 613, the testimony of a witness tended to show that such was the construction of the platform on which the appellee says he was when struck, that the cars, in passing, extended over it some eighteen inches; his own testimony showed that there was no lights at the depot. If these things were true (and whether so or not was for the jury), it was held that the evidence showed a want of due care by the appellant towards persons who might visit its depot in the night to take passage on its trains.

83. *Illinois Cent. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290.

That there was a space of ten inches between the station and car platforms does not of itself constitute negligence. *Woolsey v. Brooklyn Heights R. Co.*, 108 N. Y. S. 16, 123 App. Div. 631.

Facts held to show negligence.—A rail-

road was negligent in maintaining a platform, on which passengers were expected to alight, with a space of twelve or thirteen inches between it and the lower steps of the car. *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, 70 S. W. 359, affirmed in 72 S. W. 165, 96 Tex. 301.

It has been held that where a railroad company has provided a safe means of exit from its cars but another way, through the baggage car, is in such general use by passengers as to induce the belief that it was provided, at least in part, for that purpose, a passenger who uses the latter way, and who is injured by falling through the space, seventeen inches wide, between the doorsill of the baggage car and the platform, may recover against the company for negligently failing to render such way safe. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811.

84. *Boyce v. Manhattan R. Co.*, 118 N. Y. 314, 23 N. E. 304, 41 Am. & Eng. R. Cas. 111, affirming 54 N. Y. Super. Ct. 286.

85. Question of fact.—*Georgia R., etc., Co. v. Adams*, 127 Ga. 408, 56 S. E. 409.

86. *Ryan v. Manhattan R. Co.*, 121 N. Y. 126, 23 N. E. 1131, 44 Am. & Eng. R. Cas. 426, reversing 49 Hun 609, 1 N. Y. S. 899.

87. *Laffin v. Buffalo, etc., R. Co.*, 106 N. Y. 136, 12 N. E. 599, 30 Am. & Eng. R. Cas. 596, 60 Am. Rep. 433, reversing 36 Hun 638, mem.

Movable Platform.—It seems that cases may arise in which it is necessary for a carrier to supply a movable platform or other appliance to lessen the distance between the permanent platform and the car,⁸⁸ and the liability of a railroad company for injuries to a person attempting to board a train, caused by the inadequacy of a movable platform to cover the entire space between the permanent platform and the entrance of its train, is to be determined upon the footing of what might reasonably be required of it in the light of knowledge existing at the time of the accident, and not that acquired afterwards.⁸⁹ Although a movable platform constructed by a railroad to enable passengers to board a train without danger of stepping into an open space is the most perfect device known and is perfectly constructed, the railroad will still be negligent as to the means provided passengers for entering cars, where the operation of the platform in connection with the train is wanting in the degree of care required in a carrier of passengers in such case.⁹⁰

§ 2363. **Ingress to and Egress from Platform.**—Care should be exercised to render safe the ways by which passengers go upon and leave the platform.⁹¹ Thus, steps leading up to the station platform and which would naturally be used by passengers should be maintained in a safe condition.⁹² Although one safe way of egress from the platform has been provided, it does not follow that the rest of the premises may be left in such condition as the company may deem proper, without being chargeable with negligence; if there be upon the premises where passengers are invited, a place likely to cause injury to them, the company must exercise care for their protection.⁹³

88. Movable platform.—*Anshen v. Boston Elevated R. Co.*, 205 Mass. 32, 91 N. E. 157.

In an action for injuries to a passenger, falling into the space between the car and the platform while attempting to board a car at a subway station, it appeared that the clearance of three inches between the cars and the platform was the minimum clearance necessary. The distance between the center of the end door of the second car and a five-car train was normally eight inches, and might vary two inches more or less, owing to the swing of the car. The passenger attempted to board the second car through the end door, and fell into the space between the car and the platform, estimated at nine and one-half inches. Held as a matter of law not to show the carrier's negligence in failing to use a movable platform or other appliance, so as to lessen the space between the platform and the car. *Anshen v. Boston Elevated R. Co.*, 91 N. E. 157, 205 Mass. 32.

89. Inadequacy of platform.—*Plummer v. Boston Elevated R. Co.*, 198 Mass. 499, 84 N. E. 849.

90. Negligent operation of movable platform.—*Plummer v. Boston Elevated R. Co.*, 198 Mass. 499, 84 N. E. 849.

91. Texas, etc., R. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034.

Duty to provide safe access to and from stations held not to make carrier negligent for placing and leaving cross-ties along the track near a flag station. *Fulghum v. Atlantic, etc., R. Co.*, 74 S. E. 584, 158 N. C. 555.

92. McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114; S. C., 29 Iowa 170.

93. Ingress and egress.—In an action for injuries sustained while leaving defendant's depot, the court properly refused an instruction that, if defendant had provided one safe egress from its platform, it could leave the remainder of its premises as it might deem proper, without being chargeable with negligence. *Gulf, etc., R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563.

A railroad company was liable for injuries to one of its passengers, sustained after alighting from a train at a station by slipping down an incline on a platform leading to the waiting room, because of the failure of the railroad to use ordinary care to keep it in safe condition for the use of passengers, or to warn them that it was not a proper way for them to take in going to and from the train, though another and safe way to the waiting room had been provided by the company, where the platform on which the injury occurred was usually used by passengers going to and from the train, and where such use had been continued for such a length of time that the railroad company necessarily knew of the use. *Missouri, etc., R. Co. v. Criswell*, 101 Tex. 399, 108 S. W. 806.

A railroad company had provided a stairway for passengers through the company's station building and also a stairway at one end of the passenger platform. At the other end of the platform there was a stairway leading to a lower platform. This stairway had been built,

§ 2364. Obstructions on Platform.—Care must be exercised to have the platform free from obstructions dangerous to passengers, who are themselves in the exercise of ordinary care.⁹⁴ Thus, it may be negligence to leave a railroad spike,⁹⁵ an oil bucket,⁹⁶ freight,⁹⁷ or a trunk, on the platform at a station so near a train as to interfere with passengers in their efforts to board the train. It is negligence to permit a truck to stand so near the track as to strike a passenger boarding a train.⁹⁸ So to leave an express truck on a depot platform after night and within five inches of a passing passenger train is negligence.⁹⁹ But a carrier is not negligent in placing trunks on a depot platform, where a sufficient passageway is left.¹ And it has been held that a passageway of two feet left on the outer edge of a depot platform in placing trunks on it was sufficient.² Where mail bags are left on any part of the platform open to the use of passengers, it is the duty of the company, by adequate lighting or otherwise, to guard against injuries to passengers in consequence of the obstruction.³ Whether it is negligence to leave a baggage truck on a platform in such a place as to be in the way of passengers alighting from a train has been held to be a question for the jury.⁴ But in an action to recover for injuries received while alight-

and was used exclusively, by an express company, but it was open at the top and there was nothing to indicate that it was not for the use of passengers. Plaintiff, a passenger, in attempting to leave the station by passing down this stairway in the dark, fell from the lower platform and was injured. In her suit to recover for the injury sustained, it was held that the company was liable if it was guilty of negligence in leaving the stairway, where it left the upper platform, open and without any guard or notice to warn passengers that the stairway was not to be used as a way of passage to the street below, and if she was injured by such neglect or want of care on the part of the defendant, without any neglect or want of care on her part contributing to the injury. *Beard v. Connecticut, etc., R. Co.*, 48 Vt. 101.

A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous. It was held that the company was liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. *Longmore v. Great Western R. Co.*, 19 Com. B., N. S., 115 Eng. Com. L. 183.

94. Baker v. Clark, 99 Fed. 911, 40 C. C. A. 174.

A common carrier of persons for hire must keep the depot and platform free from dangerous obstructions. *Atchison, etc., R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681.

A railroad should keep its depot platform reasonably safe and free from obstacles on which passengers are liable to be injured. *Irvin v. Missouri Pac. R. Co.*, 81 Kan. 649, 106 Pac. 1063, 26 L. R. A., N. S., 739.

95. Liability for injury to alighting passenger by obstacle on platform.—Plaintiff, a passenger alighting from defendant's train on its regular depot platform, stepped from the last step of the car onto a railroad spike. The head of the spike had a thin, sharp edge, which injured the ball of plaintiff's foot. Held, that defendant was liable for the injury. *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737.

96. Texas, etc., R. Co. v. Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942.

Trunk.—A carrier must exercise a high degree of care in providing at its regular stations means by which passengers may board and alight in safety, and in keeping the same free from unnecessary obstructions, and the fact that a trunk was placed on the platform, so near the track that a passenger attempting to board a train in motion was injured by coming in contact with it, may be considered in determining the carrier's liability. *Roberts v. Atlantic, etc., R. Co.*, 155 N. C. 79, 70 S. E. 1080.

97. Freight.—It is the duty of a carrier to so deposit freight on a platform as not to be dangerously near a passing coach. *Chicago, etc., R. Co. v. Shannon*, 50 Tex. Civ. App. 194, 111 S. W. 1060.

98. Bell v. Southern R. Co., 94 Miss. 440, 49 So. 120.

99. Express truck on platform.—*Irvin v. Missouri Pac. R. Co.*, 81 Kan. 649, 106 Pac. 1063, 26 L. R. A., N. S., 739.

1. Trunks on platform.—*Strain v. Vicksburg, etc., R. Co.*, 123 La. 407, 49 So. 2.

2. Passageway of two feet.—*Strain v. Vicksburg, etc., R. Co.*, 123 La. 407, 49 So. 2.

3. Sargent v. St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 58 Am. & Eng. R. Cas. 184, 19 L. R. A. 460.

4. Bethmann v. Old Colony R. Co., 155 Mass. 352, 29 N. E. 587.

ing from a train in consequence of stepping on a small piece of wood—a bung of a barrel—lying on the platform, it was held that, there being no evidence to show how the bung came there and how long it had been there, a nonsuit was properly granted.⁵ The question as to whether a railroad company is properly chargeable with negligence in consequence of obstructions being left upon a station platform must necessarily depend somewhat upon the character of the station. While the presence of an obstruction upon the platform of a station which is used by a considerable number of passengers might give rise to an imputation of negligence it would not necessarily be so in the case of a flag station which is only occasionally used for the reception or discharge of passengers, or is used by only a few passengers. Thus, it has been held that where a railroad company left milk cans and other freight on the platform, used for the reception and discharge of both freight and passengers, at a flag station, where trains stopped for passengers or freight only upon receiving flag signals, and at which the company kept no agent, the company was not liable to a passenger who, in broad daylight and while looking to see where she could get on the train, stumbled over the obstructions and was injured.⁶

Act of Person Permitted to Use Platform.—A railway company is liable for injury to a passenger by the negligence of a newspaper porter while moving a truck along a platform with the carrier's consent; that the newspaper company may also be liable does not relieve the carrier from its duty to furnish the passenger a safe passage to its train.⁷ A railroad company can not avoid its liability to passengers because of dangerous obstacles on its depot platform on the ground that they were placed thereon by an express company which was permitted to use the platform for its own purpose.⁸

Act of Stranger.—Where an obstruction on a platform is the act of a stranger, in the absence of a showing that the carrier had notice thereof or should have had notice by reason of its long existence, etc., the carrier can not be held liable.⁹

§ 2365. Snow and Ice on Platform.—The carrier should exercise care to remove snow and ice which has accumulated on a platform, or to make it safe by sprinkling sand or ashes on the slippery places.¹⁰

5. *Pennsylvania*.—Bernhardt v. West Pennsylvania R. Co., 159 Pa. 360, 28 Atl. 140.

6. *California*.—Falls v. San Francisco, etc., R. Co., 97 Cal. 114, 31 Pac. 901.

7. **Injury by newspaper porter.**—Mangum v. North Carolina R. Co., 145 N. C. 152, 58 S. E. 913, 13 L. R. A., N. S., 589.

8. **Act of person permitted to use platform.**—Irvin v. Missouri Pac. R. Co., 81 Kan. 649, 106 Pac. 1063, 26 L. R. A., N. S., 739.

9. **Act of stranger.**—Where defendant's section foreman gave some old ties, removed from the track, to a stranger, and defendant's passenger was injured by the negligence of such stranger in leaving the ties on the station platform, defendant is not liable for such injuries, in the absence of any showing that such stranger was acting as agent of defendant. Moriarty v. Boston, etc., Railroad, 88 N. E. 585, 202 Mass. 166.

The presence of a piece of tobacco on a stairway leading to a railroad station, upon which a passenger stepped and fell, is, not, in the absence of evidence to indicate that the railroad had a reasonable

opportunity to discover and remove it, sufficient to charge the railroad with negligence. Kaplowitz v. Interborough Rapid Transit Co., 103 N. Y. S. 721, 53 Misc. Rep. 646.

10. *Shepherd v. Midland R. Co.*, 25 L. T. (N. S.) 879; *Seymour v. Chicago, etc., R. Co.* (U. S.), 3 Biss. 43, Fed. Cas. No. 12,685; *Chicago, etc., R. Co. v. Smith*, 59 Ill. App. 242; *Weston v. New York, etc., R. Co.*, 73 N. Y. 595, affirming 42 N. Y. Super. Ct. 156; *Timpson v. Manhattan R. Co.*, 52 Hun 489, 5 N. Y. S. 648, 24 N. Y. St. Rep. 629.

Where a carrier, after a heavy snowfall, scraped the sidewalk on its wharf, but allowed ice to remain at places on and outside the walk, without sanding it, it was liable to a passenger for injuries from a fall on the ice. *Rodick v. Maine Cent. R. Co.*, 85 Atl. 41, 109 Me. 530.

A passenger injured by falling on ice allowed to remain on a wharf, was not chargeable with negligence in failing to discover the ice, especially where she could not have seen it, if she had looked, on account of it being covered with snow. *Rodick v. Maine Cent. R. Co.*, 85 Atl. 41, 109 Me. 530.

§§ 2366-2368. Injury by Objects Thrown on Platform—§ 2366. In General.—In some cases, the right of recovery against the carrier is based, not upon any defect in the construction or maintenance of the platform, but upon the ground that the platform was rendered unsafe in consequence of objects being thrown thereon. Thus a railroad company has been held liable to a passenger, who had alighted from a train and was standing near by, for injuries received in consequence of a burning piece of wood being carelessly thrown from the train by a servant of the company, although the platform upon which the passenger was standing was not the one intended for the accommodation of passengers.¹¹ But a passenger who, while standing on the platform at a station, was injured by the throwing against him of the dead body of a woman who had been struck by a train at a crossing fifty feet away, was denied a recovery against the carrier.¹²

§ 2367. Sparks Flying from Passing Engine.—Where plaintiff, a passenger, while standing on the platform at a station, had his eye put out by a large number of sparks which escaped from the bottom of a passing engine, and the evidence tended to show that a properly constructed and carefully managed ash pan would have prevented such an emission of sparks or even any considerable fall of sparks, it was held that the question of defendant's negligence was properly submitted to the jury.¹³

§ 2368. Mail Pouches Thrown on Platform.—A passenger who is properly on the station platform is entitled to care on the part of the railroad company to protect him from injury by the throwing of mail pouches from passing trains;¹⁴ hence, it may be said to be the carrier's duty to protect passengers against injuries from mail sacks, by requiring them to be thrown at a particular place, by posting warning notices, or by other available means.¹⁵ And the railroad can not be relieved from liability for negligence in this respect by the existence of a custom to throw mail pouches from passing trains and the fact that no injury has resulted.¹⁶ Nor is it an answer to a claim for damages that the person negligently throwing the missile was not an employee of the company, but a servant or agent of the United States.¹⁷ But a railroad company can not be held liable to a passenger for injuries received in consequence of the careless throwing of a mail bag from a moving train by a United States mail agent, simply because the baggage master failed to observe how mail bags were thrown off, even though a printed notice to passenger trainmen and mail agent, designating the place for the delivery of mail from moving trains, declared that, "It must be distinctly understood, however, that this does not in any way relieve baggage masters and mail agents from using all possible precaution against liability of injuring any one in throwing off mail."¹⁸

§ 2369. Runaway Horse on Platform.—Where a passenger, while standing on a station platform, waiting for a train, was injured by a runaway horse which came upon the platform, it was held that there was no evidence of negli-

11. *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568.

12. *Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 Atl. 399, 5 Am. & Eng. R. Cas., N. S., 672, 35 L. R. A. 199, 55 Am. St. Rep. 728.

13. *Philadelphia, etc., R. Co. v. Young*, 90 Fed. 709, 33 C. C. A. 251.

14. *United States*.—*Southern R. Co. v. Rhodes*, 86 Fed. 422, 30 C. C. A. 157.

Massachusetts.—*Snow v. Fitchburg R. Co.*, 136 Mass. 552, 18 Am. & Eng. R. Cas. 161, 49 Am. Rep. 40.

Missouri.—*Hughes v. Chicago, etc., R.*

Co., 127 Mo. 447, 30 S. W. 127, 2 Am. & Eng. R. Cas., N. S., 284.

New York.—*Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 21 Am. & Eng. R. Cas. 331, 49 Am. Rep. 540.

15. *Huddleston v. St. Louis, etc., R. Co.*, 90 Ark. 378, 119 S. W. 280.

16. *Hughes v. Chicago, etc., R. Co.*, 127 Mo. 447, 30 S. W. 127, 2 Am. & Eng. R. Cas., N. S., 284.

17. *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 21 Am. & Eng. R. Cas. 331, 49 Am. Rep. 540.

18. *Pennsylvania R. Co. v. Russ*, 57 N. J. L. 126, 30 Atl. 524, 26 L. R. A. 283.

gence on the part of the company.¹⁹

§ 2370. Platform Facilities on Only One Side Track.—It is for the carrier to determine on which side of the train passengers shall alight from and board trains, and if the carrier has a platform or other facilities for entering and leaving the cars with safety on the depot side of the track, and passengers either know, or can, by the exercise of ordinary care, discover on which side the facilities are located the failure to have the opposite side likewise prepared as a place for entering and leaving the cars can not be regarded as negligence.²⁰ But although a railroad company has made provision for passengers to leave its cars on one side of its track, if it is dangerous to leave on the other side it may, under some circumstances, be a question for the jury whether it is negligence for the company not to have provided some means to prevent passengers from leaving on the wrong side.²¹ If it is so dark on both sides of the train that a passenger can not, by the exercise of ordinary care, discover the platform provided for the use of passengers, the carrier is responsible for injuries resulting from the defective or dangerous arrangement of the premises on the side on which the passenger alights, provided he is not negligent in alighting or in his subsequent conduct.²² Where an elevated train was stopped at a station where there was a platform on the south side, but none on the north side, of the track, and there was no guard provided to prevent passengers from alighting on the north side, a verdict in favor of a passenger who, in haste to catch a boat, without waiting to hear the name of the station announced, hurried from the car and stepped off in the dark, fell and was injured, has been sustained.²³ And even although a railroad company has provided a safe platform on one side of its tracks intended as a means of exit from its trains, if there is also another platform on the other side of its tracks, located in a perilous position and which passengers would naturally use, and are accustomed to use, in leaving trains, the company owes to its passengers, especially those who are strangers, the duty to exercise care in guarding them against going into the dangerous situation.²⁴ A street-railway company which ran cars out to a summer resort where it maintained pleasure grounds, had constructed its double track at the resort so as to form a loop around which the cars ran in returning. On the outside of the loop nearest the pleasure grounds

19. *Brooks v. Old Colony R. Co.*, 168 Mass. 164, 46 N. E. 566.

20. *Kentucky*.—*Louisville, etc., R. Co. v. Ricketts*, 93 Ky. 116, 19 S. W. 182; S. C., 96 Ky. 44, 27 S. W. 860, 16 Ky. L. Rep. 281, 6 Am. & Eng. R. Cas., N. S., 186; S. C., 18 Ky. L. Rep. 687, 37 S. W. 952.

Michigan.—*Michigan, etc., R. Co. v. Coleman*, 28 Mich. 440, 12 Am. R. Rep. 59.

Pennsylvania.—*Drake v. Pennsylvania R. Co.*, 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

21. *McKimble v. Boston, etc., R. Co.*, 139 Mass. 542, 2 N. E. 97, 21 Am. & Eng. R. Cas. 213.

22. *Louisville, etc., R. Co. v. Ricketts*, 18 Ky. L. Rep. 687, 37 S. W. 952. But compare *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 361, 52 Am. & Eng. R. Cas. 304.

23. *Kentucky, etc., Bridge Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448.

24. *Illinois, etc., R. Co. v. Davidson*, 76 Fed. 517, 22 C. A. 306.

Plaintiff, after buying a ticket for a train, the usual place of boarding which was on the depot side, where the ground between the tracks was macadamized and smooth, and where the conductor and

assistants stood during the letting off and taking on of passengers, went to the further side of and beyond the tracks, and then returning to and attempting to board the train from such further side, where the ground was lower and less smooth, was thrown and injured, the train having started up before he attempted to board it, or while he was in the act of doing so. His requested instruction that, where it is customary for passengers to alight at a station on both sides of the train, it is the carrier's duty to provide equal facilities for passengers to alight or take passage on both sides, was given with the qualification: "That would be so if the railroad company expressly or impliedly invited them to alight on both sides, but not otherwise." Held that, construing the term "equal facilities" to include the keeping of equal watch or lookout on both sides to prevent injury to passengers, there was no error, though the carrier might know, without entering protest, that passengers for reasons of their own frequently got on or off the wrong side at the station in question. *Du Bose v. Atlantic, etc., R. Co.*, 62 S. E. 255, 81 S. C. 271.

cinders had been spread so as to form an admittedly safe place for alighting. The track within the loop was vacant ground. In an action by a passenger to recover for injuries received alighting from a car on the side next the interior of the loop in consequence of the uneven condition of the ground, the court was of the opinion that if the uneven condition of the ground amounted to negligence, the company would be liable if passengers had been, by defendant's course of conduct, invited to alight on the inside of the hoop.²⁵ A verdict for plaintiff in an action to recover for the death of a passenger who, in alighting from a train on the opposite side from the platform in accordance with a customary and known practice, was killed by a passing train, has been sustained.²⁶

§§ 2371-2372. Safe Place to Board or Alight and Intervening Tracks, etc.—§ 2371. In General.—A carrier is required to provide reasonably safe places for passengers to alight,²⁷ and to furnish suitable means of access to its trains.²⁸ And it is bound to use proper care to see that a passenger alighting from a train at a station has a safe way of exit from the station grounds, and the relation of carrier and passenger continues until such exit is completed.²⁹ It is said that it is the duty of a railroad company so to fix its station or depot that a passenger, who gets off at the depot or place to alight, may get off the car without danger; and it is also its duty to fix such a way of exit from the depot over its right of way that the passenger may go away from the place he is invited to get on and off at without danger to life or limb; but it is not its duty to see him safe and secure in his exit from the track and over its right of way.³⁰ In some cases it is said that the law requires a high degree of diligence not only in the transportation of passengers, but also in furnishing an opportunity for approaching and leaving the cars for that purpose,³¹ and others say that in clearing the approaches to its trains, a railroad company is only bound to exercise ordinary care in view of dangers to be apprehended.³² Thus, it has been said that a failure to remove snow from its tracks is not negligence per se.³³ The carrier must exercise care that the way along which pas-

25. *Poole v. Consolidated St. R. Co.*, 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744.

26. *Robostelli v. New York, etc., R. Co.*, 33 Fed. 796, 34 Am. & Eng. R. Cas. 515.

27. **Reasonably safe place.**—*Serviss v. Ann Arbor R. Co.* (Mich.), 135 N. W. 343; *Le Duc v. St. Louis, etc., R. Co.*, 159 Mo. App. 136, 140 S. W. 758.

A carrier of passengers must exercise the highest degree of care to safely transport passengers, and to give them a reasonably safe place at which to alight from the train at their destination, but it need not stop at the station platform. *Deskens v. Chicago, etc., R. Co.* (Mo. App.), 132 S. W. 45.

Where the conductor of a train invites a passenger to alight from a car in which he was riding at a dangerous place, the carrier is guilty of negligence. *Austin v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 385.

28. **Suitable means for entering or leaving train.**—*Pennsylvania R. Co. v. Peoples*, 31 O. St. 537.

29. **Safe exit.**—*Legge v. New York, etc., R. Co.*, 197 Mass. 88, 83 N. E. 367, 23 L. R. A., N. S., 633.

30. *Seaboard, etc., Railway v. Smith*, 3 Ga. App. 1, 59 S. E. 199; *Central Railroad v. Thompson*, 76 Ga. 770, 778.

"The obligation of the company is to furnish the way—an easy and safe way

out of the car by steps onto the landing at the depot, and a safe road or path thence over its track and right of way at the depot, and there its obligation ceases in these respects. The passenger must himself step off on the convenient arrangement for his egress out of the car and over the road prepared for that exit. It is not bound to insure him a safe exit, but to insure him a safe way for him to use for an exit." *Seaboard, etc., Railway v. Smith*, 3 Ga. App. 1, 59 S. E. 199.

31. **High degree of care required.**—*Ferrell v. C. & D. R. Co.*, 12 Wkly. L. Bull. 234, 9 O. Dec. Reprint 361.

It is the duty of a carrier to use the highest degree of care, skill, and diligence, reasonably practicable and consistent with the operation of its railroad, in providing passengers an opportunity and the means necessary to a safe passage from the train. *Chicago & A. Ry. Co. v. Noble*, 132 Ill. App. 400; *Johnston v. Cedar Rapids, etc., R. Co.*, 119 N. W. 286, 141 Iowa 114; *St. Louis, etc., R. Co. v. Tittle* (Tex. Civ. App.), 115 S. W. 640.

32. **Ordinary care in view of dangers apprehended.**—*Louisville, etc., R. Co. v. Walker*, 177 Ind. 38, 97 N. E. 151; *Cincinnati, etc., R. Co. v. Dagner*, 20 O. C. C. 712, 10 O. C. D. 809.

33. *Cincinnati, etc., R. Co. v. Dagner*, 20 O. C. C. 712, 10 O. C. D. 809.

sengers must necessarily or would naturally pass in taking or leaving trains is rendered duly safe for the purpose. Thus, it is the duty of a railroad company to afford to the passengers whom it undertakes to carry a reasonable and safe opportunity to pass from the room or building in which it receives passengers for transportation to the cars, when the proper time comes for them to take their seats.³⁴ In a case in which it appeared that a train had been stopped, during the progress of a severe snow storm, a short distance from the station platform and opposite a side track, which was so near the train that passengers in alighting would naturally step on one of the rails, and which was at the time covered by snow, a verdict for plaintiff, who had been injured in consequence of slipping on the rail when alighting from the train, was sustained.³⁵ But a passenger who was injured by stumbling over one of the rails of a track intervening between the station and a train which she was about to take, the rails being laid in the usual manner, was denied recovery against the carrier.³⁶

Pass Way Leading Across Highway.—The fact that the pass way used by an alighting passenger in going to the station, is a public highway, does not

34. *Warren v. Fitchburg R. Co.* (Mass.), 8 Allen 227, 85 Am. Dec. 700.

Where the passage way from the waiting room to the point where passengers board the train ran between the depot and the railroad track, was not more than three feet wide, and upon this passage way several baggage trucks had been placed by the employees of the railroad, upon which trucks a number of negroes were seated, thus compelling a passenger to pass between the trucks and the edge of the passage way next to the track, and while a passenger was passing the trucks walking upon the platform, entirely ignorant of the approach of a train, the engine approached her from the rear; and without warning or signal to her, a portion of the engine, which projected over the platform, struck the passenger on the back, knocking her down and inflicting injuries to her, it was held that there was a good cause of action against the railroad for negligence. *Georgia R., etc., Co. v. Lloyd*, 129 Ga. 650, 59 S. E. 801.

Where a passenger who had to pass through an opening in a freight train, which was standing on a side track between the station and the main track, in order to reach his train, and was injured by the sudden closing up of the train without warning, the defendant was held liable. *Louisville, etc., R. Co. v. Thompson*, 64 Miss. 584, 1 So. 840, 30 Am. & Eng. R. Cas. 541.

In *Nicholson v. Lancashire & Y. Ry. Co.*, 3 Hurl. & C. 534, the plaintiff sued the defendants, common carriers, for not sufficiently lighting their depot, and for not providing proper and sufficient accommodation for their passengers to depart safely from their station after their arrival, and for leaving hampers in the way of passengers departing, over which the plaintiff fell and was injured. The facts were these: The plaintiff, a passenger on the defendants' railway, was set down at T., after dark, on the side of

the line opposite the station and the place of egress. The train was detained more than ten minutes at T., and from its length, blocked up the ordinary crossing to the station, which was on the level. The ticket collector stood near the crossing with a light, telling passengers to "pass on." The plaintiff passed down the train to pass behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. It was held that these facts disclosed evidence for the jury of negligence on the part of the company.

Where the train upon which plaintiff was a passenger was not stopped at, some distance from the platform of the station, and plaintiff was injured in consequence of the dangerous condition of the premises which he was compelled to traverse to reach the station, a judgment for defendant was reversed on error and a new trial ordered. *Burnham v. Wabash, etc., R. Co.*, 91 Mich. 523, 52 N. W. 14.

It is the duty of a carrier to transport passengers to their destination and there afford them reasonable opportunity to alight from the cars and depart from the train yards or depot grounds in safety, and the duty is not performed by stopping before the train reaches the usual place for debarkation, nor by stopping where there are cars on parallel tracks so close together that by the projection of the cars over the rails, passengers, in order to enter or alight from trains, are forced into a crowded pass way, where the slightest motion of either train or a rush of the passengers themselves is not unlikely to result in injury. *Smith v. North Carolina R. Co.*, 147 N. C. 448, 61 S. E. 266, 17 L. R. A., N. S., 179.

35. *Mensing v. Michigan, etc., R. Co.*, 117 Mich. 606, 76 N. W. 98.

36. *Potter v. Wilmington, etc., R. Co.*, 92 N. C. 541, 21 Am. & Eng. R. Cas. 328.

affect the decree of care owed the passenger by the carrier.³⁷ A railway company owes to one occupying the relation of a passenger, actually or constructively, a different and higher degree of care than it does to a traveller about to cross its track at a highway.³⁸ Where a passenger, on alighting at a regular station, crosses the track at a public crossing in the rear of the train, and is run over by the train backing up without notice, the railroad company is liable.³⁹

At Place Other than That Designated.—The carrier is under no obligation to provide a safe means of entrance or exit for a passenger who, voluntarily and not in pursuance of any direction of the carrier, enters or alights at a place other than the one designated for that purpose.⁴⁰ It can not be stated as a proposition of law, that it is a duty to keep the track clear for pursuers, or that a passenger has a right to chase a flying train. As a general rule, on the contrary, no such duty or right exists; and, for the sake of the public, as well as of the company, it is better they should not exist.⁴¹

§ 2372. Running Trains on Intervening Tracks.—Where a railroad takes on or discharges a passenger at a place which requires him to cross another railroad track in order to reach the train or station, it owes him the duty to protect him from injury while he is so engaged, and if he is injured by another train while crossing, he is entitled to recover.⁴² A railroad company fails

37. Pass way leading across highway.—Washington, etc., R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035.

38. Duty greater than to traveller crossing tracks.—Washington, etc., R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035.

39. Sudden movement of train.—Dallas, etc., R. Co. v. Reeman (Tex. Civ. App.), 32 S. W. 45.

40. At place other than that designated.—Central Railroad v. Thompson, 76 Ga. 770.

In an action to recover for the death of a passenger killed at a point some distance from the station, a charge with regard to the duty of the company so to arrange its station as to allow the passenger a safe place to alight and a safe means of exit from the station is hardly apposite. *Central Railroad v. Thompson*, 76 Ga. 770.

Ordinarily, the place to board a train, and the sole place, is that provided by the company for the purpose. Whether, under the circumstances, pursuit with the intention of boarding a moving train, could properly be undertaken at all, or could properly be continued until the injury was received, should be left for determination by the jury, in the light of all the evidence. *Central R., etc., Co. v. Perry*, 58 Ga. 461.

41. Person pursuing train.—Central R., etc., Co. v. Perry, 58 Ga. 461.

The officers of a railroad company have the right to presume that passengers will only attempt to get on its cars at the places designated by the company for such purpose, and it is not the duty of the railroad company to keep its track clear for those who may see proper to pursue the cars while leaving a depot or station; and more especially would

this be true as to those who pursue the cars to a point beyond that assigned by the company for receiving and discharging passengers. *Perry v. Central Railroad*, 66 Ga. 746.

42. Running trains on intervening tracks.—A rule of a railroad company provided that "when a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite to each other." A passenger alighted from a train at a station where there were double tracks with a platform on each side, and in disregard of a notice posted in the car, passed out at the left of the car which required him to cross one of the tracks before reaching the platform. The collector, who took his ticket, made no objection to his alighting from the left side of the car. In crossing the track he was struck by an engine, coming from an opposite direction, which had not observed the rule to stop. It was held that the company was guilty of gross negligence. *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

Where the company required passengers to cross two tracks to another platform to take westbound trains, it was bound to provide a reasonably safe way for crossing, and to exercise the highest degree of care to protect passengers while crossing the tracks, and would be negligent for failure to announce the train in time, or light the crossing, or guide passengers across the tracks, if due care required such precautions, or for negligently performing such services so as to endanger passengers. *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338.

It is the duty of a carrier to provide a reasonably safe passage over tracks in-

to discharge this duty when it negligently runs trains along tracks intervening between a train which passengers are boarding or leaving and the station or other place of entrance and exit. And the cases are numerous which recognize the liability of the carrier for injuries to passengers, who are themselves exercising due care, caused by negligently running trains, at a time when passengers are being received or set down, along a track which the passenger must cross, or, in accordance with a well-established and recognized custom, do cross, in approaching or leaving the train.⁴³ It is said that a railroad company must anticipate the presence of prospective passengers upon its station premises when a train is arriving, and use ordinary care for their safety.⁴⁴ Thus, it is held that

intervening between a station and a train, and not to permit locomotives to pass over them while passengers are crossing. *Keifner v. Pittsburg, etc., R. Co.*, 72 Atl. 253, 223 Pa. 50.

43. *United States.*—*Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 18 S. Ct. 68, 42 L. Ed. 491; *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642, 56 Am. & Eng. R. Cas. 296; *Chesapeake, etc., R. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102; *Graven v. MacLeod*, 92 Fed. 846, 35 C. C. A. 47, 14 Am. & Eng. R. Cas., N. S. 305; *Alabama, etc., R. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1.

Arkansas.—*St. Louis, etc., R. Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593.

Colorado.—*Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729; *Denver, etc., R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954.

Illinois.—*Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208, affirming 62 Ill. App. 264.

Maryland.—*Baltimore, etc., R. Co. v. Chambers*, 81 Md. 371, 32 Atl. 201; *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

Massachusetts.—*Warren v. Fitchburg R. Co. (Mass.)*, 8 Allen 227, 85 Am. Dec. 700.

New York.—*Beecher v. Long Island R. Co.*, 161 N. Y. 222, 55 N. E. 899, 12 Am. & Eng. R. Cas., N. S., 295, affirming 35 App. Div. 292, 55 N. Y. 23; *Brassell v. New York Cent., etc., R. Co.*, 84 N. Y. 241, 3 Am. & Eng. R. Cas. 380; *Terry v. Jewett*, 78 N. Y. 338, affirming 17 Hun 396.

Ohio.—*Lake Shore, etc., R. Co. v. Herlick*, 49 O. 25, 29 N. E. 1052, 50 Am. & Eng. R. Cas. 25.

Texas.—*Gulf, etc., R. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. 688.

Where passengers were required, in order to board west-bound trains, to cross two tracks to another platform, the tracks as they approached the depot being straight for several miles, the company was bound to know that a headlight would not accurately inform an ordinary observer of the distance of an approaching train from the depot. Judgment 105

N. W. 526, reversed on rehearing. *Dieckmann v. Chicago, etc., R. Co.*, 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338.

Passengers who are required to cross railroad tracks in getting upon or alighting from trains have the right, from the nature of their contract, to expect a safe place for that purpose and may govern themselves accordingly. *Wabash R. Co. v. Skiles*, 64 O. St. 458, 60 N. E. 576; *Lake Shore, etc., R. Co. v. Hotchkiss*, 14-24 O. C. D. 431, affirmed in 69 O. St. 557, 70 N. E. 1125, followed in *Union Exp. Co. v. Graham*, 26 O. St. 595, following *United States Exp. Co. v. Backman*, 28 O. St. 144.

While a train was standing at a station, and excursionists were crowding into it from each side, a freight car was moved up on a side track, and into the crowd, knocking one down and running over his arm, and knocking another away. A brakeman was on the car as a lookout, but he saw no one in its way, and saw no one struck, and did not warn the people of the car's approach or their danger. Held, to be actionable negligence. *St. Louis, etc., R. Co. v. Caseday (Tex. Civ. App.)*, 48 S. W. 6, reversed in 50 S. W. 125, 96 Tex. 525.

Where, in an action against a railroad, there was some evidence that when a freight train moved into a crowd at the depot it did not ring the bell nor blow the whistle, a verdict will not be set aside on the ground that the company was not guilty of any negligence. *St. Louis, etc., R. Co. v. Caseday (Tex. Civ. App.)*, 48 S. W. 6, reversed in 50 S. W. 125, 96 Tex. 525.

Defendant railroad company's train passed, at a rate of thirty miles per hour, over a side track between the main track and the depot at a junction where trains met, and no signal was given of its approach. Persons who had come in on a train just preceding it had to pass over the side track to reach the depot. Held, where a person was struck by the train on the side track, that the facts were sufficient to show negligence on the part of the company. *Sanchez v. San Antonio, etc., R. Co.*, 3 Tex. Civ. App. 89, 22 S. W. 242.

44. *St. Louis, etc., R. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527.

it is the duty of the operatives of a train approaching upon another track from the opposite direction to exercise a degree of care commensurate with the situation and the danger.⁴⁵ And it is held that where passengers are alighting from a train at a station, and going from the platform to the station, it is negligence per se for the railroad to permit a train to pass on an intervening track.⁴⁶ Where the passenger's failure to look and listen is not negligence per se, it is proper to submit the question to the jury.⁴⁷ But where a passenger alighted from a train on the side opposite from the platform and, while passing across a track on the side on which he alighted and after the train had started, was struck by a train coming in the opposite direction, it was held that there was no violation of a rule prohibiting trains from approaching stations when other trains are discharging their passengers, and that, under all the circumstances of the case, no negligence on the part of the company was shown.⁴⁸

§ 2373. Ways to and from Eating Houses.—A carrier is under no obligation to maintain a safe passageway for its passengers to and from any particular hotel, unless under exceptional circumstances, such as eating houses where trains are stopped for passengers to get meals, or hotels in which the carrier is interested, or situated within or adjoining depots or depot grounds; and a carrier, furnishing safe and sufficient egress from its depot ground, complies with its obligation to its passengers.⁴⁹ However, a railroad company should exercise care to provide easy and safe ways by which passengers may pass to and from eating houses provided for the accommodation of passengers during transportation.⁵⁰ This obligation, it has been said, imposes upon the railway company the duty of having ample and sufficient lights to safely guide their passengers to or from the hotel or eating house and, in case trains are removed from one track to another during the meal, to inform the passengers on their egress from the eating or dining-room, of the exact location of their respective trains.⁵¹ And where a person owns and keeps a lunch stand at a railroad station, by authority of the company, which can be approached only over the company's platform, the company is responsible for its condition to persons passing over it to make purchases at the lunch stand.⁵² And a railroad company has

45. In pursuance of the above rule it is said to be negligence to operate such a train at a rate of speed from twelve to fifteen miles per hour at the point where such alighting passengers are required to cross, and are actually crossing. *Illinois Cent. R. Co. v. Johnson*, 123 Ill. App. 300, judgment affirmed in 77 N. E. 592, 221 Ill. 42.

46. *Negligence per se.*—*Besecker v. Delaware, etc., R. Co.*, 220 Pa. 507, 68 Atl. 1039, 14 Am. & Eng. Ann. Cas. 21.

47. *Question for jury.*—*Gulf, etc., R. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. 688.

48. *Goldberg v. New York, etc., R. Co.*, 133 N. Y. 561, 30 N. E. 597, 4 Silvernail Ct. App. 166, reversing 60 Hun (N. Y.) 586, 39 N. Y. S. R. 785, 15 N. Y. Supp. 579.

49. *Ways to and from eating houses.*—*Alabama, etc., R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185.

50. *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729; *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

When a freight train upon which plain-

tiff and several other stockmen were passengers was stopped for the purpose of making up a new train, the conductor suggested to plaintiff and his fellow passengers that if they wished luncheon they might alight and walk to a lunch counter a block and a half away. Plaintiff and several of the stockmen, with the knowledge of the trainmen, got off on the side of the train next to a track parallel to the one on which the freight train was standing, and started to walk between the two tracks to the point indicated. Just after they had started the freight train began to move in the same direction, and, when it was opposite them, a fast passenger train came toward them on the parallel track. They were caught between the two trains and plaintiff was injured. The conductor knew that the express was due, but did not warn plaintiff or his companions. It was held that the facts justified a verdict for plaintiff. *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, affirming 65 Ill. App. 435.

51. *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

52. *Dillingham v. Teeling* (Tex. Civ. App.), 24 S. W. 1094.

been held liable to a passenger for an injury resulting from the unsafe condition of a bridge connecting its station platform with a hotel, used as an eating house for passengers.⁵³ But it has been held that a railroad company is not liable for an injury to a passenger in consequence of the defective condition of a step at the entrance of an eating house erected on ground belonging to the company, under a lease, by a third person and conducted by him for his own gain, without any control or supervision on the part of the company.⁵⁴ Nor where a railroad furnishes open, free and safe exit from its depot to a highway does acquiescence by it in the use of its track by passengers at another place, going to a hotel in which it has no interest, make it liable to such passengers beyond its liability to mere licensees.⁵⁵

§ 2374. Transfer Accommodations.—Passengers who are carried part of the way by one conveyance and the remainder of the way by another conveyance, are entitled to the exercise of care for their safety in providing a way by which they pass from one conveyance to the other. Thus a railroad company has been held liable for the defective condition of a wharf used by passengers in going aboard a steamboat on which the journey was to be completed.⁵⁶ And where a passenger is, in the course of the journey, required to change from one train to another, and, in making the change, has to cross a track, the carrier is liable for injuries resulting to the passenger in consequence of the negligent running of a train on such intervening track.⁵⁷ Where a passenger was, by reason of the failure of the conductor to awaken him as he had agreed, carried to the next station with the understanding that he could from thence return by an express train, and on reaching the next station at two o'clock in the morning, the night being dark, was injured by falling into an excavation two hundred and fifty feet east of the station-house, which had once served the purpose of a cattleguard, while passing between the tracks to reach the express train, which was standing over four hundred feet away from the train on which he had arrived, it was held that the question of defendant's negligence was for the jury.⁵⁸ While one transferring from one street car to another does not lose his status

^{53.} *Watson v. Oxanna Land Co.*, 92 Ala. 320, 8 So. 770; *East Tennessee, etc., R. Co. v. Watson*, 94 Ala. 634, 10 So. 228.

^{54.} *Obligation as to premises leased by railroad to another for hotel purposes.*—*Texas, etc., R. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617. In this case it was held that the general rule must apply that the tenant, and not the landlord, must be liable for the injuries resulting from defects in the rented premises.

^{55.} *Acquiescence as affecting liability.*—*Alabama, etc., R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185.

^{56.} *Wharf used as passage-way from trains to steamboats.*—Where plaintiff's ticket entitled her to a passage over the defendant's road to P., and by steamboat from P. to B., and the defendants had built their track upon their wharf down to the steamboats and had run their passenger train upon it for a time, and still continued to run their baggage train, and they directed their passengers verbally or by printed sign, to use the wharf as a passage-way to the boat, and they did so use it, and they made the wharf subsidiary and necessary to the proper use and enjoyment of their road. It was

held that defendants were bound to exercise the same degree of care in making the wharf safe and convenient for their through passengers to travel over as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and that such liability continued until, in the ordinary course of their passage over the wharf, they reached the point where the liability of the steamboat company commenced. *Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec. 449.

^{57.} *Baltimore, etc., R. Co. v. Hauer*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

Where a passenger while alighting from a car at a junction and crossing an intervening track to get to his train was killed by the engine of the train on which he had arrived backing down on the intervening track at a speed of eight to ten miles an hour, without any warning, and it was known that passengers would have to cross the track, the carrier was negligent. *Millett v. New York, etc., R. Co.*, 98 N. E. 574, 211 Mass. 486.

^{58.} *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145.

as a passenger, nevertheless the street railway having furnished a safe place in the street for the passenger to alight and to re-embark, is not liable for defects or dangers in the street.⁵⁹

Duties in Making Transfers.—See post, "Transfer of Passengers," § 2518.

§ 2375. Premises Contiguous to, Though Not Strictly Part of, Station Grounds.—The general duty of railroad companies to exercise care in making safe all portions of the station grounds which passengers naturally and ordinarily use in going to and from trains will, under some circumstances, make them responsible for the defective condition of premises or of structures near, though not strictly a part of, the station grounds,⁶¹ and where there is a customary use by passengers of depot premises in going to and from trains, the carrier must protect passengers from pitfalls near to the pathways by lights or barriers.⁶² A railroad company has been held liable for the death of a cattle owner, accompanying stock, resulting from the unsafe condition of a bridge which spanned a creek close by a station and which the company knew, or ought to have known, would naturally be used by shippers of stock, when the trains stopped at the station to take on water, in going around the trains to look after their stock.⁶³ A cattleman accompanying a carload of cattle on one of defendant's stock trains, in passing from defendant's station to the stock yards across a trestle bridge, which was without guards and unlighted, fell off, was injured, and soon after died from his injuries. In an action to recover for his death, it was held that if the bridge was so situated and constructed that passengers and persons in charge of cattle shipped over defendant's road would probably and naturally go thereon, and if, through the negligence of defendant, the bridge was in an unsafe and dangerous condition, defendant was liable.⁶⁴ But a carrier is not liable for the condition of a place where passengers are not expected to resort and have no occasion to go,⁶⁵ and this is especially true where he is

59. Transferring on street railway.—*Wilson v. Detroit United Railway*, 167 Mich. 107, 132 N. W. 762.

61. Arkansas, etc., R. Co. v. Robinson, 96 Ark. 32, 130 S. W. 536.

Where a city sidewalk, erected by a railroad company under a contract with the city, outside of the station grounds and separated from the station platform by a fence but on the same level with and of the same material as the platform, was used by passengers in boarding and alighting from trains in the instances in which long trains were run into the station and some of the coaches, owing to the length of the train, would come to a stand opposite the sidewalk, it was held that the company was responsible for the insufficient lighting of the sidewalk in consequence of the obstruction of a street light by the coaches which stopped outside of the station grounds. *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 2 So. 567, 30 Am. & Eng. R. Cas. 556, 4 Am. St. Rep. 231.

62. Customary use of premises.—*Louisville, etc., R. Co. v. Turner*, 137 Ky. 730, 126 S. W. 372.

63. Illinois Cent. R. Co. v. Foley, 53 Fed. 459, 3 C. C. A. 589, 56 Am. & Eng. R. Cas. 273.

64. Texas, etc., R. Co. v. Hudman, 8 Tex. Civ. App. 309, 28 S. W. 388.

65. A culvert on a main line of a rail-

road 235 yards from a depot is not an approach to the depot platform or a portion of the station grounds reasonably near to the platform, where passengers will be likely to go, within the rule requiring a railroad to keep in safe condition all portions of its depot platforms and approaches thereto and all portions of its station grounds reasonably near thereto, where passengers will naturally go. *Alabama, etc., R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185.

A carrier maintaining water-closets on its trains and at a station performs its duty in that respect at that station, and it need not anticipate that a passenger will jump from a train at dark and wander about the premises at the station to a place not ordinarily used by passengers for the purpose of responding to a call of nature. *Louisville, etc., R. Co. v. Turner*, 137 Ky. 730, 126 S. W. 372.

A steamboat company is not liable to a person who was injured in falling over an embankment near a path in attempting to reach the company's dock by using the path as a short cut rather than go a greater distance by the street, where defendant never attempted to make the path a roadway, and could not have done so without trespassing on the land of another. *Woods v. White Star Line*, 125 N. W. 396, 160 Mich. 540, 27 L. R. A., N. S., 992.

A corner of depot grounds, 130 feet

given no implied assurance by some one having authority, that he will find the premises safe.⁶⁶

§ 2376. Crowds at Stations.—It is obviously a reasonable rule, deducible from the principles of law governing common carriers, that a carrier's proposal through advertisement to conduct an excursion calculated to induce people to travel in unusual numbers implies that it will furnish greater facilities to accommodate and to care for those who avail themselves of the proffer than its usual service requires. This applies to the stations and crowds assembling there, as well as to transportation.⁶⁷ Rejecting the idea that a carrier would be required to have a force capable of overcoming whatever violence a drunken or riotous mob might choose to exhibit, it has been said in the Cannon Case: "When a railway company, for an excursion or other special purpose, invites numbers to its stations, it is not unreasonable to require more than the ordinary attendants to perform the same duties which devolve upon the usual staff at other times."⁶⁸ The rule thus laid down finds support in a class of cases which define the duties of carriers, where, owing simply to density of population, crowds are in the habit of gathering.⁶⁹

from the passenger depot occupied by a fuel company as a wood yard, near which a prospective passenger alighting from a hack has no occasion to pass, is not a place where such passengers may be expected to resort, so as to charge the company with the duty of keeping it lighted and in a safe condition. *Davis v. Houston, etc., R. Co.*, 68 S. W. 733, 29 Tex. Civ. App. 42.

Duties as to freight platforms.—A carrier is under no duty to a passenger to keep in a safe condition the part of its depot platform used, to his knowledge, exclusively for handling freight; so that it is not liable for injury received by him in stepping through a hole in it; he having gone there on a dark night to relieve himself; there being no closet, except across the track, the way to which was lighted. *Houston, etc., R. Co. v. Grubbs*, 67 S. W. 519, 28 Tex. Civ. App. 367.

66. A passenger, while waiting for a train to leave at night, responded to a call of nature and found the closet closed. The conductor refused to open it, and informed the passenger that the train left in six minutes, and on the statement of the passenger that he did not have time to hunt up a closet, and that he did not want to miss the train, the conductor told him to jump from the train anywhere in the dark. The passenger alighted and went about twenty feet from the train and fell into an unguarded culvert. The carrier maintained a closet at the station. It was not necessary or customary for passengers to use the depot grounds where the culvert was located. Held, that the carrier was not liable for the injuries, since the direction of the conductor was not an implied assurance that the passenger would find the premises safe. *Louisville, etc., R. Co. v. Turner*, 126 S. W. 372, 137 Ky. 730.

67. *Harmon v. Flintham*, 196 Fed. 635, 116 C. C. A. 309.

United States.—*Taylor v. Pennsylvania Co.*, 50 Fed. 755.

Illinois.—*Illinois Cent. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290.

Ireland.—*Cannon v. Mid. Gt. W. Ry. Co.*, 6 Irish Rep. 199, 208.

Michigan.—*Cousineau v. Muskegon Tract., etc., Co.*, 145 Mich. 314, 318, 108 N. W. 720.

The duty rests upon a railroad company which has attracted an unusual number of people to a station by advertising an excursion to furnish greater facilities than usual to accommodate, care for, and protect those who avail themselves of its offer. *Harmon v. Flintham*, 196 Fed. 635, 116 C. C. A. 309.

A railroad company must exercise care to protect passengers against the increased dangers incident to exceptionally large crowds of people at its stations, the presence of which the company is advised or is reasonably bound to anticipate. *Taylor v. Pennsylvania Co.*, 50 Fed. 755; *Illinois Cent. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290; *Muhlhouse v. Monongahela, etc., R. Co.*, 201 Pa. 237, 50 Atl. 937.

Thus, where a railroad company by extensive advertising and the offering of reduced rates induced a large number of people to go upon an excursion, it was held liable for negligence in failing to make proper provision for the control of a large crowd of people which collected at one of its stations. *Taylor v. Pennsylvania Co.*, 50 Fed. 755.

68. *Harmon v. Flintham*, 196 Fed. 635, 116 C. C. A. 309.

69. *Harmon v. Flintham*, 196 Fed. 635, 116 C. C. A. 309, citing *Pennsylvania R. Co. v. Stockton*, 184 Fed. 422, 106 C. C. A. 433; *Young v. New York, etc., R. Co.*, 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193; *Dittmar v. Brooklyn Heights R. Co.*, 91 App. Div. 378, 86 N. Y. S. 878, 879;

§ 2377. Box or Stool in Lieu of Platform.—It is in some cases the duty of a carrier to provide a box or portable step to facilitate boarding and alighting from its cars, but although it may be negligent in failing to furnish such a facility, this negligence must be the proximate cause of the injury to render it liable.⁷⁰ When a railroad company, instead of providing a platform, furnishes a box or stool for passengers to step upon in alighting, it must exercise care to see that such appliance is itself safe for the purpose for which it is used,⁷¹ and that it is properly placed.⁷² Although death of a passenger could not reasonably be anticipated from the use of a stool used to alight from a train, yet if the use of the stool was negligence on the part of the defendant, without contributory negligence by the deceased, and the injury was the proximate result of that negligence, the defendant is liable.⁷³

Questions for Jury.—Whether failure of a carrier to provide a stool for passengers in getting on and off trains is negligence is a question for the jury,⁷⁴ and it is for the jury to determine whether the negligent use of such appliance was the proximate cause of the injury.⁷⁵

§ 2378. Lighting Station Houses, Platforms and Grounds.—The due performance by railroad companies of the obligation to afford passengers the use of necessary and safe station facilities, requires the carrier to exercise care that its station houses, platforms, approaches, and the other places connected therewith which would naturally be visited by passengers, are adequately lighted for a reasonable length of time before and after the arrival and departure of trains at night, if that is necessary to the safety of persons taking passage on, and of passengers leaving, trains; and a negligent omission of this duty, causing injury to a passenger who is himself without fault, charges the carrier with liability.⁷⁶ They must use reasonable and ordinary care to light

McGearty v. Manhattan R. Co., 43 N. Y. S. 1086, 15 App. Div. 2; *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917.

70. Failure to provide proper facilities must be proximate cause of injury.—Where a passenger, in attempting to board a train, slipped and fell by reason alone of the icy condition of the car steps, the fact that the railroad company may also have been negligent in not providing a portable step is not a ground of recovery. *Ft. Worth, etc., R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962.

71. Missouri Pac. R. Co. v. Wortham, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368; *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593.

72. Atlanta, etc., R. Co. v. Holcombe, 88 Ga. 9, 13 S. E. 751; *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593.

In an action against a carrier for damages alleged to have resulted through its failure to furnish proper facilities to enable a passenger to alight safely at her destination, where the evidence, though conflicting, is sufficient to authorize a finding that the passenger was injured while attempting to alight from defendant's train, owing to the fact that the step of the car was a long distance from the ground and that the stool placed to assist her was upon soft ground and

overturned when she stepped upon it, throwing her and causing her painful and serious injuries, a verdict for the plaintiff will not be disturbed. *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015.

73. Gulf, etc., R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592.

74. Question for jury.—*Missouri, etc., R. Co. v. Sherrill*, 32 Tex. Civ. App. 116, 72 S. W. 429.

75. St. Louis, etc., R. Co. v. Johnson, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162.

76. United States.—*Grimes v. Pennsylvania Co.*, 36 Fed. 72.

Alabama.—*Alabama, etc., R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359, 35 Am. & Eng. R. Cas. 466, 5 Am. St. Rep. 354.

Arkansas.—*St. Louis, etc., R. Co. v. Battle*, 69 Ark. 369, 63 S. W. 805, 22 Am. & Eng. R. Cas., N. S., 700; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *St. Louis, etc., R. Co. v. White*, 48 Ark. 495, 4 S. W. 52, 30 Am. & Eng. R. Cas. 545; *St. Louis, etc., R. Co. v. Briggs*, 87 Ark. 581, 113 S. W. 644.

Indiana.—*Louisville, etc., R. Co. v. Treadway*, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041.

Iowa.—*Hiatt v. Des Moines R. Co.*, 96 Iowa 169, 64 N. W. 766.

Kansas.—*Missouri Pac. R. Co. v. Neis-*

their platforms so that passengers may enter and leave trains with reasonable safety.⁷⁷ The duty on the part of the railroad company of maintaining a light at its station must be the result of some duty owed to the public, to enable the public to transact business with the railroad company with safety.⁷⁸ Thus, the platform must be sufficiently well lighted so that a passenger, who exercises ordinary care, will not be at a loss to determine on which side of the train the platform is located.⁷⁹ When a passenger is set down, in the night, at a freight instead of the regular passenger station he may recover for the negligent failure of the company properly to light the station and approaches.⁸⁰ But if the station is sufficiently lighted for the convenience of passengers the duty is discharged, and the company is not bound to so light its premises that a drunken person, going to sleep on or near the track, would be discovered and injury to him averted.⁸¹ And it has been held that where the trainmen are on the platform with their lanterns to furnish passengers light during the time the train stops,

wanger, 41 Kan. 621, 21 Pac. 582, 39 Am. & Eng. R. Cas. 471, 13 Am. St. Rep. 304.

Kentucky.—*Louisville, etc., R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352, 19 Am. & Eng. Ann. Cas. 294; *Chesapeake, etc., R. Co. v. Robinson*, 135 Ky. 850, 123 S. W. 308.

Louisiana.—*Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 2 So. 567, 30 Am. Eng. R. Cas. 556, 4 Am. St. Rep. 231; *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Abney v. Louisiana, etc., R. Co.*, 127 La. 437, 53 So. 678.

Massachusetts.—*Wentworth v. Eastern R. Co.*, 143 Mass. 248, 9 N. E. 563; *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251, 7 N. E. 874, 27 Am. & Eng. R. Cas. 137.

Minnesota.—*Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390, 20 N. W. 379, 18 Am. & Eng. R. Cas. 153.

Missouri.—*Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348, 21 S. W. 823, 58 Am. & Eng. R. Cas. 184, 19 L. R. A. 460.

North Dakota.—*Messenger v. Valley City St., etc., R. Co.*, 21 N. Dak. 82, 128 N. W. 1023, 32 L. R. A. N. S., 881.

Oklahoma.—*Atchison, etc., R. Co. v. Calhoun*, 89 Pac. 207, 18 Okla. 75, 11 Am. & Eng. Ann. Cas. 681.

Texas.—*Galveston, etc., R. Co. v. Thornsberry (Tex.)*, 17 S. W. 521; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034; *Texas Mid. Railroad v. Brown (Tex. Civ. App.)*, 58 S. W. 44; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573; *Texas, etc., R. Co. v. Reich (Tex. Civ. App.)*, 32 S. W. 817; *Eddy v. Still*, 3 Tex. Civ. App. 346, 22 S. W. 525; *Houston, etc., R. Co. v. Reason*, 61 Tex. 613.

Virginia.—*Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289; *Richmond, etc., R. Co. v. Morris*, 72 Va. (31 Gratt.) 200.

As to placing "safeguards," see *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

Wisconsin.—*Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

A railway passenger, injured through being pushed from the steps of a car in alighting, can not recover on the theory that the place was dark, especially where she admits that it was light enough for her to see the skirts of the woman in front of her. *Marr v. Boston, etc., Railroad*, 94 N. E. 692, 208 Mass. 446.

Where a railroad, either for its own or for the convenience of its patrons, establishes quasi depots or stopping places, it must make them safe by providing lights at night. *Wagner v. Atlantic, etc., R. Co.*, 147 N. C. 315, 61 S. E. 171, 19 L. R. A. N. S., 1028.

A carrier must keep its stations and platforms and cars so lighted as to enable passengers to avoid danger, and when it may be reasonably assumed that the necessities of the passengers may require lights, a failure to furnish them is negligence. *Valentine v. Northern Pac. R. Co.*, 70 Wash. 95, 126 Pac. 99.

77. Reasonable and ordinary care.—*Merryman v. Chicago, etc., R. Co.*, 135 Iowa 591, 113 N. W. 357.

A railroad maintained a depot platform 13 5/8 inches from the outer edge of the lowest car step, and 5 3/4 inches below it, for the use of its passengers at day and night. No lights, or at most only a very dim light, reached the place where passengers alighted from trains at night. Held, that it was negligent in not providing sufficient light to enable its passengers to observe the open space between the car step and the platform, and enable passengers to alight in safety. *Skow v. Green Bay, etc., R. Co.*, 123 N. W. 138, 141 Wis. 21.

78. Extent of duty.—*Central, etc., R. Co. v. Floyd*, 3 Ga. App. 257, 59 S. E. 826.

79. *Louisville, etc., R. Co. v. Ricketts*, 18 Ky. L. Rep. 687, 37 S. W. 952.

80. *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 2 Am. & Eng. R. Cas. 497, 37 Am. Rep. 753.

81. *Rozwadosfskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872.

the carrier is not liable because they do not remain on the platform after the train starts.⁸² It can not be said, as a matter of law, that it is the duty of the carrier to light every station. His duty is to do what prudent men engaged in like business usually do or should do under similar circumstances.⁸³ This duty of lighting only applies to the platforms and approaches which are reasonably necessary to the ingress and egress of the traveling public, and not necessarily to all platforms and approaches that may be used in connection with the stations for other purposes.⁸⁴ If trains arrive at and leave a station at frequent and short intervals the carrier might not be able to discharge its full duty with respect to lighting except by keeping the station lighted continuously during the hours of darkness. But ordinarily the carrier is not bound to light its stations at all times in the night; it is bound to do so only for a sufficient time before the departure of a train to enable persons wishing to take passage to be in readiness and to enter the cars without undue haste, and, after the arrival, to enable passengers leaving the train to do so conveniently and safely.⁸⁵ But where a carrier is charged with knowledge that there will be passengers for a train leaving a flag station at a certain time it is bound to have the station platform lighted for a reasonable time before the arrival of the train.⁸⁶ Like the nature of the station structures themselves, the character and the extent of lighting required at any particular station must depend on the amount and nature of the business to be transacted, and the character, situation, and surroundings of the station with reference to tracks and other physical conditions reasonably calculated to effect the security of persons in the proper use of the premises and in the exercise of ordinary care.⁸⁷ This liability on the part of a carrier exists independent of any statutory provision,⁸⁸ but in some states statutes exist, regulating matters of this kind, thus, in Texas it is provided by statute that a railroad company shall keep its depots or passenger houses lighted a reasonable time before the arrival and after the departure of all trains carrying passengers.⁸⁹ But that statute does not apply to depot platforms or other places, where passengers are expected to get on or off trains.⁹⁰

Excuses for Failure.—The fact that another company is under contract to keep the station lighted does not relieve the railroad company of responsibility for a breach of this duty,⁹¹ nor is a carrier excused from the duty to sufficiently

82. Chesapeake, etc., R. Co. v. Robinson, 135 Ky. 850, 123 S. W. 308.

83. Not a matter of law in every case.—Railroad Co. v. Anderson, 21 O. C. C. 288, 11 O. C. D. 765.

When it is not so obviously dangerous to permit passengers to pass from a train to an unlighted station platform that the court can say it was negligence to do so, it is error for the court in its charge to assume that it was the duty of the carrier to furnish light. Railroad Co. v. Anderson, 21 O. C. C. 288, 11 O. C. D. 765.

84. Texas, etc., R. Co. v. Reich (Tex. Civ. App.), 32 S. W. 817.

Platforms of a railroad station should at night be reasonably lighted for a sufficient time before and after the arrival of trains to enable passengers to avoid danger. Hall v. Bessemer, etc., R. Co., 36 Pa. Super. Ct. 556.

85. Alabama, etc., R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 35 Am. & Eng. R. Cas. 466, 5 Am. St. Rep. 354; Louisville, etc., R. Co. v. Treadway, 142 Ind. 475, 40 N. E. 807; Hodges v. New Hanover Transit Co., 107 N. C. 576, 12 S. E. 597.

86. Reasonable Time.—Cleveland, etc., R. Co. v. Harvey, 45 Ind. App. 153, 90 N. E. 318.

87. Pere Marquette R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026; Sargent v. St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 58 Am. & Eng. R. Cas. 184, 19 L. R. A. 460.

88. It has been held that a railroad company is liable to persons lawfully on its premises for failure to keep them sufficiently lighted; and this without reference to any statutory provision. Texas, etc., R. Co. v. McKenzie (Tex.), 2 Posey 307; Rozwadoskie v. International, etc., R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872; Texas, etc., R. Co. v. Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720, affirmed in 93 Tex. 674, no op.

89. Sayles' Supp. Rev. Stat. of Texas, art. 4238.

90. Does not apply to platforms, etc.—Gulf, etc., R. Co. v. Barnett, 47 S. W. 1039, 19 Tex. Civ. App. 626.

91. Texas, etc., R. Co. v. Reich (Tex. Civ. App.), 32 S. W. 817.

light its depot by the fact that there is no system of public lighting in the municipality in which it is located.⁹²

Abandonment of Station.—A station at a village was not abandoned by a railway company, so as to relieve it from duty with reference to lighting and safety of platform, where, though it ceased to maintain an agent and sell tickets there, tickets were sold to such point and its passenger trains regularly stopped there.⁹³

Proximate Consequences.—A carrier is liable for only such injuries to a passenger as are the proximate consequences of its failure to comply with the law requiring it to light its station houses and grounds, that is, such consequences as it should have foreseen.⁹⁴

Negligent Performance Question for Jury.—The adequacy of the lighting at a railroad station is ordinarily a question for the jury under proper instructions.⁹⁵

§ 2379. **When Passengers Are Carried on Freight Trains.**—It has been said that passengers on freight trains can not expect and are not entitled to the same accommodations for entering and leaving the trains as passengers carried on regular passenger trains.⁹⁶ The company is not bound in either case to make landings or any provision whatever for the reception or discharge of passengers where none are expected to be.⁹⁷ But even when carrying passengers on freight trains the carrier is no doubt bound to exercise care to provide

92. **Absence of lighting system.**—*Toledo, etc., R. Co. v. Stevenson*, 122 Ill. App. 654.

93. **Abandonment of station.**—*Gulf, etc., R. Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. 653.

94. **Carrier liable only for proximate consequences of neglect of duty.**—An assault by a negro on a female passenger, in an unlighted waiting room after dark, is not such a proximate consequence of the railroad company's failure to light the room as to charge it with having foreseen the danger and render it liable therefor. *Prokop v. Gulf, etc., R. Co.*, 79 S. W. 101, 34 Tex. Civ. App. 520.

Where a railroad company fails on a dark night to furnish sufficient light at a station platform, and a passenger is injured because of the deficiency in the light, the railroad company is liable. *Abney v. Louisiana, etc., R. Co.*, 127 La. 437, 53 So. 678. See ante, "Liability Based on Negligence," § 2279.

95. **Negligent performance question for jury.**—*Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026.

Negligence in performance of duty question for jury.—Where a passenger was injured by stepping off the end of a platform, which he could not see because of darkness, the question whether the railroad company was negligent in failing to light it was for the jury. *Gulf, etc., R. Co. v. Barnett*, 47 S. W. 1039, 19 Tex. Civ. App. 626.

Whether it was, under the circumstances, negligence in a railroad company not to provide lights at a freight depot is a question of fact for the jury. *Stew-*

art v. International, etc., R. Co., 53 Tex. 289, 2 Am. & Eng. R. Cas. 497, 37 Am. Rep. 753.

Sayles' Supp. Rev. St., art. 4238 (Laws 1889, p. 19), requiring railroad companies to keep their depots lighted, requires the lighting only of such platforms or approaches as are necessary for ingress and egress of passengers; and where a passenger is injured at night by falling over an obstruction on an unlighted south platform of a union depot, and it appears that the trains of several of the defendant companies stop on that side of the depot, the question of the negligence of a company whose trains stop at a platform on the north side is for the jury. *Texas, etc., R. Co. v. Reich* (Tex. Civ. App.), 32 S. W. 817.

96. **Passengers on freight trains.**—A party who makes an arrangement to be carried on a freight car impliedly agrees to accept and be satisfied with such accommodations, as regards carriages and seats, and places of entering and leaving the carriages, as may be found in the usual course of the business. If the cars, at the time of agreeing to his passage and taking his seat, are at a freight depot, he should be satisfied with such means of entering them as are provided for the loading of freight. If the cars are, at the time, standing on a part of the track, where there is no provision for landing or receiving either goods or passengers, he should be satisfied with such means and facilities as may casually be within his reach. *Central Railroad v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

97. **Landings, approaches, etc.**—*Central Railroad v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

the facilities to which the mode of conveyance employed is reasonably susceptible. A railroad company is not relieved of its obligation to furnish a proper and convenient exit from its cars by the fact that there is an unusual and unexpected number of passengers, so that the supply of passenger cars has to be supplemented with box cars, which are not provided with platform steps or ladders, or other means by which to enter and leave the cars. Having received passengers, without qualification or condition, or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier of passengers, and becomes liable for the consequences of a failure to perform those obligations.⁹⁸

Mixed Train.—The duty of a railroad company to furnish its passengers a reasonably safe place to alight from or enter its cars is not changed because the train is a mixed one, carrying both passengers and freight.⁹⁹ But it is held that a carrier stopping its mixed train before reaching the station platform, so as to make a step of three feet from the car step to the ground, which is dry and smooth, does not fail to perform its duty to give the passengers a reasonably safe place at which to alight, and, where a passenger is injured while alighting at such place because of her failure to leave her baggage on the step until she reaches the ground, the carrier is not liable.¹

§ 2380. Duty to Inform Passengers as to Movements of Trains.—It may be generally stated that a carrier, in the absence of a request for information, is not bound to inform a passenger of the time of departure of its earliest train from a junction point to his destination.² It is a passenger's duty to exercise ordinary intelligence and prudence in ascertaining the proper train for him to take.³

Duty to Indicate Direction of Trains by Platform Signs or by Announcement.—The statutes of Texas do not impose the duty upon railroads to display upon their platform signs showing which way its trains are going, nor require of them to have an employee call out the direction the train is going.⁴

Displaying Schedule.—In some states railroad companies are required to display, at certain stations, in a conspicuous place by blackboard or otherwise, at certain times, the schedule time for the arrival of trains stopping at those

98. *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322.

Where the question was, whether the defendant was negligent in stopping the cab of its freight train near a dangerous retaining wall and leaving the plaintiff, who had been allowed to take passage on the train, without a light and without notice of the dangerous character of the place, it was proper to charge the jury that "when the defendant brought the passenger to the place where the train was going, all it was bound to do then was to see that he was afforded reasonable immunity from danger and reasonable protection in getting away from the point where he had been landed." *Central R., etc., Co. v. Smith*, 80 Ga. 526, 5 S. E. 772.

99. *Mixed train.*—*Le Duc v. St. Louis, etc., R. Co.*, 159 Mo. App. 136, 140 S. W. 758.

1. *Deskins v. Chicago, etc., R. Co.* (Mo. App.), 132 S. W. 45.

2. **Duty to inform passengers of movements of trains.**—*Latimer v. St. Louis,*

etc., R. Co., 40 Tex. Civ. App. 614, 90 S. W. 665.

3. A charge that it is the duty of a railroad company to use such care to inform a passenger as to what train she should take as reasonably prudent persons engaged in the same business and under similar circumstances would use, is erroneous, in that it relieves the passenger of the duty to exercise ordinary intelligence and prudence in ascertaining the train she should take. *Missouri, etc., R. Co. v. Walden* (Tex. Civ. App.), 46 S. W. 87.

4. **Signs and announcements as to direction of trains.**—*Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 139, 42 S. W. 576.

In an action against a railroad company to recover for injury to plaintiff's wife, caused by the conductor's want of proper care in putting her off a train which she had taken by mistake, evidence tending to show that such mistake was due to defendant's failure to provide signs or call trains was irrelevant. *Gary v. Gulf, etc., R. Co.*, 42 S. W. 576, 17 Tex. Civ. App. 139.

places; and the fact whether such train is on time or not, and, if late, when it will arrive.⁵ In some cases these statutes are penal and as such must be strictly construed, and can not be extended by implication to cases not falling within their terms.⁶

§ 2381. Duty as to Opening Waiting Rooms.—It is not only the duty of a railroad company to build and maintain depots for the comfort of its passengers, but it is likewise its duty to keep the same open for the reception of passengers for a reasonable time before a train is scheduled to arrive.⁷ A carrier's duty to passengers as to opening waiting rooms is not fully fixed by the rule of the railroad commission which requires such carriers to open them at least thirty minutes before train time; where the civil law of the same state requires a reasonable time, which the jury may, under the circumstances, determine to be more than thirty minutes.⁸

Rules Regulating Waiting Rooms.—A railroad company has the right to establish reasonable rules providing when its waiting rooms at stations shall be closed.⁹ A person who desires to take passage upon the cars must exercise his right to enter and remain in the station house in conformity with the due and reasonable regulations of the company as to his conduct while there, and he can not exercise it until a reasonable time next prior to the departure of the train on which he intends to go. What is such a reasonable time depends upon the circumstances of each particular case.¹⁰ It is the duty of every person who desires to remain in a railroad station house, for the purpose of taking the cars therefrom, to make known such intention to do so; and, if such is the regulation of the company, he may be required to purchase a ticket before he can be permitted to remain in the depot.¹¹

§§ 2382-2385. Street Railways—§ 2382. In General.—There is necessarily a considerable difference between the respective obligations of ordinary railroads and of street railways to provide facilities for taking on and setting down passengers at their stations and stopping places. In the first place, the means of conveyance are different, and the facilities which must be supplied by an ordinary railroad are not necessary for the safety of passengers boarding and

5. Duty to display time schedules.—The act of May 8, 1886 (83 O. L. 118), is as follows: "Section 1. Be it enacted by the General Assembly of the state of Ohio, that every company or person operating a railroad within the state, shall, immediately after the taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company, located at any station in this state at which there is a telegraph office, a blackboard, at least four feet in length and two feet in width, upon which board such company or person shall cause to be written, at least ten minutes before the schedule time for the arrival of each passenger train stopping regularly upon such road at such station, the fact whether such train is on schedule time or not, and if late, how much." *McClurg v. Cleveland*, etc., R. Co., 8 O. C. C. 604, 4 O. C. D. 372.

6. Construction of statute.—*Hall v. State*, 20 O. 7; *McClurg v. Cleveland*, etc., R. Co., 8 O. C. C. 604, 4 O. C. D. 372.

An action for penalties amounting to \$14,340 for 1,434 violations, under the Ohio act was held to be but one violation, viz, the failure to have a blackboard.

McClurg v. Cleveland, etc., R. Co., 8 O. C. C. 604, 4 O. C. D. 372.

7. Duty as to opening waiting rooms.—*Chicago & A. R. Co. v. Walker*, 118 Ill. App. 397.

A railroad company agreeing to stop its train at a station to take on a passenger agrees to keep open its waiting room for the accommodation of the passenger while awaiting for the train. *Draper v. Evansville*, etc., R. Co., 74 N. E. 889, 165 Ind. 117.

8. Effect rules of commission.—*Neal v. Southern Railway*, 92 S. C. 197, 75 S. E. 405.

9. Rules regulating opening of station.—*Phillips v. Southern R. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163.

A rule of a railroad company requiring its waiting rooms at a station to be closed after the departure of its trains, and until 30 minutes before the departure of its next train, is reasonable. *Phillips v. Southern R. Co.*, 32 S. E. 388, 124 N. C. 123, 45 L. R. A. 163.

10. Right to use station house.—*Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337.

11. Regulation as to ticket.—*Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337.

alighting from street cars. And secondly a difference necessarily exists with respect to this duty between carriers which have the power of constructing and exclusively controlling places for the reception and discharge of passengers and carriers which do not have that power.

§ 2383. When Carrier Has No Control Over Street.—A public street in a town is not to be regarded as a passenger station for the safety of which a street railway company is responsible, when used by passengers as a place to alight.¹² Where consent is obtained to lay street railway tracks upon a public road, it becomes the duty of the company to conform its line to the established grade of the highway and to adjust its operation to the conditions existing on the ground, and it has neither the right nor duty to exercise any control over the highway, nor does the burden rest upon it to furnish approaches or places for passengers to alight.¹³ But it is the duty of a street railway to exercise proper care to see that the place of alighting is safe.¹⁴ Naturally, a street railway company which is engaged in carrying passengers along a public street over which it has no control is not charged with the duty of providing safe places for taking on and setting down passengers; the extent of its duty in this respect is to exercise care in selecting such places as are safe and convenient for the purpose.¹⁵ The duty of a street railway company in setting down passengers

12. Massachusetts.—*Thompson v. Gardner, etc.*, St. R. Co., 193 Mass. 133, 78 N. E. 854.

Michigan.—*Spangler v. Saginaw Valley Tract. Co.*, 152 Mich. 405, 116 N. W. 373.

13. Sligo v. Philadelphia Rapid Transit Co., 224 Pa. 135, 73 Atl. 211.

Passengers could alight on either side of the car, and in alighting step down on a level, macadam road on one side, or on a receding gutter on the other side. A passenger in an open summer car with a running board on each side stepped off on the gutter side, and in so doing, the step being a little high, she lost her balance and fell and was injured. The accident occurred in the twilight. The gutter was made by grading the highway under municipal regulation and was of the general character of gutters alongside country roads. Held, that such passenger was not entitled to recover. *Sligo v. Philadelphia Rapid Transit Co.*, 73 Atl. 211, 224 Pa. 135.

14. Spangler v. Saginaw Valley Tract. Co., 152 Mich. 405, 116 N. W. 373; *Cossett v. St. Louis, etc.*, R. Co., 224 Mo. 97, 123 S. W. 569.

In undertaking to land passengers, some obligation rests on a street railroad company to afford a reasonably safe place for them to alight and a reasonable opportunity to do so in safety. *Speck v. International R. Co.*, 118 N. Y. S. 71, 133 App. Div. 802.

In an action against a street railroad company for injuries received by a passenger, on alighting from a street car, by stepping into a depression in the pavement, held, that the depression was not of such a character as to charge defendant with negligence. *Grissinger v. International R. Co.*, 143 App. Div. 631, 128 N. Y. S. 63.

15. Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269; *Conway v. Lewiston, etc.*, R. Co., 87 Me. 283, 32 Atl. 901, 2 Am. & Eng. R. Cas., N. S., 339; *Robinson v. Helena, etc.*, R. Co., 38 Mont. 222, 99 Pac. 837.

The rule imposing ordinary care on a railroad to provide a safe place for landing of passengers is not applicable to a street car company, operating on a public street of a city and not providing places for passengers to get off or on, but stopping cars at street crossings or intermediate places on signal. *Turner v. City Elect. R. Co.*, 68 S. E. 735, 134 Ga. 869.

Plaintiff, a street car passenger, was required to transfer from one car to another, because of repairs being made by another street railway company in the street. As plaintiff stepped down from the car, the ground under her sunk in somewhat and she was thrown to the ground. Plaintiff testified that when she started to alight it appeared to her that everything was all right, and there was nothing with reference to the character of the street to show that the conductor should have known that the ground was defective. Held, that such facts were insufficient to show negligence on the part of the carrier. *Rose v. Boston, etc.*, St. R. Co., 80 N. E. 580, 194 Mass. 415.

Curbstones constructed by the city, inclosing a reserved space used for street railroad purposes and for ornamentation, did not amount to a defect in the street, rendering the street railroad company liable for injuries to a passenger on alighting from a car by her foot slipping on the curbstone, which terminated within a few inches of the track. *Farrington v. Boston Elevated R. Co.*, 88 N. E. 578, 202 Mass. 315.

in the street is met when it stops its car so that the passenger, in alighting, will step on a part of the street properly worked for public travel.¹⁶ But a street railway company is, of course, liable for a failure to exercise due care in the selection of places for taking on and letting off passengers.¹⁷ Thus, it is said that it is the duty of a street car company to use due diligence to select a reasonably safe place for landing its passengers with reference to getting off the car while at rest.¹⁸ Where a street is temporarily defective, and a passenger alighting is apt to step on the defect, a street railway company may be held to reasonable care, either by way of warning or otherwise; but where there is nothing in the appearance of the passenger to indicate to a conductor that she has not ordinary capacity to care for herself, or that it would be more dangerous for her to alight than for other persons the company has a right to assume that she knows generally of the construction of sidewalks.¹⁹ In a case in which it appeared that a street car was stopped, after dark, alongside of an excavation in the street, which had been made by the city authorities for the purpose of laying sewers and which was unprovided with proper safeguards or lights, and plaintiff, in alighting from the car, stepped into the excavation and was injured, a judgment for plaintiff was sustained.²⁰ Where a passenger, on boarding a street car, at night, informed the conductor of his destination, and as the car approached the street where he was to get off and where there was a plank roadway thirty or forty feet wide guarded by railings on all sides, the name of the street was called, but the car, instead of stopping there, went about fifty feet beyond and stopped over a trestle where there were no accommodations for passengers to alight, and the passenger, believing that the car was at the usual stopping place, alighted and, in doing so, was injured, it was held that defendant was guilty of negligence.²¹ If, however, a stop is made on account of an obstruction upon the track, the requirement as to the selection of a safe place, has no application; for, when a stop is made for that reason, and there is broad daylight by which passengers can see for themselves, if one of them attempts to get off, whether the car be in motion or at rest, the conductor not seeing him or being aware of his purpose, he can not complain that a safe place was not selected for him to alight.²² It is not negligence per se to permit passengers to stand on the platform of a street car. But if passengers are permitted to remain standing on

16. Street properly worked for public travel.—*Farrington v. Boston Elevated R. Co.*, 202 Mass. 315, 88 N. E. 578.

17. Sowash v. Consolidated Tract. Co., 188 Pa. 618, 41 Atl. 743, 12 Am. & Eng. R. Cas., N. S., 124; *Vasele v. Grant St. Elect. R. Co.*, 16 Wash. 602, 48 Pac. 249, 9 Am. & Eng. R. Cas., N. S., 75.

A street car was being followed by a hook and ladder truck and apparatus, running to a fire. The conductor of the street car, notwithstanding that the truck was close to the car and advancing rapidly, ignored the signal of the person in charge of the fire apparatus to go on, and stopped the car to let plaintiff off. A verdict for plaintiff in her action to recover for injuries sustained in the collision which resulted was sustained. *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378.

Plaintiff sustained injuries in alighting from a street car which had been stopped, in broad daylight, opposite a place where the street was being repaved, and where there was a slight excavation in consequence of the paving blocks, which were about six inches in depth, not having been laid. The difference between the

level of the street in the condition in which it was at the time, and its level with the blocks in place, was not so great as to render it hazardous for a passenger to leave the car, or make it necessary for those in charge of the car to refuse to stop the car at that place, or to caution passengers as to alighting. On the ground that the employees in charge of the car had a right to assume that plaintiff in alighting would notice the condition of the street, it was held that it was proper for the trial court to direct a verdict for defendant. *Bigelow v. West End, etc., R. Co.*, 161 Mass. 393, 37 N. E. 367.

18. Turner v. City Elect. R. Co., 134 Ga. 869, 68 S. E. 735.

19. Farrington v. Boston Elevated R. Co., 202 Mass. 315, 88 N. E. 578.

20. Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404, 44 Am. & Eng. R. Cas. 418.

21. Henry v. Grant St. Elect. R. Co., 24 Wash. 246, 64 Pac. 137.

22. Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269.

the platform of a car in such a position as to deprive a passenger of the support in alighting which would otherwise be available and other suitable protection is not furnished, the question of the carrier's negligence may properly be submitted to a jury.²³

Ice and Snow.—It has been said that a street railway company must exercise care and diligence in the removal of snow and ice which accumulates along its track and renders it dangerous to board and alight from its cars.²⁴ While the duty of a street railroad company to keep each stopping place where there are no street intersections free of ice and the snow leveled down, exists, it must be a relative one, taking into consideration the weather on the one hand and the safety of passengers on the other.²⁵

Open Car with Transverse Seats.—Where a street car company operates an open car with transverse seats, the implied invitation upon the stopping of the car, or the implied representation as to the safety of the points upon the street opposite the seats, is not restricted to one side or the other, in the absence of warning by the company.²⁶

Cars on Parallel Tracks.—When passengers are being discharged from a street car, care should be exercised that they may not be placed in a position of danger by the manner in which cars are run on a parallel track.²⁷ A carrier owes a very high degree of care to protect its passengers who alight from one car against the danger of collision from a moving car on another track, and it must take note of the usual dangers surrounding such a situation, and must conduct its moving cars past standing cars with due regard to such danger, but it is not an insurer, and is liable only for a breach of duty.²⁸ It has been held negligence, where street car tracks are in close proximity, to run a car or train of cars in one direction, at a rapid, although not unlawful, speed, and without signal or warning, over a sidewalk crossing, while a train bound in the opposite direction is discharging passengers at the crossing, the view of the approaching train being obstructed by the standing cars from which passengers are alighting.²⁹

23. *Neslie v. Second, etc., R. Co.*, 113 Pa. 300, 6 Atl. 72, 27 Am. & Eng. R. Cas. 180.

24. *Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170, 3 N. E. 65, 26 Am. & Eng. R. Cas. 203.

25. **Relative duty.**—*Speck v. International R. Co.*, 118 N. Y. S. 71, 133 App. Div. 802.

26. *White v. Lewiston, etc., Railway*, 107 Me. 412, 78 Atl. 473, citing *McKimble v. Boston, etc., R. Co.*, 141 Mass. 463, 5 N. E. 804; *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404, 44 Am. & Eng. R. Cas. 418.

As was said in the case here cited: "The plaintiff was sitting at the end of one of the transverse seats, * * * and would be expected to alight, as she did from the side of the car at the point opposite her seat." *White v. Lewiston, etc., Railway*, 107 Me. 412, 78 Atl. 473, 475, citing *Conway v. Lewiston, etc., R. Co.*, 90 Me. 199, 38 Atl. 110.

27. *Smith v. Union Trunk Line*, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

It was wantonly negligent for a motorman to run his car at a high rate of speed on entering a station and passing another car on an adjoining track, which had stopped or was stopping to discharge

passengers. *Birmingham R., etc., Co. v. Landrum*, 153 Ala. 192, 45 So. 198.

When a street car stops at a street crossing, it is a warning to others using the street that passengers may get off and pass to either sidewalk, and it is a situation to be considered in determining whether a given rate of speed of a car on another track is negligence. *Moore v. Metropolitan, etc., R. Co.*, 126 S. W. 181, 142 Mo. App. 290.

28. A passenger on a street car, which entered a switch to wait for the passing on the main track of a car running in the opposite direction, alighted therefrom intending to pass around the rear of the car and walk across the main track. The street was not paved, and she stumbled and fell across the space between the tracks at almost the instant the car on the main track passed, and its fender struck her. The evidence showed that the car on the main track was slowed down at the lower end of the switch, and again as it approached the standing car. Held, not to show negligence of the carrier. *Bloom v. Sioux City Tract. Co. (Iowa)*, 122 N. W. 831.

29. *Chicago, etc., R. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87.

Obligation as to Safety Assumed.—Where a street car company voluntarily provides and points out to passengers a path around an obstruction to their line to a point where the route is continued, it assumes an obligation to make reasonable provision for their safety, regardless of whether the relation of carrier and passenger exists while they are passing around the obstruction.³⁰ The fact that the carrier has not obtained permission from the owner of the land over which the path lay to use the land, so that both the carrier and those using the path are trespassers against the owner, does not relieve the carrier from exercising due care for the safety of those it invited to use the path.³¹

Platforms Erected by Street Railway.—Even if a street railway company is not bound to furnish platforms in the street for its passengers to use in boarding and alighting, where it erect platforms or where they are erected by others in such a way as to invite passengers to pass over them on leaving the cars, it is bound to keep them in a safe condition.³² Though the company has never repaired the platforms or assumed any control over them, it owes the nondelegable duty to its passengers to see that they are reasonably safe, and it is responsible for a defective condition resulting in injury to a passenger.³³

Failure to Light Platforms.—And a street railway has been held bound to keep its platforms in the street in a safe condition for passengers by properly lighting them if necessary, irrespective of the city's failure to light the street at that point, so that its failure to light the platforms, causing injury to a passenger, was actionable negligence; the platforms having no guard rail.³⁴

§ 2384. When Carrier Responsible for Conditions.—The rule which requires only ordinary care of railroad carriers in maintaining safe places for the ingress and egress of passengers to and from their trains at regular stopping places does not apply to the obligation imposed on a street railway company requiring a passenger to alight from a car to board another to complete her journey, because of excavations of the track and street; the obstructions of the street, the stopping of the car in the middle of a square, the condition of the place of alighting, and the requirement of the passenger to alight being brought about by the company.³⁵ The responsibility of a street railway company with respect to the safety of stopping places is more extensive when it is invested with control over the streets along which its tracks are laid. If the carrier is under obligation to keep the street along which its cars are run in good order and repair, it will be liable in damages to passengers who are injured, while boarding or alighting from its cars, in consequence of a neglect of the duty.³⁶

30. Providing path around obstruction.—*Powers v. Old Colony St. R. Co.*, 201 Mass. 66, 87 N. E. 192.

31. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 N. E. 192.

32. Platforms erected in streets by street railways.—*Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

Defendant street railroad company maintained two board platforms in the street opposite to its double tracks for receiving and discharging passengers. One of them was on the westerly side of its westerly track and the other on the easterly side of its easterly track, and they were connected by a plank walk laid on the ties, which was about four feet wide and was the only convenient way to pass from one platform to the other. The platforms were about four feet wide and thirty-two feet long, and with the walks were the only convenient means of reaching the graded part of the street. One platform was only a few inches

higher than the track, while the other was some sixteen inches above the street grade, each having steps and both were necessarily used by passengers on one of the lines. Held, in an action for personal injuries to a passenger by stepping from one of the platforms in the dark, that the case was properly tried on the theory that the two platforms and the walk were maintained as a station, imposing upon the company the resulting liability. *Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

33. Carter v. Rockford, etc., R. Co., 147 Wis. 86, 132 N. W. 598.

34. Failure to light platforms.—*Harris v. Seattle, etc., R. Co.*, 65 Wash. 27, 117 Pac. 601.

35. Carrier responsible for conditions.—*Louisville, etc., R. Co. v. Walker*, 177 Ind. 38, 97 N. E. 151.

36. Fielders v. North Jersey, etc., R. Co., 67 N. J. L. 76, 50 Atl. 533; *Ober v.*

Interurban Railway.—An interurban railway company owes a public duty to a passenger to furnish him a safe place to alight at his destination, and is not relieved of that duty by knowledge on the part of the passenger that it had not previously been discharging that duty.³⁷ An interurban railroad, operating cars for the accommodation of passengers, is required to exercise reasonable care to enable passengers to alight with as little danger as practicable, and where a car is stopped at a highway crossing, and a passenger invited to alight at a place more hazardous than that at which the car might conveniently have been stopped, the railroad is negligent.³⁸

§ 2385. Transfer Accommodations.—A street railway company does not fulfill its duty to a passenger by furnishing him a suitable place to alight from its car, where he is required to transfer from one car to another, but must also furnish a reasonably safe way to make the transfer.³⁹

§§ 2386-2402. As to Roadbed and Track—§ 2386. In General.—The duties of passenger carriers with respect to the road or way along which the vehicles are run must necessarily depend upon the nature of the means of conveyance employed. Carriers by stage coach and other similar carriers who do not provide and have no control over the roads which they travel, can not be charged with a strict accountability for the safety of the roads; the extent of their duty must be to exercise care to select the safest route and the safest part of the road traveled, and, perhaps, to refrain from traveling over a road which is obviously unsafe. But carriers, such as ordinary steam railroads and street railways, whose vehicles are run on a fixed track specially constructed for the purpose are naturally held to a strict accountability for the safety of the track provided. These carriers may be divided into two classes: those who do and those who do not own or control the roadbed, and, generally speaking, the duties of each of these classes with respect to the safety of the roadbed must depend upon whether they do or do not own, or possess the power of control over, the roadbed.⁴⁰ Although a railroad company is not liable where the roadbed is rendered unsafe by the act of God,⁴¹ yet it is the duty of such company

Crescent City R. Co., 44 La. Ann. 1059, 11 So. 818, 52 Am. & Eng. R. Cas. 576, 32 Am. St. Rep. 366.

A carrier having the duty to keep in repair the portions of the streets occupied by its tracks, it was responsible for dangerous conditions of its own making existing there; and, where it stopped its car at such a place, it was liable for injuries received by the passenger from such dangerous condition after alighting from the car. *White v. Lewiston, etc., Railway*, 107 Me. 412, 78 Atl. 473.

37. *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412.

38. *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412.

39. **Transfer accommodations.**—*Creegan v. International R. Co.* (App. Div.), 124 N. Y. S. 360.

Where, at a street railway transfer point, one of the cars rounded a corner, and there was an unimpeded level stretch of street between the nearest car track and an accumulation of snow of 8 or 8½ feet, and there was a clear space in addition to the overhang of the car in rounding the curve sufficient for a person to walk in safety, and there were also

paths from the place of debarkation to the sidewalk where passengers could walk in making their transfer in safety, the carrier complied with its obligation to furnish a reasonably safe way for passengers to make their transfer. *Creegan v. International R. Co.* (App. Div.), 124 N. Y. S. 360.

40. While a carrier of passengers upon an ordinary road is not responsible for its condition, as it is not under his control and supervision, a different rule prevails as regards a railroad corporation, which, under extraordinary grants of franchise, builds, controls, and generally has the exclusive use of its road bed and track. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

41. **Roadbed rendered unsafe by act of God.**—Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God," excusing the carrier from liability for injuries due to such causes. *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

to so construct its track and roadbed that they shall be reasonably safe, and to maintain them in a reasonably safe condition,⁴² so far as it can by the exercise of the utmost human skill and foresight;⁴³ or, as some say, the carrier must show the exercise of the highest practical care.⁴⁴ It is the duty of a railroad company to see that its roadbed and track are constructed by competent engineers and workmen, of good and suitable material, and to maintain the same in good order.⁴⁵

Test as to Care of Road, etc., Required of Company.—The high degree of skill and care required of a railroad company towards its passengers extends to the original construction of its roadbed and track.⁴⁶ In accordance with the general rule previously laid down, it is only for the consequence of such risks as could have been provided against by proper diligence that the carrier is liable.⁴⁷ A carrier is not liable if the defect that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the use of proper care and skill.⁴⁸

Obvious Dangers.—The railroad company is under an active duty and obligation to its passengers to take such reasonable precaution as is necessary to re-

42. Duty as to track and roadbed.—*Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

Missouri.—*Norris v. St. Louis, etc., R. Co.*, 239 Mo. 695, 144 S. W. 783.

Tennessee.—*Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. (23 Pickle) 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324; *N. & C. R. Co. v. Messino*, 33 Tenn. (1 Sneed) 220; *Louisville, etc., R. Co. v. McKenna*, 75 Tenn. (7 Lea) 313.

Texas.—*International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

43. *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648.

44. Where it is shown in an action against a carrier for personal injuries that a pole or trolley broke in consequence of its weakened condition, it devolves upon the defendant to show the exercise of the highest practical degree of care. *Donovan v. Kansas City, etc., R. Co.* (Mo. App.), 138 S. W. 679.

45. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Texas, etc., R. Co. v. De Milley*, 60 Tex. 194; *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277; *Texas, etc., R. Co. v. Barron*, 4 Tex. Civ. App. 546, 23 S. W. 537; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. 897, affirmed in 94 Tex. 691, no op.; *San Antonio Tract. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.; *Houston, etc., R. Co. v. Norris* (Tex. Civ. App.), 41 S. W. 708.

46. Test as to care required.—*Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560.

An instruction that it is the duty of a railroad company to use the greatest care and skill in constructing its road, "in order to transfer over it safely its passengers, and in like manner to use such care in keeping" it "in repair as to secure its passengers a safe travel, as the nature of

the business reasonably requires to protect the traveling public," does not make the company an insurer of the safety of passengers. *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277.

In an action by a passenger against a railroad company for personal injuries, caused by an alleged defective roadbed, an instruction that it is the duty of the company to furnish a reasonably safe roadbed, and to use ordinary care to keep it so, but, if the roadbed was not unsafe, or if it were, it was not due to defendant's negligence, and its condition was unknown to defendant, or was known to plaintiff, or such condition was not the proximate cause of plaintiff's injuries, the jury must find for defendant, is not erroneous. *Galveston, etc., R. Co. v. Waldo* (Tex. Civ. App.), 26 S. W. 1004.

47. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Texas, etc., R. Co. v. Hardin*, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460; *Houston, etc., R. Co. v. Norris* (Tex. Civ. App.), 41 S. W. 708.

In an action by a passenger for personal injuries sustained in a railroad wreck, the fact that the accident was caused by a break in the track resulting from a flow of water during a rain is not sufficient ground for a new trial after verdict for plaintiff, when the evidence was conflicting as to whether the rainfall was unusually great. *Texas, etc., R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698.

A mere continued spell of wet weather with a fall of snow is not such an unexpected and unforeseen contingency as will relieve a railroad company from liability to a passenger for injuries resulting from failure to keep the track in repair. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128.

48. *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411.

move or prevent obvious dangers, whether they be on its right of way or beyond its right of way.⁴⁹ But what might be termed an apparent and obvious danger along a railroad track in some sections of the United States, especially in less mountainous and rugged sections, would clearly not be considered an obvious danger along a line of road through the mountains, canyons and gorges.⁵⁰ A carrier is not liable for injuries to a passenger from a stone rolling down a mountain, unless it appear that the carrier either had actual notice of the danger, or that the place was so obviously dangerous as to impute notice of the danger to the carrier, and charge it with negligence in failing to take reasonable precaution to prevent injury from such cause.⁵¹

Question as to Condition of Road One for Jury.—Where a railroad's defense in a suit resulting from a wreck is that the wreck resulted from an unforeseen event against which the carrier could not guard, it is for the jury to determine its liability from all the evidence, and to determine whether the roadbed was properly constructed.⁵²

§§ 2387-2388. Roadbed—§ 2387. Railroad Companies.—Ordinary steam railroads generally own or lease the roadbed, and are, therefore, bound to exercise care to see that it is properly constructed and maintained in a safe condition. This duty necessarily extends to every part of the roadbed, including embankments and fills, and culverts, bridges, and cuts. The embankments should be so constructed as to withstand the force of all floods which, in the exercise of the high degree of care with which passenger carriers are charged, can reasonably be expected to occur in the particular locality.⁵³ A rain of not unusual violence, and the probable results thereof in softening the superficial earth, are not to be considered as an act of God so as to excuse a carrier of passengers for an injury resulting therefrom.⁵⁴ Similarly, in the construction

49. *Le Deau v. Northern Pac. R. Co.*, 19 Idaho 711, 115 Pac. 502, 34 L. R. A., N. S., 725, Ann. Cas. 1912 C, 438; *Filbin v. Chesapeake, etc., R. Co.*, 91 Ky. 444, 16 S. W. 92, 13 Ky. L. Rep. 14.

50. *Le Deau v. Northern Pac. R. Co.*, 19 Idaho 711, 115 Pac. 502, 34 L. R. A., N. S., 725, Ann. Cas. 1912 C, 438.

51. *Le Deau v. Northern Pac. R. Co.*, 115 Pac. 502, 19 Idaho 711, 34 L. R. A., N. S., 725, Ann. Cas. 1912 C, 438.

A passenger can not recover from a carrier for being struck by a rock rolling down the mountain side, where the evidence fails to show what set the rock in motion, or from where it started, but did show that it did not come from the face of the cut through which the train was running, or from the carrier's right of way, and no negligence of the carrier appears. *Le Deau v. Northern Pac. R. Co.*, 115 Pac. 502, 19 Idaho 711, 34 L. R. A., N. S., 725, Ann. Cas. 1912 C, 438.

52. **Question for jury.**—*Texas, etc., R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698.

53. *Missouri.*—*Ely v. St. Louis, etc., R. Co.*, 77 Mo. 34, 16 Am. & Eng. R. Cas. 342; *Ellet v. St. Louis, etc., R. Co.*, 76 Mo. 518, 12 Am. & Eng. R. Cas. 183.

Pennsylvania.—*Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407.

Texas.—*International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

54. **Rain not to be considered as act of God.**—*Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

An accident was caused by a landslide, which occurred in a cut some fifteen or twenty feet deep. The defendant gave evidence tending to prove that rain had fallen a day or so before the accident and the claim was that the slide was produced by the loosening of the earth by the rain. It was held that such an ordinary occurrence was not embraced by the technical phrase "an act of God," there being no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. "It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded." *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

Sudden and extraordinary rainfall.—By a sudden and extraordinary heavy rainfall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it gave way under the weight of a train, three or four hours afterwards, and a passenger was injured. The railway bed was in safe condition before the rainfall; a train had safely passed over it two hours before the acci-

of culverts a railroad company should exercise care to avoid such dangers as can be reasonably foreseen or ascertained by competent and skillful engineers as likely to result from rainfalls and freshets incident to the particular section of the country in which they are constructed.⁵⁵ It must exercise care in the construction of cuts and fills to avoid injury from overhanging banks, rocks or debris created by the common processes of nature.⁵⁶ A railway cut is of course as much a part of the railroad structure as is the fill, and, therefore, the company must exercise care that the banks of a cut are not left in such a condition that a land slide will be caused by the vibration of passing trains or other forces which the carrier, if in the exercise of the care which the law enacts, would foresee.⁵⁷ Care must be exercised that all the bridges are properly constructed and maintained in a safe condition.⁵⁸ A railroad company will be liable to a passenger, who is himself in the exercise of ordinary care, for injuries sustained by a window falling upon his hand in consequence of the rough and uneven condition of the road, if the accident resulted from the negligence of the company in failing to keep the road in repair.⁵⁹ A railroad company whose negligence with respect to the construction and maintenance of its roadbed contributes to an accident can not escape liability on the ground that the negligence of a third person was also a contributing cause.⁶⁰

dent; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. Held, that no action would lie against the company. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343.

55. *Libby v. Maine, etc., R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. (23 Pickle) 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

56. Construction of cuts and fills.—*Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

"To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the debris created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment." *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, 47 Am. & Eng. R. Cas. 513.

57. *Gleeson v. Virginia Mid. R. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, 47 Am. & Eng. R. Cas. 513, reversing 5 Mackey (D. C.) 358.

58. Indiana.—*Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 27 Am. & Eng. R. Cas. 88, 329, 57 Am. Rep. 120; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466.

Iowa.—*Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405.

Missouri.—*Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609, 50 S. W. 894, 13 Am. & Eng. R. Cas., N. S., 632.

Texas.—*San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. 517.

Virginia.—*Baltimore, etc., R. Co. v. Noell*, 73 Va. (32 Gratt.) 394.

At a point where defendant's road crossed a creek, excavations had been made for the purpose of widening the creek. As a result the running of trains across the bridge at that point was rendered impossible and had been stopped, the passengers being required to change cars at that point and to walk across the bridge for the purpose of doing so. Defendant had laid a line of planks between the rails, extending from end to end across the creek, and filling the place between the rails. But no railing had been provided on either side, and no lights were provided. A verdict for plaintiff, a passenger who had been injured while attempting to cross the bridge in the night time, was sustained. *Jamison v. San Jose, etc., R. Co.*, 55 Cal. 593, 3 Am. & Eng. R. Cas. 350.

59. *Gulf, etc., R. Co. v. Killebrew* (Tex.), 20 S. W. 182.

60. It has been held that if a railroad company was chargeable with negligence in the construction of a culvert, and the faulty construction of the culvert con-

§ 2388. Street Railways.—The position of a street railway company which lays its tracks in a street or highway over which it has no control is somewhat different from that of an ordinary steam railway as respects the duty to exercise care to provide and maintain a safe roadbed. The steam railway usually has full control over its right of way and roadbed and, therefore, may properly be held to the same responsibility for defects in its roadbed as for defects in its track or rolling stock. But the ordinary street railway usually has no more than a right to lay its track in the street or highway and is without the power to make alterations and repairs. While it may be negligence for a street railway company to run its cars along a street which is manifestly defective and dangerous, to hold it responsible for defects in the roadbed to the same extent as for defects in its track and vehicles would be to impose duties which the carrier has not the power to discharge.⁶¹ If, however, the roadbed of a street railway is in a defective condition through the negligence of the company, the carrier is, of course, responsible.⁶² Thus, it has been held that a passenger has the right to assume that a carrier has performed its duty in so constructing its road that its passengers, even on the footboards of its cars, will not be exposed to injury by the unsafe construction of its road.⁶³ A street railway company has been held liable for injuries sustained by a person who was about to board a car, in consequence of slipping on a ridge of snow which had been thrown up by the

tributed to an accident, the company could not escape responsibility by reason of the fact that the breaking of a dam constructed by a third person caused or contributed to the breaking of the culvert. "If the construction of the culvert was faulty, and it would not have broken but for the additional contribution of water flowing at a given time upon it from the breaking of the dam, even then appellees were entitled to recover; for they would certainly be entitled to recover, if the negligent manner in which the culvert was constructed contributed to the injury, although the negligence of a third person may have contributed to the same result. The question was, would the accident have occurred but for the negligent construction of the culvert." *Bonner v. Wingate*, 78 Tex. 333, 14 S. W. 790.

61. In a case decided by the New York court of appeals, plaintiff, a passenger on one of defendant's cars, was injured in consequence of a defect in a bridge over a canal which the car was crossing. The bridge had been built by, and was under the care and control of, the state. Defendant had a bare permission from the state to cross the bridge, without any control over it whatever, and had no right to build another bridge over the canal. Under the circumstances the court regarded the bridge as in substance and effect nothing more than a continuation of the street, and that, in crossing the bridge, defendant did not make it an appliance of its own to the extent of becoming responsible for latent defects. "Where a steam railroad has the right to build a bridge, and, instead of building, leases the right to cross the bridge of another, the reason for holding that such bridge is thereby adopted as its own by

the company using it is obvious. It is a voluntary matter on the part of the company whether to build its own or to lease the bridge of another, and if it choose the latter mode of crossing the obstruction it is but another way of obtaining a bridge of its own, and, when it thus contracts for its use, it of course adopts it as its own structure. The position of a street railroad in attempting to carry on its business of running cars through the public streets of a city has nothing in common with that occupied by a steam railroad under the circumstances mentioned; and where the street railroad is confronted by one of the canals of the state, over which it has no right to build a bridge, but which it is necessary to cross in order to carry out the purpose of its organization, the company may cross such bridge with the permission of the state authorities, without thereby making it a part of its appliance, for a latent defect in which it must be held responsible if discoverable in the process of manufacture. The contract to carry safely does not, and ought not to, extend that length." *Birmingham v. Rochester City, etc., R. Co.*, 137 N. Y. 13, 32 N. E. 995, 58 Am. & Eng. R. Cas. 134, 18 L. R. A. 764, reversing 63 Hun 635, 18 N. Y. S. 649, 59 Hun 583, 37 N. Y. St. R. 317, 14 N. Y. S. 13.

62. *Smedley v. Hestonville, etc., R. Co.*, 184 Pa. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas., N. S., 649.

Reasonably safe roadbed.—*Nashville Railroad v. Howard*, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

63. **Right of passenger to assume that road was properly constructed.**—*San Antonio Tract. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

company's snow plow and sweepers, and left lying alongside the track for a time much longer than was reasonably sufficient for its removal.⁶⁴

§§ 2389-2402. Tracks and Appliances—§§ 2389-2397. Railroad Companies—§ 2389. In General.—Since nothing can be more necessary to the safe carrying of passengers by railroad companies than that the track, including the rails, ties, switches, and all the subsidiary appointments, should be adequate for the purposes for which they are intended, and that the track should be kept free of obstructions, care must be exercised to render the track safe in all these respects.⁶⁵ The keeping of railroad tracks in such a condition that the trains can be operated over them in the usual and customary way in which the same are operated is not the test of the degree of care required of the railroad, but it is bound to the highest degree of care in keeping its tracks in condition for the operation of its trains.⁶⁶

§ 2390. Rails, Ties, etc.—Care should be taken to provide proper rails and to see that they remain in a sound condition.⁶⁷ The cross-ties should be sound⁶⁸ and they should be properly ballasted.⁶⁹ The rails should be securely fastened

64. *Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170, 3 N. E. 65, 26 Am. & Eng. R. Cas. 203.

65. Maintenance of tracks.—*Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. (23 Pickle) 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; *Citizens R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329; *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *Levy v. Campbell (Tex.)*, 19 S. W. 438.

"A railway car can not be successfully or safely run except upon a track, and a railway company can not lawfully, either as to car or track, be wanting in extraordinary diligence towards passengers without becoming responsible in law for the consequences." *San Antonio Tract. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

66. *St. Louis, etc., R. Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070.

67. United States.—*Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257, 27 Am. & Eng. R. Cas. 291; *Anthony v. Louisville, etc., R. Co.*, 27 Fed. 724.

Alabama.—*Alabama, etc., R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 44 Am. & Eng. R. Cas. 441, 9 L. R. A. 442, 24 Am. St. Rep. 764.

Arkansas.—*Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *George v. St. Louis, etc., R. Co.*, 34 Ark. 613, 1 Am. & Eng. R. Cas. 294.

Dakota.—*Pattee v. Chicago, etc., R. Co.*, 5 Dak. 267, 38 N. W. 435, 34 Am. & Eng. R. Cas. 399.

Florida.—*Florida R., etc., Co. v. Webster*, 25 Fla. 394, 5 So. 714.

Indiana.—*Cleveland, etc., R. Co. v. New-*

ell, 75 Ind. 542, 8 Am. & Eng. R. Cas. 377; *Pittsburg, etc., R. Co. v. Williams*, 74 Ind. 462, 3 Am. & Eng. R. Cas. 457.

New Hampshire.—*Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

Pennsylvania.—*McCafferty v. Pennsylvania R. Co.*, 193 Pa. 339, 44 Atl. 435, 16 Am. & Eng. R. Cas., N. S., 122, 74 Am. St. Rep. 690.

Texas.—*Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128; *Texas, etc., R. Co. v. Hardin*, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460.

68. United States.—*Newman v. Alabama, etc., R. Co.*, 38 Fed. 819.

Alabama.—*Alabama, etc., R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 44 Am. & Eng. R. Cas. 441, 9 L. R. A. 442, 24 Am. St. Rep. 764.

Illinois.—*Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

Kentucky.—*Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 14 Ky. L. Rep. 611, 21 S. W. 244, 58 Am. & Eng. R. Cas. 418, 40 Am. St. Rep. 211, 19 L. R. A. 310.

Louisiana.—*McFee v. Vicksburg, etc., R. Co.*, 42 La. Ann. 790, 7 So. 720; *Rutherford v. Shreveport, etc., R. Co.*, 41 La. Ann. 793, 6 So. 644, 41 Am. & Eng. R. Cas. 129.

Missouri.—*Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

Pennsylvania.—*O'Donnell v. Alleghany Valley R. Co.*, 59 Pa. 239, 98 Am. Dec. 336.

Texas.—*Gulf, etc., R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128; *Texas, etc., R. Co. v. Hardin*, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460.

69. Kansas.—*Southern Kansas R. Co. v.*

to the ties.⁷⁰ The fact that cross-ties are in such a rotten condition that they will not hold the spikes by which the rails are fastened down warrants the conclusion, it has been held, that the railroad was negligent.⁷¹

§ 2391. Switches.—Care must, of course, be exercised to construct proper switches and to maintain them in a safe condition.⁷² And care should be exercised that the switches are put in the proper position and not misplaced so as to threaten the safety of passengers by derailments or collisions.⁷³ A railroad company has been held responsible for injuries to a passenger in consequence of the misplacement of a switch connecting the road with that of another company, although the switch had been constructed by the latter company, which also employed and paid the switchman who attended the switch and whose negligence was the cause of the misplacement.⁷⁴ The conditions of the traffic may be such that the jury may be justified in finding that it is negligence to fail to provide a switch tender at a particular switch.⁷⁵ And since the introduction and general adoption of indicators at railway switches, a railroad company, in most cases, is properly chargeable with negligence if it fails to equip a switch with a proper indicator, which can be seen by the trainmen in time to provide against the consequences of the switch being out of place.⁷⁶ The fact that the displacement of a switch was because it had been tampered with by a stranger does not of itself exonerate the carrier from responsibility; the question remains whether the company had done everything to prevent the act which the high degree of care imposed upon passenger carriers demand.⁷⁷

§§ 2392-2397. Obstructions—§ 2392. In General.—The duty of a railroad company to exercise the utmost care for the safety of its passengers extends to keeping its road bed free from obstructions endangering such passengers.⁷⁸ Care must be exercised to guard against the track itself becoming obstructed by objects which may cause collisions and derailments, and against structures and objects alongside or above the tracks which may obstruct the safe passage of trains or otherwise endanger the life and limb of passengers thereon.⁷⁹ This duty is clearly embraced within its warranty to carry their passengers safely, so far as human care and foresight can go; because railroad companies conveying

Walsh, 45 Kan. 653, 26 Pac. 45, 47 Am. & Eng. R. Cas. 493.

Minnesota.—Edlund v. St. Paul, etc., R. Co., 78 Minn. 434, 81 N. W. 214.

Texas.—Norton v. Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

70. *Dakota*.—Pattee v. Chicago, etc., R. Co., 5 Dak. 267, 38 N. W. 435, 34 Am. & Eng. R. Cas. 399.

Illinois.—Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

Indiana.—Louisville, etc., R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476, 28 Am. & Eng. R. Cas. 170.

Texas.—Norton v. Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

71. *Louisville*, etc., R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343, 58 Am. & Eng. R. Cas. 304.

72. *Terre Haute*, etc., R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Grant v. Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209; Houston, etc., R. Co. v. Summers (Tex.), 51 S. W. 324, affirming 49 S. W. 1106.

73. *Massachusetts*.—Caswell v. Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec.

151; McElroy v. Nashua, etc., R. Corp. (Mass.), 4 Cush. 400, 50 Am. Dec. 794.

Michigan.—Patterson v. Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761, 18 Am. & Eng. R. Cas. 130.

Texas.—International, etc., R. Co. v. Bibolet, 24 Tex. Civ. App. 4, 57 S. W. 974; Texas, etc., R. Co. v. Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155.

74. *McElroy v. Nashua*, etc., R. Corp. (Mass.), 4 Cush. 400, 50 Am. Dec. 794.

75. *Baltimore*, etc., R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578.

76. *Baltimore*, etc., R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578.

77. *New York*, etc., R. Co. v. Daugherty (Pa.), 11 Wkly. Notes Cas. 437, 6 Am. & Eng. R. Cas. 139.

78. Obstructions.—International, etc., R. Co. v. Thompson, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.

79. Duty to keep track clear.—Union Pac. R. Co. v. Harris, 158 U. S. 326, 39 L. Ed. 1003, 15 S. Ct. 843; Farlow v. Kelly, 108 U. S. 288, 27 L. Ed. 726, 2 S. Ct. 555, 11 Am. & Eng. R. Cas. 104. Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502.

passengers, combining in themselves ownership as well of the road as of the cars and locomotives, are bound to the utmost care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.⁸⁰ A carrier of passengers must look out for and remove such objects along and adjacent to its roadway as may threaten the safety of its passengers, and where threatening objects, such as decayed trees, stand immediately adjacent to the right of way and are sufficiently menacing to evince probable danger, it must exercise high care as to them, and must remove them when it can do so without becoming a trespasser,⁸¹ and this may be a duty imposed by statute or charter.⁸² It has been held that a code provision for sounding alarms and putting on brakes to prevent accidents when "any person, animal or other obstruction appears upon the road," etc., and making the railroad liable for injury for failure to comply therewith, has no application to the injury of a passenger caused by an obstruction on the railroad.⁸³

§ 2393. Cattle on Track.—A railroad company must exercise care to prevent accidents in consequence of the intrusion of cattle on the track. The due performance of this duty may, in particular cases, require the carrier to fence the track, to provide cattle guards, to station watchmen, to remove timber and bushes along the track on the land of the company, or to moderate the speed of trains, at points where cattle are likely to intrude. In the absence of legislative enactments defining the duties of railroads in this respect, the means by which straying cattle are to be excluded is for the determination of the carrier, subject to responsibility for negligence in case of a failure to adopt those means which the exercise of the high degree of care demanded of passenger carriers will suggest.⁸⁴ It has been held that if an animal on the track is struck by one train and crippled and left in a disabled condition on the track or so near the track as to be struck by another train, there is undoubtedly negligence for the consequences

80. Duty embraced in warranty.—Virginia Cent. R. Co. *v.* Sanger, 56 Va. (15 Gratt.) 230; Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

81. Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

82. Rev. St. 1909, § 3049 (Rev. St. 1899, § 1035; Ann. St. 1906, p. 898), authorizing railroads to enter on the lands of any person and cut down standing trees that may be in danger of falling on the tracks, making compensation therefor, imposes a duty on a railroad, subject to the statute as a part of its charter, and the railroad must look out for and remove menacing trees standing adjacent to the right of way, and, for its failure so to do, it must respond in damages for breach of duty. Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

83. Tennessee Code (§ 1166, subsec. 5, and § 1167). Louisville, etc., R. Co. *v.* McKenna, 75 Tenn. (7 Lea) 313.

84. Arkansas.—Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

Kentucky.—Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 9 Ky. L. Rep. 22, 3 S. W. 591, 28 Am. & Eng. R. Cas. 167.

New York.—Brown *v.* New York Cent. R. Co., 34 N. Y. 404.

Pennsylvania.—Lackawanna, etc., R.

Co. *v.* Chenewith, 52 Pa. 382, 91 Am. Dec. 168; Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. 234, 72 Am. Dec. 698.

Texas.—Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; Eames *v.* Texas, etc., R. Co., 63 Tex. 660, 22 Am. & Eng. R. Cas. 540.

Where a train collides with cattle on the track, injuring a passenger, it can not, as a basis for exclusion of evidence that the right of way fence near the place was so defective as not to prevent cattle coming through, be held, as matter of law, that a carrier by rail owes its passengers no duty to fence its right of way, or to use reasonable care and diligence to keep the fence in such repair as will prevent cattle coming through onto the track. International, etc., R. Co. *v.* Thompson, 77 S. W. 439, 34 Tex. Civ. App. 67.

Duty to remove bushes.—The failure of a railroad company to cut down bushes along the track, which enabled cattle to come suddenly upon the track without time for the engineer to avoid them, renders the company liable to a passenger injured by a cow so getting onto the track and derailing the train. Eames *v.* Texas, etc., R. Co., 63 Tex. 660, 22 Am. & Eng. R. Cas. 540.

of which the company must answer.⁸⁵ The duty to fence tracks, imposed upon railroad companies by statute, is intended, not only to protect the lives of animals, but also to protect servants and passengers upon the trains.⁸⁶ And when the duty to fence its track and to construct cattle guards is imposed upon a railroad company by statute, it is responsible for accidents to passengers which result from a failure properly to discharge the duty.⁸⁷

§ 2394. Cars on Side Tracks.—The duty of a railroad carrying passengers to keep its tracks free of obstructions requires it to be careful not to leave cars on a side track so close to the main track as to cause collisions with passing trains,⁸⁸ and to see that cars which it uses on side tracks are secured in place, so that they will not come upon the track to overthrow any train that may come along.⁸⁹ Thus, it is the duty to so secure cars left standing on a side track that no wind reasonably to be anticipated will move them upon the main track.⁹⁰ Whatever is necessary to keep such cars securely in place should be done. If the setting of the brakes is not sufficient, it may become necessary to block the wheels.⁹¹ And the fact that an engineer having the control of a colliding train or locomotive was forbidden to run on the track at the time, and had acted in disobedience of such orders, is no defense.⁹² However it is not negligence to leave idle cars standing on a side track so near to the main track that a train, which runs upon the side track in consequence of the misplacement of a switch, can not be stopped in time to avoid a collision.⁹³

§ 2395. Structures Alongside the Track.—A railroad company has been held to have been negligent in having coal bins located so close to the track that a passenger, rightfully on the running board of an open car forming part of an excursion train, was struck by the bins and injured.⁹⁴

85. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

86. *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 42 Am. & Eng. R. Cas. 580, 7 L. R. A. 527.

87. *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565, affirming 50 Ill. App. 276; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58.

A railroad company was, by statute, required to fence its tracks at all places, except public crossings and within the limits of cities and incorporated towns and villages laid off into towns and blocks, and to erect and maintain sufficient cattle guards at all crossings. At the point where the road crossed the limits of a village the cattle guards were insufficient to prevent cattle from passing out along the track, and from that point to the place where the train on which plaintiff was a passenger collided with cattle the track was not fenced. It was held that defendant was liable notwithstanding the fact that the cattle first entered upon the track at a point within the village and where defendant was not bound to fence its track. *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565, affirming 50 Ill. App. 276.

88. *Farlow v. Kelly*, 108 U. S. 288, 2 S. Ct. 555, 27 L. Ed. 726, 11 Am. & Eng. R. Cas. 104.

89. **Duty to avoid collision with trains on sidetrack.**—*Union Pac. R. Co. v. Harris*, 158 U. S. 326, 39 L. Ed. 1003, 15 S. Ct. 843; *Farlow v. Kelly*, 108 U. S. 288, 27 L. Ed. 726, 2 S. Ct. 555, 11 Am. & Eng. R. Cas. 104.

The culpable negligence of the managers of the road in leaving a freight car to stand on a side track, so near the main track as to make a collision with the approaching train inevitable, renders the company liable for resulting injuries. *Farlow v. Kelley*, 108 U. S. 288, 27 L. Ed. 726, 2 S. Ct. 555, 11 Am. & Eng. R. Cas. 104.

In *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 39 L. Ed. 1003, 15 S. Ct. 843, the company was held liable for injuries caused by a collision with a car loaded with coal for a coal company which had escaped from the side track and run upon the main track.

90. *Webster v. Rome, etc., R. Co.*, 115 N. Y. 112, 21 N. E. 725.

91. *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.

92. **Unauthorized presence of another train on track.**—*Philadelphia, etc., R. Co. v. Derby* (U. S.), 14 How. 468, 14 L. Ed. 502.

93. *Grant v. Raleigh, etc., R. Co.*, 108 N. C. 462, 13 S. E. 209.

94. *Dickinson v. Port Huron, etc., R. Co.*, 53 Mich. 43, 18 N. W. 553, 21 Am. & Eng. R. Cas. 456.

§ 2396. **Overhead Structures.**—As to passengers who have a right to be on top of trains, for example, cattlemen riding on freight trains in charge of cattle, the carrier is under an obligation to so construct bridges, snow-sheds, or other structures overhanging the track, that they will not endanger the life and limb of the passengers who are rightfully on top of the cars, or to give such passengers warning, by means of whip lashes or otherwise, of the dangerous proximity of the overhead structure.⁹⁵ But it has been held that if the top of a caboose is not intended for the accommodation of passengers, and it is against the rules of the company for passengers to ride on top of the caboose, a passenger who is injured while doing so, in consequence of being struck by an overhanging water spout, has no action against the carrier.⁹⁶

§ 2397. **Obstructions Caused by Third Persons.**—The responsibility of railroad companies for accidents caused by obstructions placed upon the track by strangers must depend upon whether the company should not have anticipated the act or discovered and removed the obstructions. Thus, while a railroad company is bound to use great care to keep its track clear, it is not responsible for the unlawful act of some third person in placing obstructions thereon without its knowledge or consent, unless the circumstances are such that the act might reasonably have been anticipated.⁹⁷ If by the exercise of the high degree of care exacted of passenger carriers, the company can reasonably anticipate, and make due provision to prevent, the act, it must answer for the consequences of its failure to do so. Thus, the mere fact that cars which have been placed on a side track inclining towards the main track and securely fastened by brakes or blocks, have been set in motion by the act of a stranger is not alone sufficient to relieve the carrier from responsibility.⁹⁸ Since the duty which carriers owe passengers with respect to the roadbed and track is a positive duty imposed by law, the assignment of which can not relieve the carrier from liability for a negligent performance, the rule which exempts a principal from liability for the negligence of an independent contractor and his servants does not apply; the carrier must respond in damages for injuries to passengers resulting from the obstruction of the track by an independent contractor or his servants if the exercise of the high degree of care which the law imposes upon carriers would have prevented the placing of obstructions on the track or resulted in their discovery and timely removal.⁹⁹ A railroad company which permits third persons to place loaded cars on a spur track is liable for the negligence of their servants in so placing the cars as to obstruct the main track.¹

95. *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551; *Nelson v. Southern Pac. R. Co.*, 18 Utah 244, 55 Pac. 364, 14 Am. & Eng. R. Cas., N. S. 374; *Saunders v. Southern Pac. R. Co.*, 13 Utah 275, 44 Pac. 932.

Plaintiff, a cattleman was injured while on top of a train by being struck by a waterpipe, attached to a water tank and which, instead of being left in its proper position, overhung the top of the cars. A judgment for plaintiff was sustained. *Missouri Pac. R. Co. v. Callahan (Tex.)*, 12 S. W. 833, 41 Am. & Eng. R. Cas. 85.
96. *St. Louis, etc., R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525.

97. *Harris v. Union Pac. R. Co.*, 4 McCrary 454, 13 Fed. 591.

98. *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7, 18 Am. & Eng. R. Cas. 399.

99. *Virginia Cent. R. Co. v. Sanger*, 56 Va. (15 Gratt.) 230. Compare *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; *Carrico v. West*

Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; S. C., 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393.

If a railroad company, whilst using its tracks for the carriage of passengers, engages in a work to be done on its road and in immediate proximity to its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, and accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defense to show merely that they had placed the work in the hands of an independent contractor, and that the obstruction was caused by the carelessness of one of his employees. *Virginia Cent. R. Co. v. Sanger*, 56 Va. (15 Gratt.) 230.

1. *Georgia, etc., R. Co. v. Underwood*, 99 Ala. 49, 8 So. 116, 44 Am. & Eng. R. Cas. 367, 24 Am. St. Rep. 756.

§§ 2398-2401. Street Railways—§ 2398. In General.—The duty to exercise care to provide and maintain a safe track is, of course, imposed upon street railway companies to the same extent as upon ordinary steam railways² and they are not relieved of the duty by reason of the fact that the track is located by authority of a municipality.³ A street railway company is no doubt guilty of negligence when it runs its cars over a track which is in such a torn-up and defective condition on account of the making of repairs, that even by the exercise of the increased vigilance and care which is practicable, the safety of passengers is not well assured.⁴ A traction company, which undertakes to pass over a bridge owned by a municipality without seeing to its safety, is liable to its passengers for injuries resulting to them through the insufficiency of the bridge used to sustain the weight of the cars of such company.⁵ And the fact that a culvert used by a street railroad had existed long prior to the construction of the tracks, and had subsequently been maintained principally by the municipality does not relieve the carrier.⁶ But in a case based upon an accident resulting from the frightening of the horses drawing a street car by heaps of dirt piled near the track at a point where repairs were being made it was said that the mere fact of piling dirt or clay on or near the track was not negligence.⁷

§§ 2399-2401. Obstructions—§ 2399. In General.—A street railway company, like ordinary steam railroads, must, of course, exercise care that the track is not rendered unsafe by the presence of obstructions thereon.⁸ Thus, it is said that a street railroad company must exercise reasonable care and diligence, proportioned to the dangers likely to result from its failure to do so, to keep its roadbed and tracks free from dangerous obstructions.⁹ And it has been held that where workmen are engaged and material changes are continually being made along the street car tracks, those in charge of a car, particularly when it is crowded to the running board with passengers, should exercise special care to avoid accidents.¹⁰ A street railway company must be held responsible for an accident resulting from the presence of a plank on the track, if it has been guilty of negligence in causing or permitting the plank to be placed in a dangerous position near the track or in failing properly to inspect the track, or if the motor-man or person in charge of the car fails to maintain a proper lookout.¹¹ But

2. *Edlund v. St. Paul, etc., R. Co.*, 78 Minn. 434, 81 N. W. 214; *Smedley v. Hestonville, etc., R. Co.*, 184 Pa. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas., N. S., 649; *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op. See, also, *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308. *Citizens' R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329.

The rule of law requiring railway companies to exercise extraordinary diligence in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of cars thereon. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

In an action against a street railway for injuries to a passenger owing to a defective track, defendant can not complain of the fact that the court only charged on its duty to keep its track and appliances in a reasonably safe order and condition. *Nashville Railroad v. Howard*, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

A traction company in selecting its route must use care to select a safe one.

Elgin, etc., Tract. Co. v. Hench, 132 Ill. App. 535.

3. *Baltimore, etc., Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346, 27 Am. & Eng. R. Cas. 194.

4. *Citizens', etc., R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55, 30 Am. & Eng. R. Cas. 616.

5. **Municipal owned bridge.**—*Elgin, etc., Tract. Co. v. Hench*, 132 Ill. App. 535.

6. *Sawin v. Connecticut Valley St. R. Co.*, 213 Mass. 103, 99 N. E. 952, 43 L. R. A., N. S., 72.

7. *Noble v. St. Joseph, etc., R. Co.*, 98 Mich. 249, 57 N. W. 126.

8. *Dusenbury v. North Hudson County R. Co.*, 66 N. J. L. 44, 48 Atl. 520.

9. *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369.

10. **Special care called for.**—*Judgment, Kramer v. Brooklyn Heights R. Co.*, 100 N. Y. S. 276, 114 App. Div. 804, reversed. *Cramer v. Brooklyn Heights R. Co.*, 83 N. E. 35, 190 N. Y. 310.

11. *Cogswell v. West, etc., Elect. R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

the carrier can not be held liable when he is not guilty of negligence in allowing the obstruction and where the passenger is guilty of contributory negligence in occupying a dangerous position.¹²

Determining Negligence.—In determining whether it is negligent for a street railroad company not to remove leaves on the track, the jury should consider the nature of the obstruction, whether it is necessary to remove it, and the character and extent of the labor required to do so, keeping in view the degree of care required by the company in maintaining its tracks.¹³

§ 2400. **Structures Alongside the Track.**—The track of a street railway should be laid at a sufficient distance from adjacent structures that the life and limb of passengers on the cars are not endangered, and the company which is negligent in this respect and fails to instruct passengers, or otherwise guard them against the dangers incident to the negligent construction, must answer for the consequences to passengers who are themselves in the exercise of due care.¹⁴ And trolley poles, cross beams used thereon, etc., should be placed a safe distance from the track, and the same high degree of care is required as to them.¹⁵

Negligence—Acts or Omissions Constituting Negligence.—When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain, even prudent men may be induced to enter, and it is practicable to remove such danger, without injuriously interfering with other rights or privileges, then the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites or even permits it.¹⁶

Carriers—Carriage of Passengers—Street Railroads.—A street railroad is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon

12. Plaintiff, a boy of thirteen years, got on one of defendant's cars, which was very much crowded, to ride as a passenger. There was no room on the back platform, and just enough on the front platform to allow him to get on. He sat down on the platform, with his feet on the step, and his knees projecting several inches beyond the side of the car. While in this position his knees were struck by a mortar box, which had been placed in the street by some builders, and he was thrown from the car, and run over. The mortar box was from two to four inches from the side of the car as it passed. After all the evidence was in, defendant moved for a judgment of compulsory nonsuit on the ground that there was no evidence of any negligence on the part of defendant, and because there was contributory negligence on the part of plaintiff. The motion was allowed, and, on appeal, the judgment was affirmed. *Butler v. Pittsburgh, etc., R. Co.*, 139 Pa. 195, 21 Atl. 500.

13. **What to be considered.**—*Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369.

14. *New Orleans, etc., R. Co. v. Schneider*, 8 C. C. A. 571, 60 Fed. 210; *West Chicago, etc., R. Co. v. Marks*, 182

Ill. 15, 55 N. E. 67, affirming 82 Ill. App. 185.

15. If a cross-beam on a pole carrying cross-wires to support the trolley wire has been placed nearer to the track than a very careful person would have permitted under like circumstances, and the company knew of such condition, or by the exercise of such high degree of care might have known it in time to have remedied it, and prevented injury to a passenger therefrom, and failed to do so, it would be liable. *Gardner v. Metropolitan, etc., R. Co.*, 122 S. W. 1068, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166.

Where a street railway company maintains a cross-beam carrying feed wires and bolted to one of the poles supporting a cross-wire which supports the trolley wire, the pole, cross-beam, and wire are necessary parts of the equipment used in furnishing motive power, and the law imposes the same degree of care in providing such equipment as it does in furnishing safe cars in which passengers may ride. *Gardner v. Metropolitan, etc., R. Co.*, 223 Mo. 389, 122 S. W. 1068, 18 Am. & Eng. Ann. Cas. 1166.

16. *Cameron v. Lewiston, etc., St. R. Co.*, 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

one of its cars may at any place along the line and while the car is in motion undertake to change his seat.¹⁷

Same—Contributory Negligence.—It is too narrow a construction, and against good public policy, to hold that it is negligence per se on the part of a passenger riding on a trolley car not to anticipate that a pole may be permitted to stand so near the railroad track that he can not, in an erect position and careful manner, pass from one seat in the car to another over the running board without danger of injury from collision with such pole.¹⁸ It establishes a safer rule of law to require a street railroad to exercise a degree of care sufficient for the protection of its passengers with respect to poles and other obstacles along its right of way when such protection involves only a question of pecuniary outlay than to hold that such railroad may be permitted, for the mere purpose of saving expenditure to continue a structure which is calculated sooner or later to result in the injury or death of a passenger.¹⁹ Thus a street railway company has been held liable to a passenger who was struck by a derrick standing close to the track.²⁰ A carrier has been held liable to a passenger on a street car for injuries received while the car was crossing a bridge, in consequence of the elbow of the passenger coming in contact with a portion of the bridge as he was walking towards the rear end of the car, which was of the kind called a double-decker, for the purpose of descending to the lower platform so as to be in a position to alight from the car shortly after it should pass the bridge.²¹ Where a street railway track is laid so near telegraph poles or other structures that passengers while getting on and off or riding on the cars are in danger of being injured by contact with the obstruction, the question of the carrier's negligence is properly left to the jury.²²

Question for Jury.—A street railroad owes to its passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of its passengers by coming in contact with a pole or other structures, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.²³

17. *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

18. *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

"In *San Antonio Tract. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, the plaintiff was on the running board moving toward a vacant seat. While crossing a bridge, the space between the bridge and the car not being sufficient to allow his body to pass, he was struck by the bridge and injured. This was held to constitute negligence on the part of the road." *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

"In *Elliott v. Newport, etc.*, R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, the court held: 'A passenger who rides on the foot board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there; such, for instance, as injury from passing vehicles, or of being thrown off by the swaying or jolting of the car, assuming, of course, proper management of the car and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passen-

ger whom the railroad company has undertaken to carry on the foot board of its car is bound to anticipate and be on the lookout for; unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road.'" *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

19. *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

20. *Seymour v. Citizens' R. Co.*, 114 Mo. 266, 21 S. W. 739, 58 Am. & Eng. R. Cas. 395.

21. *Baltimore, etc., Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346, 27 Am. & Eng. R. Cas. 194.

22. *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672, 52 Am. & Eng. R. Cas. 522, affirming 40 Ill. App. 590.

23. *Cameron v. Lewiston, etc.*, St. R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

"In *Anderson v. City, etc.*, R. Co., 42 Ore. 505, 71 Pac. 659, the court say: 'The

§ 2401. Adjustment of Parallel Tracks.—A street railway with double tracks should construct the track at such a distance apart that the safety of passengers on cars running on one of the tracks will not be jeopardized by the running of cars on the other track,²⁴ and due care should be taken when cars are passing on such tracks not to injure the passengers.²⁵ It is held that to lay parallel street railroad tracks so close together that the space between open passenger cars operated thereon is very narrow, is evidence of negligence.²⁶ And the condition of things may be such as to justify a presumption that the tracks were negligently constructed and maintained, authorizing a verdict in favor of a passenger who is injured.²⁷ However, the duty of a street car company to exercise care to lay its parallel tracks a safe distance apart does not require such tracks that a passenger can not under any circumstances be injured by coming in contact with a car on the other track.²⁸ *

§ 2402. Liability of Carrier Using Track of Another Company.—The liability of a railroad company for the defective condition of the roadbed and track of another company over which it runs its trains will be discussed in a subsequent note dealing with the subject of connecting carriers.

authorities all agree that it is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on and off its cars or riding thereon, are in danger of coming in contact therewith, and it is generally considered a question for the jury as to whether a given obstruction is so situated.' This opinion cites numerous cases. To the same effect are *West Chicago, etc., R. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67; *Mason v. Boston, etc., St. R. Co.*, 190 Mass. 255, 76 N. E. 717; *Nugent v. Boston, etc., Railroad*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Withee v. Somerset Tract. Co.*, 98 Me. 61, 56 Atl. 204, and *Stone v. Lewiston, etc., St. Railway*, 99 Me. 243, 59 Atl. 56." *Cameron v. Lewiston, etc., St. R. Co.*, 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

A passenger on a street car, while riding on the footboard of the car, without objection on the part of the conductor, was struck by a trolley pole. The distance between the inside of the pole and the outer edge of the footboard was ten and one-half inches. Plaintiff did not know of the location of the pole, and was not warned of any danger in riding on the footboard. The trial court directed a verdict for defendant, but plaintiff's petition for a new trial was granted on the ground that the question of defendant's negligence should have been submitted to the jury. *Elliott v. Newport, etc., R. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208.

24. *Summers v. Crescent City R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419.

A street railroad company is liable for injuries resulting from such a condition of its tracks as permits passing cars to come in contact with each other. *Staples v. Rhode Island, etc., R. Co. (R. I.)*, 67 Atl. 431.

In a case in which it appeared that the

defendant street railway company's tracks were separated by so narrow a space on a curve that when the car on which plaintiff was a passenger and another car were passing in opposite directions they came in collision, whereby plaintiff was injured, a judgment for plaintiff was sustained. *Germantown, etc., R. Co. v. Brophy*, 105 Pa. 38, 16 Am. & Eng. R. Cas. 361.

25. Bells should be sounded.—A street car company is liable for the death of a passenger who, while standing on the inside running board of an open car, was struck by a car from the opposite direction on the other track, if the bell on such car was not sounded. *Kalis v. Detroit United Railway*, 119 N. W. 906, 155 Mich. 485.

26. Evidence of negligence.—*La Barge v. Union Elect. Co.*, 138 Iowa 691, 116 N. W. 816, 19 L. R. A., N. S., 213.

27. It was so held where the elbow of a street car passenger was struck and injured by a passing car, it appearing that the space between defendant's double tracks at the point in question was so narrow that the cars would rub or bump together in passing, and plaintiff's evidence showed that they did so. *Smith v. St. Louis Transit Co.*, 120 Mo. App. 328, 97 S. W. 218.

28. A passenger riding on the foot or running-board of an open street car was struck by a car passing on the neighboring track. The tracks were at least seventeen inches apart. Open cars had been in daily use during the summer months for at least twenty years. Thousand of persons during this long period had seen riding at or near the point at which the accident happened on the outside of the open cars at times when they met cars coming from the opposite direction, and the cars had passed each other, and no one had ever been hurt, nor had any accident ever before happened there, or at any other portion of

§§ 2403-2425. **As to Vehicles—§ 2403. General Rule.**—While, a distinction necessarily exists between different kinds of carriers with respect to the duty to exercise care that the road over which passengers are carried is safe and suitable for the purpose,²⁹ all carriers are under practically the same obligation with respect to the vehicle in which passengers are transported; every public carrier of passengers, whether by railroad, stage coach, water craft, or otherwise, is bound to exercise care to see that the vehicle or vessel in which passengers are carried is safe and secure.³⁰ The caution and vigilance required of a carrier of passengers must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing adequate cars or vehicles sufficiently secure as to strength and other requisites, for the safe conveyance of passengers, and for the slightest negligence or fault in this regard, the carrier is liable.³¹ The high degree of care imposed

the road, from any such cause. A verdict for plaintiff was reversed and a new trial ordered on the ground that no negligence on the part of the defendant had been shown. *Craighead v. Brooklyn, etc., R. Co.*, 123 N. Y. 391, 25 N. E. 387, reversing 5 N. Y. S. 431.

29. See note to *Whippel v. Michigan, etc., R. Co.*, 108 Pa. 524, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774.

30. *Smithers v. Wilmington City R. Co.* (Del.), 6 Pen. 422, 67 Atl. 167.

31. **Duty as to vehicles or means of carriage.**—*United States.*—*Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225; *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153, 156, 44 L. Ed. 1015, 20 S. Ct. 880; *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061.

Iowa.—*Dorn v. Chicago, etc., R. Co.* (Iowa), 134 N. W. 855.

Ohio.—*Mt. Adams, etc., R. Co. v. Isaacs*, 18 O. C. C. 177, 10 O. C. D. 49.

Oklahoma.—*Atchison, etc., R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681.

Tennessee.—*Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. (23 Pickle) 106, 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324; *N. & C. R. Co. v. Messino*, 33 Tenn. (1 Sneed) 220; *Louisville, etc., R. Co. v. McKenna*, 75 Tenn. (7 Lea) 313.

Texas.—*International, etc., R. Co. v. Halloran*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *Levy v. Campbell* (Tex.), 19 S. W. 438; *Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op.

A carrier of passengers must provide cars and appliances of the most approved type in general use by others engaged in a similar occupation, and exercise a high degree of care to maintain and keep them in suitable repair and efficient for their intended purpose. *Irwin v. Louisville, etc., R. Co.*, 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

A carrier must furnish reasonably safe

equipment for passengers, and maintain it in that condition so far as it can by the exercise of the utmost human skill and foresight. *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648.

Street railway.—*San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; *Citizens' R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329.

Class of conveyance to be provided.—Carriers of passengers are bound to provide such conveyance as will best secure the safety of passengers. *Farish & Co. v. Reigle*, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666; *Baltimore, etc., R. Co. v. Wightman*, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 73 Va. (32 Gratt.) 394.

"And while the law does not require any particular form of equipment or any particular appliances for the regulation of speed of its cars, or for checking their movement, it does require safe appliances and proper skill in the person operating the car, so as to perform their particular functions." *Cincinnati Tract. Co. v. Baron, etc., Co.*, 3 N. P., N. S., 633, 635, 16 O. D. N. P. 537, affirmed in 76 O. St. 599, 81 N. E. 1182.

Suitable and sufficient.—The legal obligation imposed on railroad companies by their contracts with passengers and employees is, that their machinery is suitable, sufficient, and as safe as care and skill can make it; and, that they will be responsible for injuries resulting from defects therein, which might have been detected by their agents upon a careful and skillful application of the proper and approved tests. *Nashville, etc., R. Co. v. Jones*, 56 Tenn. (9 Heisk.) 27.

"A railroad company is required to and does provide suitable and safely constructed cars, for carrying passengers. Such cars are frequently and carefully inspected. The company is held to a strict accountability and made liable for negligence causing injury to passengers. A hand car is for the use of the employ-

upon a railroad company by law as a carrier of passengers requires it to adopt all reasonable means for the comfort and safety of its passengers.³² While a carrier of passengers is required to use the utmost diligence and care in providing reasonably safe cars, such carrier is not an insurer of the absolute safety of its passengers, but has discharged its duty in respects to its cars and trains when it has supplied the best instrumentalities that a highly prudent person would have supplied in the same business in the then known condition of the art and business.³³ It is the duty of the carrier to avail itself of well-tested inventions and improvements which materially contribute to safety.³⁴ It is said that a carrier must provide vehicles as safe as skill and foresight can reasonably make them.³⁵ It is not to be understood that the general rule as to the degree of care demanded of carriers of passengers requires of a railroad company every possible precaution which ingenuity might suggest or the skill of science might afford, by which accidents may be avoided, but that it shall adopt such precautions of known value as have been practically tested.³⁶ Although a carrier must afford reasonable means for passengers to alight, yet it is guilty of no breach of duty if the construction of its car adopted is in common use and approved by experience.³⁷ But the rule is that negligence on the part of the car-

ees of the company in repairing the road. It is not provided with a view to the convenience or safety of passengers, nor intended to be used in transporting them. It forms no part of the passenger service of a railroad." *Cincinnati, etc., R. Co. v. Morley*, 4 O. C. C. 559, 2 O. C. D. 706.

32. *Houston, etc., R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. 201; *Houston, etc., R. Co. v. Swaney* (Tex. Civ. App.), 128 S. W. 677.

A carrier of passengers for hire is bound to give all reasonable facilities for the reception and comfort of passengers. *Ramjak v. Austro-American Steamship Co.*, 108 C. C. A. 339, 186 Fed. 417.

33. *Ozanne v. Illinois Cent. R. Co.*, 151 Fed. 900; *Houston, etc., R. Co. v. Swaney* (Tex. Civ. App.), 128 S. W. 677; *Citizens' R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329.

34. *Johnson v. Gulf, etc., R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274.

35. *Irwin v. Louisville, etc., R. Co.*, 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

36. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829. And see *Texas Mid. R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797; *Missouri, etc., R. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94.

In an action for the death of a passenger, an instruction that railroad companies engaged in transporting passengers for hire are bound to use the best precaution in practical use to secure the safety of passengers was objectionable; such carriers being only required to use the best precautions in "known" practical use. *Valente v. Sierra R. Co.*, 91 Pac. 481, 151 Cal. 534.

The test of care is not the selection of

"one of the best approved appliances," but it is the exercise of that high degree of care required of a carrier in selecting the appliance. *Judgment, St. Louis, etc., R. Co. v. Parks* (Tex. Civ. App.), 73 S. W. 439, reversed. S. C., 76 S. W. 740, 97 Tex. 131.

Plaintiff, a passenger on defendant's train, was injured by the escape of a red-hot cinder from the engine. Held, that a charge which required defendant to show that its engine was equipped with the best appliances obtainable, without qualification as to whether such appliances were in use or had been approved, was erroneous, since it imposed too high a degree of care. *Texas Mid. R. Co. v. Jumper*, 60 S. W. 797, 24 Tex. Civ. App. 671.

Plaintiff, a passenger in a sleeping car on defendant's railroad, was thrown down while in the ladies' dressing room, by the swing of the car as the train passed around a curve going at its ordinary speed. The car was constructed according to pattern uniformly used by the makers, which was considered the best, but the ladies' dressing room was not equipped with handholds affixed to the walls, nor with any seat or chair. Cars of the type in question had been operated for years with safety, and plaintiff's injury was the first of its kind that the sleeping car company had ever known. Held, that the failure to equip the dressing room with seats and handholds did not constitute negligence per se. *Ozanne v. Illinois Cent. R. Co.*, 151 Fed. 900.

37. *Traphagen v. Erie R. Co.*, 73 N. J. L. 759, 64 Atl. 1072, 67 Atl. 753, 9 Am. & Eng. Ann. Cas. 964.

Where plaintiff was injured while alighting from a passenger coach by her heel catching in the step, and the negligence alleged was the height of the step from the ground, and there was no evi-

rier must be shown,³⁸ and this is a question for the jury.³⁹ The question of the liability of the carrier is unaffected by the fact that the vehicle, or other apparatus, was purchased of another, if the defect is one that might have been discovered by any known means.⁴⁰ Since a very large proportion of modern passenger transportation is in the hands of railroad and street railway companies, there are, very naturally, many recent cases in which the duty of these carriers with respect to their vehicles is stated. But most of these cases will be used later in this note in connection with a discussion of the specific applications of the duty, and only a few cases which state the obligation in general terms are here cited.⁴¹

To What Part of Train Applicable.—Where a railroad company had no agent at a station and no means for a passenger to arrange with reference to his baggage before boarding the train, and the passenger was required to go into the

dence that the height was unusual, no negligence of defendant was shown. *Traphagen v. Erie R. Co.*, 64 Atl. 1072, 67 Atl. 753, 73 N. J. L. 759, 9 Am. & Eng. Ann. Cas. 964.

38. Negligence must be shown.—In an action by a woman against a railway company for damages due to mortification caused by her becoming locked in the water-closet of a railway coach, on account of a defect in the door lock, it appeared that the lock was of the best manufacture, and that, as soon as plaintiff's predicament was discovered, plaintiff, while the brakeman was attempting to pry off the lock, voluntarily escaped from the closet through the window, with her husband's assistance. Held, that defendant was not liable. *Gulf, etc., R. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

Where, in an action for damages for injuries to plaintiff's hand by a car window and his testimony that when he entered the car the window was raised, and that he did not touch it, is disputed by other witnesses, and found untrue by the court, and it is found that plaintiff raised the window himself, and there is no evidence as to the cause of the fall, or that it was caused by any defect in the window or fastening, a judgment for plaintiff is not justified. *Texas Mid. Railroad v. Johnson* (Tex. Civ. App.), 65 S. W. 388.

39. Question as to negligence in using certain appliances one for jury.—Where a passenger in a Pullman car goes to the wash room while the car is in motion, and while steadying himself by placing his hand on what appeared to him a plain wall, in order to dry his hands after washing, his hand is caught in a door as it is opened, which was due to the peculiar mechanism of the door, it is a question for the jury whether the company was negligent in using a door of that kind. *Sturdivant v. Fort Worth, etc., R. Co.* (Tex. Civ. App.), 27 S. W. 170.

Where a passenger was injured by the falling of a car window, caused by defective or insufficient fastenings, whether defendant's failure to provide the windows with reasonably safe fastenings and

keeping them in that condition was negligence was for the jury, and hence it was error for the court to charge as a matter of law that "any failure or omission of defendant" to so provide and keep reasonably safe fastenings was negligence. *International, etc., R. Co. v. Hubbs*, 82 S. W. 1062, 37 Tex. Civ. App. 77.

Whether a street railroad was negligent in using, for the transportation of small children, an open car, the seats of which projected beyond the floor, so as to leave an opening or pitfall through which a child might fall to the street, is a question of fact. *Northern Texas Tract. Co. v. Royce*, 86 S. W. 621, 38 Tex. Civ. App. 601.

40. Defects in vehicles purchased of another.—The City of Panama, 101 U. S. 453, 25 L. Ed. 1061. See post, "Liability for Negligence of Manufacturer or Builder," § 2434.

Persons transported in such conveyances contract with the proprietors or owners of the conveyance and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective ship, car, engine, or other apparatus was purchased of another, if the defect is one that might have been discovered by any known means. *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061.

41. Michigan.—Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Minnesota.—Bishop v. St. Paul, etc., R. Co., 48 Minn. 26, 50 N. W. 927.

New York.—Curtis v. Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Hege-man v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. 353.

Pennsylvania.—Meier v. Pennsylvania R. Co., 64 Pa. 225, 3 Am. Rep. 581.

Texas.—Texas, etc., R. Co. v. Hamilton, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182; Texas, etc., R. Co. v. Suggs, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475.

Washington.—Washington v. Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

coach to make his arrangements after boarding the train, he was not a mere volunteer or licensee in so doing, but the company owed him the duty of seeing that the doors through which he was required to pass were reasonably safe.⁴² That the door of such a coach was constructed in the way that doors to such cars are ordinarily constructed does not relieve the railroad company of the charge of negligence, where the method of construction was inherently negligent.⁴³

§§ 2403-2422. Railroads and Street Railways—§ 2404. Safe Means of Ingress or Egress.—It is the duty of the carrier to provide reasonably safe means of ingress and egress to its cars for passengers, and this includes aisles, passage ways,⁴⁴ and platforms and steps.⁴⁵ But it is held that the mere fact that the personal baggage of a passenger is in the aisle of a car at the exact time of the accident does not of itself raise a presumption of negligence on the part of the employees of the railroad company.⁴⁶ While it no doubt is the duty of the employees of the railroad company to remove the personal baggage of passengers from the aisle of cars, they must, in order to make it their duty to act, have notice that such obstructions are in the aisle, or the obstruction must have remained there for so long a time before the accident that, in the exercise of due care, they would have discovered it before the accident occurred.⁴⁷

§ 2405. Cars, Engines, Couplings, Bell-Ropes, etc.—In the case of a railroad train, the whole train must be regarded as the vehicle, and care must be exercised that the engine and all the cars are free from defects and road-

42. To what part of train applicable.—*Creason v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 445.

43. What is negligence.—*Creason v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 445.

Where the door knob of the door to a passenger coach, where a passenger was required to go to arrange with reference to his baggage, was so close to the door casing that when the door was closed a man's finger could not be passed between them, this was sufficient to charge the railroad company with negligence. *Creason v. St. Louis, etc., R. Co.* (Mo. App.), 130 S. W. 445.

44. *Burns v. Pennsylvania R. Co.*, 233 Pa. 34, 82 Atl. 246, Ann. Cas. 1913B, 811.

45. See post, "Platforms and Steps of Cars," § 2411.

46. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

The rule is that where a passenger is injured by anything done or left undone by the carrier, or its employees, in connection with the appliances of transportation, or in the conduct and management of the business relating to the same, the burden of proof is upon the carrier to show that such injury did not result from its negligence. But, to cast this burden upon the carrier, it must first be shown that the injury complained of resulted from something improper or unsafe in the conduct of the business or in the appliances of transportation. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; *Thomas v. Philadelphia, etc., R. Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Ginn v. Penn-*

sylvania R. Co., 220 Pa. 552, 69 Atl. 992; *Sutton v. Pennsylvania R. Co.*, 230 Pa. 523, 79 Atl. 719. See post, "Actions," chapter 27.

The appliances of transportation referred to in such cases mean the road-bed, tracks, cars, engines, and all other machinery and equipment furnished by the railroad company and used in connection with the conduct and management of its business. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

47. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; *Stimson v. Milwaukee, etc., R. Co.*, 75 Wis. 381, 44 N. W. 748.

There is no Pennsylvania case directly in point. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

To this general effect, see *Van Winkle v. Brooklyn City R. Co.*, 46 Hun 564, 12 N. Y. St. Rep. 548; *Pitcher v. Old Colony St. R. Co.*, 196 Mass. 69, 81 N. E. 876, 13 L. R. A., N. S., 481, 124 Am. St. Rep. 513, 12 Am. & Eng. Ann. Cas. 886; *Lyons v. Boston Elevated R. Co.*, 204 Mass. 227, 90 N. E. 419; *Price v. St. Louis Transit Co.*, 125 Mo. App. 67, 102 S. W. 626.

And see the case of *Cincinnati Tract. Co. v. Hamburger*, 22-32 O. C. D. 253, judgment affirmed *Hamburger v. Cincinnati Tract. Co.*, 84 O. St. 456, 95 N. E. 1148, wherein it was held that a passenger can not recover for injuries sustained in attempting to get by a basket and box placed in the aisle by other passengers.

worthy, that the couplings are adequate,⁴⁸ and that the appliances necessary to the safe management of the train are supplied.⁴⁹ A railroad must furnish safe cars for the transportation of all persons, whether passengers or employees, who have the right to travel on them, and if a car be so improperly constructed as to make its use gross negligence, and such negligence is the proximate cause of an injury, an action for damages will lie.⁵⁰ The cars used by a passenger carrier should be equipped with safe windows,⁵¹ doors,⁵² floors,⁵³ platforms,⁵⁴ and coup-

48. Cars, engines, etc.—Louisville, etc., R. Co. v. McKenna, 75 Tenn. (7 Lea) 313.

A finding that a street railway was negligent in using for the carriage of a small child an open car, the seats of which projected along the floor, so as to leave an opening or pitfall through which the child fell to the street, was justified. Northern Texas Tract. Co. v. Royce, 86 S. W. 621, 38 Tex. Civ. App. 601.

49. Eaton v. Wilmington City R. Co., 1 Boyce's (24 Del.) 435, 75 Atl. 369.

Plaintiff was injured as the result of an explosion or burst of flame from the controller on defendant's street car, in which she was a passenger. Defendant claimed that the flash was an ordinary flash from the controller, which could not be prevented by any means yet devised or any care which could be exercised. There was other evidence, however, that the flash was more than an ordinary controller flash, and that it lasted fifteen to twenty seconds, lighted the whole front vestibule, and filled the car with dense smoke. Held, that such facts were sufficient to warrant an inference of negligence on defendant's part. Gilmore v. Milford, etc., St. R. Co., 78 N. E. 744, 193 Mass. 44.

50. Duty as to cars.—Gulf, etc., R. Co. v. Ryan, 69 Tex. 665, 7 S. W. 83.

Use of broad gauge car on narrow gauge track.—The use in a train running over a track of three feet gauge, of two large box cars built for a road of four feet eight inches gauge, with knowledge of the defect, is inconsistent with the high degree of care required of passenger carriers, and a court in a suit by the administrator of a passenger for damages for his wrongful death, may so instruct. East Line, etc., R. Co. v. Smith, 65 Tex. 167.

Dangerous appliance.—Where a passenger on a street car jumped therefrom because of an extraordinary explosion and fire issuing from the controller box, and was injured, it was no defense that the controller was of the best and most approved pattern, that it had been inspected in the most approved manner, that such inspection disclosed no defects, and that there was no known means by which it could be determined in advance whether the controller would explode and burn up in the manner in which it did, since if such were the fact defendant

might be guilty of actionable negligence in using such a dangerous appliance on its street cars. Paine v. Geneva, etc., Tract. Co., 101 N. Y. S. 204, 115 App. Div. 729.

51. Safe windows.—A passenger was injured by the window of a car falling on his fingers, and in an action for the injuries it was shown that the car had left a place of general inspection; that it was a new one, and that the window was supplied with proper catches, but that the window was not raised above the catches; and that it is sometimes difficult to raise windows above catches on new cars. Held, that the evidence was sufficient to sustain a verdict for plaintiff. International, etc., R. Co. v. Phillips, 69 S. W. 107, 29 Tex. Civ. App. 336.

Latent defects.—See post, "Liability for Latent Defects," § 2433.

52. Safe doors.—Texas, etc., R. Co. v. Leahey, 87 S. W. 1168, 39 Tex. Civ. App. 584.

In an action by a passenger for personal injuries alleged to have been caused by defendant's negligence in using a car door of unusual construction, rendering it more than ordinarily dangerous, plaintiff can recover on proof of this allegation on showing that such negligence caused his injury with no contributory negligence on his own part. Sturdivant v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 27 S. W. 170.

In an action for injuries to a passenger whose fingers were crushed by the closing of a car door, the evidence held sufficient to warrant a finding that the latch used to hold the door open was defective. Missouri, etc., R. Co. v. Perry (Tex. Civ. App.), 95 S. W. 42.

Usual and customary door.—A carrier was not negligent because a door of a toilet room on a car, which closed on the hand of a passenger, where he had thrust it to prevent falling, after losing his balance, was not supplied with a door check, so that it would close automatically, carriers not ordinarily equipping such doors with such checks, but the door being a customary appliance, in good repair and not obviously dangerous, and used in a usual and customary manner. Merton v. Michigan Cent. R. Co., 137 N. W. 767, 150 Wis. 540.

53. Floors.—A common carrier owes the duty of reasonable care in furnish-

54. See post, "Platform Guards and Entrance Doors," § 2410.

ling coverings.⁵⁵ And in view of the use of handholds on a street car, it has been held that a street railway company is bound to maintain them as a very high factor of safety.⁵⁶ It may be a question for the jury as to whether it is negligence to use a baggage car for the transportation of passengers.⁵⁷ The fact that passengers are carried on a hand car can not, of course, relieve the railroad of the obligation to exercise care properly to equip the car for the purpose.⁵⁸ If, during the course of a trip, a street car is discovered to be out of repair, it should ordinarily be withdrawn from the service.⁵⁹ A car is, of course constructed with a view to its proper management, and it can not be said that the mode of construction is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of passengers or company.⁶⁰ The engine should be of the proper kind and in good condition.⁶¹ It may, in some cases, be necessary to equip the engine with spark arresters⁶² and to keep such appliances in good repair,⁶³ to protect passengers from injury by escaping sparks. A railroad company has been held liable to a passenger rightly standing on a station platform who was injured by sparks flying from a passing engine, the evidence tending to show that the emission of sparks was due to a defectively constructed ash pan.⁶⁴

Couplings.—Care should be exercised that the couplings are of the proper kind and in repair.⁶⁵

ing cars in a safe condition, and in a street railroad passenger's action for injuries through falling on a defective car floor, an instruction making defendant's liability depend on such a condition of the floor as of itself to necessarily apprise defendant of its dangerous character was erroneous. *Plefka v. Detroit United Railway*, 118 N. W. 731, 155 Mich. 53.

55. Plaintiff, while traveling on defendant's passenger train, started to go from one coach to another for water, and on his return lost his balance by the movement of certain planks across the space between the cars, and was thrown to the ground. Defendant was changing the drawheads of its cars, and the coaches in this instance were chained together leaving an extraordinary space between the cars of about 18 inches, covered by the planks, which were nailed at one end and loose at the other. Held, that the use of such coupling and walkway constituted negligence on the part of the carrier. *St. Louis, etc., R. Co. v. Keitt* (Tex. Civ. App.), 76 S. W. 311, affirmed in 97 Tex. 645, no op.

56. Handholds.—*Gerlach v. Detroit United Railway*, 171 Mich. 474, 137 N. W. 256.

57. *Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 2 Am. & Eng. R. Cas., N. S., 187, 31 L. R. A. 313.

58. *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 44 Am. & Eng. R. Cas. 294, 19 Am. St. Rep. 795; *International, etc., R. Co. v. Cock* (Tex.), 14 S. W. 242.

59. *Washington v. Spokane St. R. Co.*, 13 Wash. 9, 42 Pac. 628.

60. *Werbowlsky v. Fort Wayne, etc., R. Co.*, 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120.

61. *Peyton v. Texas, etc., R. Co.*, 41 La. Ann. 861, 6 So. 690, 41 Am. & Eng. R. Cas. 550, 17 Am. St. Rep. 430; *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165.

62. *Higgins v. Cherokee Railroad*, 73 Ga. 149, 27 Am. & Eng. R. Cas. 218.

The duty of a carrier to exercise the highest degree of care compatible with the reasonable prosecution of its business to prevent injury to a passenger extends to the providing of a safe spark arrester. *St. Louis, etc., R. Co. v. Parks*, 76 S. W. 740, 97 Tex. 131, reversing for error in charge 73 S. W. 439; *Missouri, etc., R. Co. v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

63. In an action against a railroad for injuries to a passenger caused by cinders escaping from the engine and getting into the passenger's eyes, a charge to find for plaintiff, if defendant negligently failed to equip its engine with proper and suitable appliances to prevent the escape of cinders or negligently failed to have such appliances in reasonably good repair, or if its servants negligently operated the engine and such negligence was the proximate cause of plaintiff's injury, was proper. *St. Louis, etc., R. Co. v. Parks*, 90 S. W. 343, 40 Tex. Civ. App. 480.

64. *Philadelphia, etc., R. Co. v. Young*, 33 C. C. A. 251, 90 Fed. 709. See *Texas Mid. R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797.

65. *Cotchett v. Savannah, etc., R. Co.*, 84 Ga. 687, 11 S. E. 553; *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun 486, 11 N. Y. St. Rep. 872.

A cattleman while descending a ladder of one of the cars in the train on which

Bell-Ropes.—In a few states it is provided by statute that passenger trains shall be equipped with bell-ropes.⁶⁶ But while it might be negligence to fail to equip a train with bell-ropes when that is necessary for the protection of passengers and it is practicable to do so, there is no rule of the common law which requires that to be done in all cases and on every kind of train.⁶⁷

Headlight.—Carriers of passengers should equip their cars with headlights⁶⁸ and it is the duty of a carrier to use the best headlight the state of the art affords.⁶⁹

§ 2406. Brakes.—Care must be exercised to equip a train or street car with proper and sufficient brakes, and to maintain them in sound working condition,⁷⁰ and a carrier is, in such cases, liable only for such results as might have been anticipated from using defective brakes.⁷¹ This is based on the rule that the carrier's negligence must be the proximate cause of the injury.⁷² Under this rule it has been held that a carrier is not liable where the sole cause of the accident was the failure of air brakes to work, there being no negligence upon its part.⁷³ This duty has been made the subject of legislative enactment in several states, and it has been provided that passenger trains shall be equipped with automatic

he was riding in charge of cattle, was injured in consequence of being caught between that and the adjoining car and crushed. It was alleged in the declaration that the two cars were defective owing to the bumpers being out of repair, so that, when the train was backed or pushed forwards, the two cars came within six inches of each other. A judgment for plaintiff was sustained. *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174.

66. Tenn. Code 1884, § 1306; Vt. Stat. 1894, § 3909. And see *Hay v. Great Western R. Co.*, 37 U. C. Q. B. 456.

67. In an action by a passenger on a "mixed" train operated as a "way freight" and "passenger accommodation" combined, it appearing in evidence that it was impracticable and not usual to have bell-ropes on such trains, and it not being shown that the use of a bell-rope would have tended to prevent the accident complained of, it was held that the trial court erred in refusing to instruct the jury "that on the evidence they could not find the defendant ought to have a bell-rope on the train." *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436.

68. **Headlight.**—Electric railway cars should be provided with headlights. *Briggs v. Durham Tract. Co.*, 147 N. C. 389, 61 S. E. 373.

69. **Best headlight.**—*Louisville, etc., R. Co. v. McKenna*, 75 Tenn. (7 Lea) 313.

70. *United States*.—*Lyon v. Union Pac. R. Co.*, 25 Fed. 111.

Michigan.—*Wormsdorf v. Detroit, etc., R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453.

New York.—*Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721, 4 Silvernail Ct. App. 214, reversing 14 N. Y. S. 172.

Pennsylvania.—*People's, etc., R. Co. v. Weiller (Pa.)*, 2 Atl. 510.

Texas.—*Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182, in *Citizens' R. Co. v. Wade*, 40 Tex. Civ. App. 561, 91 S. W. 645, affirmed in 101 S. W. 631, no op.

Washington.—*Cogswell v. West, etc., Elect. R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

A judgment for plaintiff in an action by a passenger who was injured by the sudden flying back of an iron brake lever, the declaration alleging and the evidence tending to prove that the brakes and grip and appurtenances were in bad order and condition, has been sustained. *West Chicago St. R. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334, affirming 77 Ill. App. 142.

71. **Carrier liable only for results which might have been anticipated.**—Where the air brakes on the rear passenger coach of a train are in such a condition that the passengers are not endangered as long as the coach is attached to the train, the fact that the brakes are not in such a high degree of efficiency as to stop such coach before the forward section of the train is stopped, all the brakes being automatically set by the act of a drunken passenger in uncoupling the rear coach while the train is in motion, is not sufficient, as a matter of law, to render the company liable to a passenger injured in a collision of the coach with the forward section, as the company is not bound, as a matter of law, to anticipate such unauthorized acts by passengers, but the question whether the circumstances require it to anticipate such act is for the jury. *Texas, etc., R. Co. v. Storey*, 68 S. W. 534, 29 Tex. Civ. App. 483.

72. See ante, "Liability Based on Negligence," §§ 2269-2273.

73. Plaintiff, a passenger on an electric car, was injured in a collision as the car was rounding a curve near the foot of an incline, because of excessive speed. The motorman approached the incline at proper speed, and when he saw that the

air brakes,⁷⁴ which shall at all times be kept in good condition,⁷⁵ but such a provision does not make a carrier liable, merely because the air hose breaks, stopping a train on a trestle, and a passenger goes out on the car platform and falls off.⁷⁶ A statute in regard to brakes and brakemen on mixed trains can have no application where injuries occur on passenger trains.⁷⁷

§ 2407. Interior of Railroad Coaches.—The duty of a railroad company to exercise care to provide safe vehicles necessarily extends to the interior fixtures of its coaches. Thus, railroad companies have been held liable to passengers for injuries inflicted by the falling of a lampshade,⁷⁸ by the falling of a seat,⁷⁹ by the falling of a berth,⁸⁰ and by a bell-cord which a brakeman, in making a connection, pulled through a car in a violent manner.⁸¹ A railroad company will be liable for injuries to passengers resulting from the use of doors of unusual construction and which are more than ordinarily dangerous.⁸² But in an action to recover damages for mortification sustained by a woman passenger on account of being imprisoned in a water-closet owing to a defective lock, it appearing that the lock was of the best manufacture, and it not being shown that defendant was guilty of negligence in failing to keep the lock in good repair, a judgment for plaintiff was reversed.⁸³

§ 2408. Light, Heat and Water.—See post, "In General," § 2493.

In Regard to Women and Children.—The duty to provide warm coaches is clearer when women and little children are in the coaches, whose discomfort from want of heat is made known to the conductor and the attending brakeman, and where heat is requested.⁸⁴

§ 2409. Window Guards.—No obligation rests upon a railroad to provide the car windows with guards so as to protect passengers from injury by exposing their arms at the windows, or to protect them against missiles thrown from the outside by person over whom the company has no control.⁸⁵ And so in the case

air brake failed to check the car as it coasted down the incline he did everything in his power to stop it, but was unable to do so. It also appeared that when the motorman took charge of the car the machinery was in good order. Held, that the failure of the air brake to work, without prenotation or warning, was the sole cause of the accident, and that defendant was not negligent. *Tucker v. Rhode Island Co. (R. I.)*, 69 Atl. 850.

74. Ky. Gen. Stat. 1894, § 778; 1 How. Ann. Mich. Stat., § 3363; N. Y. Laws 1884, c. 439, § 6; R. I. Pub. Stat. 1882, c. 158, § 12; Vt. Stat. 1894, § 3910.

When a train is equipped with the usual air-brakes required by law, which are in good condition when the train is started, but the brakes refuse to work in consequence of the unexplained turning of an air-cock, the failure of the brakes to work is not, it has been held, of itself evidence of negligence. *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511.

75. Be kept in good condition.—*Louisville, etc., R. Co. v. Gregory*, 141 Ky. 747, 133 S. W. 805, 35 L. R. A., N. S., 317.

76. *Louisville, etc., R. Co. v. Gregory*, 141 Ky. 747, 133 S. W. 805, 35 L. R. A., N. S., 317.

77. Rev. St., art. 4517, requiring railroad companies to provide the rear coach

of every train transporting passengers and merchandise with a good and efficient brake, and to station a competent brakeman on such coach, does not render a railroad company liable for an injury to a passenger on a passenger train resulting from a failure to provide an efficient hand brake and brakeman on the rear coach, as the statute only applies to mixed trains. *Texas, etc., R. Co. v. Storey*, 68 S. W. 534, 29 Tex. Civ. App. 483.

78. *White v. Boston, etc., R. Co.*, 114 Mass. 404, 11 N. E. 552, 30 Am. & Eng. R. Cas. 615.

79. *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. 897.

80. *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866, 48 Am. & Eng. R. Cas. 91. See, post, this note, II, S., and IV.

81. *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107, 17 So. 503.

82. *Sturdivant v. Fort Worth, etc., R. Co. (Tex. Civ. App.)*, 27 S. W. 170.

83. *Gulf, etc., R. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

84. In regard to women and children.—*Atlantic, etc., R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

85. *Indianapolis, etc., R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Pittsburg, etc., R. Co. v. McClurg*, 56 Pa. 294,

of street railways, undoubtedly there is no invariable rule of law requiring them to provide the windows of their cars with guards to prevent injury to passengers who expose their hands and arms at the windows. Still under some circumstances, as where the cars run unusually close to structures alongside the track, it may be a question for the jury whether due diligence does not require that barricades or guards be provided for the car windows.⁸⁶

§ 2410. Platform Guards and Entrance Doors.—It has sometimes been provided by statute that the platforms of passenger coaches shall be guarded with flexible or movable bridges or aprons⁸⁷ and that the front platform of street cars shall be equipped with gates.⁸⁸ But in the absence of statutes to this effect it can not be said as a matter of law that it is negligence on the part of railroad or street railway companies not to equip their cars with gates or similar guards; the question of the carrier's negligence must be determined in each case in view of all the facts. Thus it has been held that there is no absolute duty resting on a street railway company operating cars on parallel tracks to equip the car platforms with gates to prevent passengers from getting off the cars on the side next to the parallel track; whether it is negligence to fail to equip cars with gates is a question for the jury to be determined upon the facts of each particular case.⁸⁹ And it has been held that it is a question of fact which ought to be submitted to a jury to determine whether or not the position of riding upon the front platform of a street car is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent them from being thrown from the car.⁹⁰ But in an action against a street railway operating its cars upon a single track, it was held that the use of cars which had no gates upon the platforms was not negligence.⁹¹ The question of whether a company which has equipped its cars with gates is chargeable with negligence in failing to have them closed must, it has been said, be determined by the jury in each case.⁹² And the

overruling *New Jersey R. Co. v. Ken-
nard*, 21 Pa. 203; *Missimer v. Philadel-
phia, etc., R. Co.* (Pa.), 42 Leg. Int. 405,
17 Phila. 172.

86. *New Orleans, etc., R. Co. v. Schnei-
der*, 8 C. C. A. 571, 60 Fed. 210.

87. (Conn. Gen. Stat. 1888, § 3540; Ohio
Rev. Stat. 1890, § 3347.)

88. See *Muehlhausen v. St. Louis R.
Co.*, 91 Mo. 332, 2 S. W. 315, 28 Am. &
Eng. R. Cas. 157.

89. *Augusta R. Co. v. Glover*, 92 Ga.
132, 18 S. E. 406, 58 Am. & Eng. R. Cas.
269. See, also, *Mt. Adams, etc., R. Co.
v. Isaacs*, 18 O. C. C. 177, 10 O. C. D. 49.

A street car company is not required,
as a matter of law, either by a statute or
rule of law, to keep a safety bar before
the entrance of open street cars. *Mor-
gan v. Los Angeles Pac. Co.*, 13 Cal. App.
12, 108 Pac. 735.

90. *Archer v. Ft. Wayne, etc., R. Co.*,
87 Mich. 101, 49 N. W. 488, 48 Am. &
Eng. R. Cas. 50; *West Philadelphia, etc.,
R. Co. v. Gallagher*, 108 Pa. 524, 27 Am.
& Eng. R. Cas. 201.

91. *Byron v. Lynn, etc., R. Co.*, 177
Mass. 303, 68 N. E. 1015.

92. *Augusta R. Co. v. Glover*, 92 Ga.
132, 18 S. E. 406, 58 Am. & Eng. R. Cas.
269.

In an action to recover for the death
of a passenger from injuries received in
consequence of falling off the rear plat-
form of a street car, the evidence tended

to prove the following facts: The rear
platform extended the whole width of the
car body—about 6 feet—and was about
three and one-half feet wide. It had a
dasher across the end, and a shifting gate
on the side next the other track, for the
purpose of keeping passengers from go-
ing out on that side. The other side of
the platform was left open for the ingress
and egress of passengers. The dasher
had a rail along the top, and on the rear
end of the car body was a hand rail on
each side of the door. The rail on the
dasher was about two and one-half feet
high, and the gate on the side was "a lit-
tle lower." The dashers and gates on the
cars on some of defendant's other lines
were from 6 to 8 inches higher. The
track on that line was quite rough, had
"high and low joints," so that a car
"would go uneven when it passes over
them." The cars would rock a good deal.
It was the practice and custom of the de-
fendant to carry passengers on the plat-
forms, and at certain hours they would
be crowded. On appeal, the reviewing
court, in holding that the question of de-
fendant's negligence was one for the jury,
said: "Permitting and inviting, as it did,
passengers to ride on the platform, it was
its duty to use all reasonable precautions
to insure their safety. Under the circum-
stances disclosed by the evidence it was
to be anticipated that passengers might,
by reason of the jolting or rocking of the

holding that a carrier is not negligent in failing to require that the entrance doors or guards to its street car be closed or locked until the cars come to a standstill is based on the fact that the carrier is bound to provide for the public the quickest possible entrance to its cars consistent with safety.⁹³

Platform Gate an Appliance.—A gate on the side of the platform of a surface street car is an appliance, within the rule requiring a carrier of passengers to exercise the utmost human skill, care, and foresight in the maintenance of its appliances for the protection of its passengers.⁹⁴

§ 2411. Platforms and Steps of Cars.—As it is a carrier's duty to provide safe and convenient means of ingress and egress in and out of its trains for its passengers,⁹⁵ rightfully there,⁹⁶ it must exercise the care which a very prudent person would exercise to keep its car platform and steps in a safe condition for its passengers to board and alight,⁹⁷ and, where it maintains a dangerous place of exit, it must warn or assist passengers.⁹⁸ And in this connection it is said that carriers should anticipate that women, the feeble as well as the strong and robust, will seek passage, and provide suitable platforms and steps for their convenience and assistance.⁹⁹ A railroad or a street railroad is liable for defects in the floor of the platform of its car,¹ and unquestionably such a carrier must exercise care to keep the platforms and steps of its cars free from snow, ice, and other substances which threaten the safety of passengers in getting on and off. It is liable for negligence in the discharge of any of these duties.² A carrier is liable if a sufficient opportunity has been had to remove the source of danger,³ but not otherwise.⁴ The duty of the carrier is not performed by appointing servants to

cars, or of some other cause, lose their balance, especially when the platform was crowded; and it was a fair question for the jury to say whether, in the exercise of that high degree of care required of carriers of passengers, the defendant ought not to have guarded the platform with rails or gates of sufficient height to have prevented just such accidents as occurred in this instance." *Matz v. St. Paul, etc., R. Co.*, 52 Minn. 139, 53 N. W. 1071.

93. *Gagnon v. Boston Elevated R. Co.*, 205 Mass. 483, 91 N. E. 875.

Where an elevated train had nearly reached a station, and then properly stopped on the curve just outside to wait for a signal to enter, so that it was the duty of the brakeman to announce the station, which he did, the act of the brakeman in removing chains stretched across the open space on platforms of the cars, in accordance with his regular practice, was merely a reasonable preparation to facilitate rapid transit by avoiding the necessity of delay to travelers, and it was not a negligent act, for which the railroad was liable to a passenger on the platform falling therefrom on the train starting to enter the station. *Crowley v. Boston Elevated R. Co.*, 90 N. E. 532, 204 Mass. 241.

94. Platform gate an appliance.—*Staplers v. Interurban St. R. Co.*, 106 N. Y. S. 854, 56 Misc. Rep. 337.

95. Ingress and egress.—*Rearden v. St. Louis, etc., R. Co. (Mo.)*, 114 S. W. 961.

96. The only duty of a carrier is to keep the platforms of its cars safe for passengers rightfully there. *Rivers v. Pennsylvania R. Co.*, 80 N. J. L. 217, 76 Atl. 455.

97. *San Antonio Tract. Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 529, no op.

A railroad company's agents and employees must use that high degree of care to keep the steps of the cars in as reasonably safe condition as would be exercised by very prudent persons in the same circumstances. *St. Louis, etc., R. Co. v. Gresham (Tex. Civ. App.)*, 140 S. W. 483.

98. Duty to warn or assist.—*San Antonio Tract. Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200.

99. *Rearden v. St. Louis, etc., R. Co. (Mo.)*, 114 S. W. 961.

Where a passenger was thrown from the platform of a street car, before it had stopped at his destination, by a defective board in the platform, which turned his foot, the street car company was liable for the injury. *Blackwell v. Metropolitan, etc., R. Co.*, 119 S. W. 456, 137 Mo. App. 654.

2. *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Herbert v. St. Paul City R. Co.*, 85 Minn. 341, 88 N. W. 996.

3. *Murphy v. North Jersey St. R. Co.*, 80 Atl. 331, 81 N. J. L. 706, 35 L. R. A., N. S., 592.

4. *Hotenbrink v. Boston Elevated R. Co.*, 211 Mass. 77, 97 N. E. 624, 39 L. R. A., N. S., 419.

That snow and ice had accumulated on the steps of a street car by being brought in on the feet of passengers between the time a passenger boarded it and slipped in getting off it is not evidence of negligence. *Caywood v. Seattle Elect. Co.*, 110 Pac. 420, 59 Wash. 566.

keep the car steps in safe condition, nor is it an excuse that they neglected their duty.⁵ In a case in which there was evidence that there was snow and ice on the step of a car before the train started, and that the step was in such a condition that passengers would slip upon it in getting on or off the car, it was held that the jury was warranted in finding that defendant was negligent.⁶ But it would be unreasonable to require the immediate and continuous removal of all snow and ice from trains during passage, and a passenger can not assume that the effects of a continuous storm of snow, sleet, or rain will be immediately and effectually removed from the exposed platform of a train between stations.⁷ Thus, a railroad company can hardly be expected to keep an exposed car platform clear of snow while in transit during a storm. The question of the carrier's negligence in this particular must depend upon whether it has had a reasonable opportunity to remove the nuisance⁸ and is, in nearly every case, to be determined by the jury.⁹ And it has been held that it would be unreasonable to require a

5. *Murphy v. North Jersey St. R. Co.*, 80 Atl. 331, 81 N. J. L. 706, 35 L. R. A., N. S., 592, reversing judgment, 73 Atl. 1119.

6. *Gilman v. Boston, etc., R. Co.*, 168 Mass. 454, 47 N. E. 193, 8 Am. & Eng. R. Cas., N. S., 478.

7. *Riley v. Rhode Island Co.*, 69 Atl. 338, 15 L. R. A., N. S., 523, 29 R. I. 143, 17 Am. & Eng. Ann. Cas. 50.

8. *Pittsburg, etc., R. Co. v. Aldridge*, 27 Ind. App. 498, 61 N. E. 741.

9. *Louisville, etc., R. Co. v. Cockerel*, 17 Ky. L. Rep. 1037, 33 S. W. 407; *Neslie v. Second, etc., R. Co.*, 113 Pa. 300, 6 Atl. 72, 27 Am. & Eng. R. Cas. 180.

In an action to recover for injuries received while alighting from defendant's train by slipping on snow and ice alleged to have been allowed to accumulate on the platform of the car through the negligence of the defendant, it appeared that the accident had happened about five o'clock in the morning at the end of a twelve hours' journey. It had stormed at various times during the night and morning, and the weather was cold and freezing. It was quite certain that the quantity of either ice or snow on the platform was inconsiderable, and perceptible only after some inspection. In reversing a judgment for plaintiff on the ground that the case presented no facts as to the negligence of defendant which the jury were justified in regarding as proof of negligence, the reviewing court, in discussing the duty of a railroad company to remove snow and ice on cars attached to a running train traveling at night during a continuous storm, said: "The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its ef-

fects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain, or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so. We are not referred to any case laying down the precise degree of care and diligence required of such corporations, under such circumstances; but we think it must be somewhat analogous to that imposed upon municipal corporations in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred, but they are not to be deemed negligent if they do not remove all traces of such obstructions when they do not constitute something more than the presence of a danger arising alone from their inherent quality of being slippery." *Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, 18 N. E. 859, 37 Am. & Eng. R. Cas. 150, 2 L. R. A. 252, reversing 42 Hun (N. Y.) 656, 4 N. Y. St. Rep. 888.

A railroad company can not be expected to keep up a continuous inspection or to know at each moment the condition of every part of a train. In an action by a passenger to recover for injuries received, while alighting from defendant's train, by slipping on filth which covered the car step, the evidence showed the following facts: The train had been inspected before the train started, the cars being found to be in good condition and free from the particular nuisance. The distance from the station where the inspection was made and where plaintiff boarded the train to the point where she alighted was two or three miles. The regular running

carrier to prevent the steps of its cars from becoming slippery, where it is caused by the ingress of passengers.¹⁰ It can not be said that a carrier is chargeable with negligence merely because vestibuled cars are not provided.¹¹ Of course the carrier is not liable for injury resulting from an obstruction placed in a car door by another passenger, in the absence of a showing that it had notice thereof or should have had notice by reason of the length of time the obstruction existed, etc., prior to the injury.¹²

§ 2412. Projecting Bolts, etc., Catching Clothing of Passengers.—Care should be exercised that bolts, hooks, etc., are not allowed to project from the floor or other parts of the vehicle in such a manner that they may catch in the clothing of, and cause injury to, passengers.¹³

time between the two points was eleven minutes. It was night, and there was no evidence to show that, in the brief interval which had elapsed since the inspection was made, either the conductor or any one of the brakemen had been so situated, in the discharge of his duties, that observation would have disclosed to him the condition of the step. The trial court refused to direct a verdict for defendant and plaintiff had judgment. On error, the judgment was reversed on the ground that the verdict for plaintiff was not supported by the evidence. *Proud v. Philadelphia, etc., R. Co.*, 64 N. J. L. 702, 46 Atl. 710, 18 Am. & Eng. R. Cas., N. S., 633, 50 L. R. A. 468.

10. At the time plaintiff was injured a snowstorm had continued throughout the day, with some rain, and the temperature was below the freezing point. Before starting on the trip the conductor had removed the accumulated ice and snow from the street car steps; but during the trip a considerable mass of ice and snow was deposited on the step by incoming passengers, and plaintiff, in alighting from the car, slipped from the step and was injured. He testified that before stepping down he saw the ice and snow, and used due care in alighting. Held, that defendant was not negligent in permitting snow and ice to gather on the steps. *Riley v. Rhode Island Co.*, 69 Atl. 338, 15 L. R. A., N. S., 523, 29 R. L. 143, 17 Am. & Eng. Ann. Cas. 50.

11. *Haas v. St. Louis, etc., R. Co.*, 128 Mo. App. 79, 106 S. W. 599.

12. That a passenger of an elevated railroad was injured by falling over parcels negligently left in the doorway of the car by another passenger, does not render the carrier liable for the injury, in the absence of a showing that defendant had notice of the obstruction, or that it had existed for such a length of time that defendant should have known thereof. *Lyons v. Boston Elevated R. Co.*, 90 N. E. 419, 204 Mass. 227.

13. *Bowdle v. Detroit, etc., R. Co.*, 103 Mich. 272, 61 N. W. 529, 2 Am. & Eng. R. Cas., N. S., 223, 50 Am. St. Rep. 366; *Tunncliffe v. Bay Cities Consol. R. Co.*, 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142.

A woman who was a passenger on defendant's suburban train, in attempting to alight, was injured by being thrown to the ground in consequence of the skirt of her dress becoming caught on the head of a coupling pin which projected from the platform of the car. It was held that the facts that similar platforms were recognized by railroad men as suitable and safe, and were in general use by railroad companies, did not conclusively establish the absence of negligence on the part of the defendant, but that the projecting pin being plainly visible so that the company had notice of the possible danger to passengers, the question of defendant's negligence was properly left to the jury, and a judgment for plaintiff was affirmed. *Illinois, etc., R. Co. v. O'Connell*, 160 Ill. 636, 43 N. E. 704, 4 Am. & Eng. R. Cas., N. S., 260, affirming 59 Ill. App. 463.

Plaintiff was injured, while alighting from defendant's street car, by being thrown to the ground in consequence of her dress becoming caught in a curtain hook. The hook was of the kind known as a snap hook, consisting of a hook with a spring, forming a ring or loop when the spring was in place. But the spring of the particular hook which caused the accident was broken. The only proof of negligence given by the plaintiff was that the spring of the hook was broken, and that the point of the hook was thus exposed. There was no proof showing how or when the spring was broken, nor how long it had been broken; nor was there any proof that, by any degree of diligence or care incumbent upon the defendant, it could have known of its defective condition. The hooks broke in no other way than by use, and, for aught that appeared, the particular hook might have been broken by some person after the car started upon the trip. The defendant gave evidence showing that all its cars were furnished with the same kind of curtains and hooks, and that there was no better way known of fastening the curtains; that its road had been operated for several years, and carried more than a million of passengers every year, and that such an accident had never before oc-

§ 2413. **Projection of Wheel Guard from Floor of Street Car.**—It can not be said that a street car is negligently constructed because a sheathing, covering the wheels and which is open to the view of passengers, projects a few inches above the floor of the car, that being the usual construction and no better being known.¹⁴ And it has been held that the existence of a space of several inches between the sheet iron covering of the wheels of a street car, which project through the floor of the car under the seats to a height of two or three inches, and the side of the car where the seats extend down to its edge, does not amount to defective construction.¹⁵

§ 2414. **Construction of Steps of Street Cars.**—The steps by which passengers get on and off street cars should, of course, be suitable for the purpose.¹⁶

§ 2415. **Wheel Guards.**—It has been held that, although it is provided by statutes that railway companies operating street cars shall have guards upon their cars to protect persons from getting under the wheels, it is a question for the jury whether the absence of guards constitutes negligence.¹⁷

§ 2416. **Motive Power of Street and Cable Cars.**—Care must be exercised by a street railway company employing horses as the motive power to select safe and tractable horses considering the use to which they are to be put.¹⁸ Street railways employing electricity as the motive power must exercise care to have the cars properly insulated and to discover any escape of electricity which may cause injury to passengers.¹⁹ So where a passenger in alighting was invited to pass through the vestibule, close to electric apparatus, the motorman was bound to protect her from any danger incident to its presence by exercising the highest

curred; that the springs in the hooks would sometimes break by use; that at the end of every trip the cars were inspected by persons assigned to that duty, and the curtains examined, and, if a broken hook was discovered, it was taken off, and replaced by a perfect one. In reversing a judgment for plaintiff, the reviewing court by Earl, J. (Danforth, J., dissenting), said: "It is difficult to perceive what more the defendant could have done or was bound to do. A defective, broken hook was not of such a dangerous character as to require the very highest degree of diligence to discover and remove it. It was not more dangerous in this car than it would have been elsewhere, where people were passing. No prudent man would have anticipated such an accident as this, or apprehended such an injury from a broken hook. Upon all the evidence, therefore, we are of opinion that the trial judge should have held, as matter of law, that the plaintiff had failed to establish a case entitling her to a recovery." *Kelly v. New York, etc., R. Co.*, 109 N. Y. 44, 15 N. E. 879, reversing 39 Hun (N. Y.) 486.

14. *Farley v. Philadelphia Tract. Co.*, 132 Pa. 58, 18 Atl. 1090, affirming 6 Pa. Co. Ct. R. 347.

15. *Thompson v. Metropolitan St. R. Co.*, 135 Mo. 217, 36 S. W. 625.

16. But in an action to recover for injuries received by plaintiff while boarding defendant's open summer car, it appeared that there was a step extending

the whole length of the car. The step was seven and three-fourths inches wide, and thirteen inches below the floor of the car. The space between the back of the step and the edge of the floor was not entirely closed; but at the bottom, and resting on the step, was a board four inches high, above it an open space of three and three-fourths inches, and above this a board five and one-fourth inches wide, which reached to the floor. The injury to plaintiff was received, while passing from the step to the floor of the car, by getting his foot caught in the open space at the back of the step. It was held that there was nothing to show that the car was negligently constructed, and plaintiff was nonsuited. *Keller v. Hestonville, etc., R. Co.*, 149 Pa. 65, 24 Atl. 159. For very similar cases, see *Werbowsky v. Fort Wayne, etc., R. Co.*, 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120, and *Frobisher v. Fifth Ave. Transp. Co.*, 151 N. Y. 431, 45 N. E. 839, reversing 81 Hun (N. Y.) 544, 30 N. Y. S. 1099.

17. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas., N. S., 393.

18. *Noble v. St. Joseph, etc., R. Co.*, 98 Mich. 249, 57 N. W. 126; *Wormsdorf v. Detroit, etc., R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453.

19. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Burt v. Douglas County, etc., R. Co.*, 83 Wis. 229, 53 N. W. 447, 58 Am. & Eng. R. Cas. 158, 18 L. R. A. 479.

degree of care consistent with the practical performance of his other duties.²⁰

A car run by cable as the motive power should be equipped with a sufficient grip.²¹

Trolley Rope.—It is a street railway company's duty not only to provide a suitable trolley rope and place for fastening it, etc., but also to see that the rope is fastened when the car started on its journey, and to exercise the highest diligence consistent with the operation of the car to see that it continues to remain fastened and in a safe place during the entire trip.²²

§ 2417. Formation of Train.—It is provided by statute in a number of states that, in forming trains, baggage, freight and similar cars shall be placed in front of the passenger coaches.²³ And, irrespective of statute, a railroad company may no doubt lay itself open to a charge of negligence in making up a train in an improper and unsafe order. It has been held that attaching the locomotive at the rear of a train, and operating the train in that manner, justifies a finding of negligence by the jury.²⁴ And in an action to recover for injuries sustained by plaintiff in consequence of the derailment of the train on which he was a passenger, it was held that the facts that the engine was run backward with the tender in front, so that the headlight could not throw any light on the track, and that a milk car forming part of the train was placed last, should be considered by the jury along with the other evidence in the cause in deciding whether or not defendant had been guilty of negligence.²⁵ But it has been held that it is not necessarily negligent to make up a train, which is about to pass through a storm along the line, with a snow-plow ahead and flanger between the leading locomotive and those attached to the cars for traction purposes.²⁶

§ 2418. Attaching Improperly Loaded Car, or Car of Wrong Gauge, to Train.—Several flat cars loaded with logs were attached to a train in front of the passenger car in which plaintiff was riding. There was evidence to the effect that the flat cars were improperly loaded and that the derailment, which resulted in injury to plaintiff, was caused by a log rolling off one of the cars and changing the position of a switch over which the train was passing. A judgment for plaintiff was sustained.²⁷ A railroad company has been held liable to a passenger for injuries sustained in consequence of the derailment of a train caused by attempting to run in the train cars with a gauge wider than the gauge of the track.²⁸

20. Protection from electric apparatus.—*Martin v. Old Colony St. R. Co.*, 211 Mass. 535, 98 N. E. 579.

21. Sharp v. Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93, 52 Am. & Eng. R. Cas. 561.

22. Trolley rope.—*Denver City Tramway Co. v. Hills*, 116 Pac. 125, 50 Colo. 328, 36 L. R. A., N. S., 213.

23. Mansf. Dig. Ark., § 5477, in connection with which, see *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Ind. Rev. Stat.* 1894, § 5191; 1 *How. Ann. Stat. Mich.*, § 3373; *Mo. Rev. Stat.* 1889, § 2607; *Mont. Penal Code* 1805, § 691; *Nev. Gen. Stat.* 1885, § 881; *N. J. Rev. Stat.*, p. 933, § 116; *N. Car. Code* 1883, § 1971; *R. I. Pub. Stat.* 1882, p. 406, c. 158, § 10; 1 *S. Car. Rev. Stat.* 1893, § 1680; *Sayles' Civil Stat. Tex.*, art. 4233; 2 *Utah Comp. Laws* 1888, p. 32, § 2352.

Burns' Ann. St. 1901, § 5191, provides that, in forming a passenger train, baggage, freight, merchandise, or lumber cars shall not be placed in rear of pas-

and baggage car, with one end not vestibuled, and designed to be placed next to the engine, was placed behind a passenger coach, and plaintiff, in passing through the train, fell or was thrown overboard through the unprotected space. Held, that such a car was within the prohibition, and the company in disregarding the statute was guilty of negligence. *Pittsburgh, etc., R. Co. v. Schepman* (Ind. App.), 82 N. E. 998, judgment reversed in 84 N. E. 988.

24. Chicago, etc., R. Co. v. Grimm, 25 Ind. App. 494, 57 N. E. 640. See *Louisville, etc., R. Co. v. Weaver*, 22 Ky. L. Rep. 30, 50 L. R. A. 381.

25. Philadelphia, etc., R. Co. v. Anderson, 94 Pa. 351, 6 Am. & Eng. R. Cas. 407, 39 Am. Rep. 787.

26. Denver, etc., R. Co. v. Pilgrim, 9 Colo. App. 86, 47 Pac. 657, 8 Am. & Eng. R. Cas., N. S., 249.

27. Keating v. Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575.

28. East Line, etc., R. Co. v. Smith, 65

§ 2419. Precautions against Fires and Explosions.—The legislatures of some of the states have imposed certain duties upon railroad companies intended to protect their passengers against injuries by fire. Thus, the kind of heaters to be used in railroad coaches has sometimes been regulated by statute.²⁹ In at least one state it has been provided that the heat shall be generated outside of the cars (N. Y. Laws 1887, c. 616), and the requirement has been held to be within the police power of the state.³⁰ In quite a number of states the use of illuminating oil which will ignite at a temperature of less than three hundred degrees Fahrenheit is prohibited.³¹ And to aid passengers to make their escape from wrecked cars, railroads must, in some states, supply their passenger cars with certain prescribed tools such as saws, axes, etc.³² In some states the locking of the doors of passenger coaches while the train is in motion is prohibited.³³ In the statutes of the United States and of at least one of the states, provisions are found which inhibit the transportation of certain kinds of explosives on passenger trains.³⁴ Section 5353 of the United States, prohibiting the transportation of nitroglycerine on a railway train employed in conveying passengers from one state to another, has been held to apply to the transportation of dynamite on a freight or mixed train carrying passengers.³⁵

§ 2420. Mixed Trains.—The line of a railroad may be so short, and the business done by it so small, as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business is sufficiently large and profitable to warrant it, and the safety of the passengers is endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it is clearly the duty of the railway company to run separate trains.³⁶

§ 2421. Vestibule Trains.—While a carrier is not bound to provide vestibuled cars,³⁷ when it does so, it must use the highest degree of human care consistent with the practical operation of the train to keep such cars safe for passengers, and it is liable for damages caused by its slightest negligence; the same principles applying to such vehicles as to other means of passenger transportation.³⁸ Thus, if it negligently permits the appliances to be out of order, or carelessly leaves the doors open so that passengers who rely and have a right to rely upon the safety of and proper management of the train are injured

29. 3 How. Ann. Stat. Mich., § 3434b; N. H. Pub. Stat. 1891, p. 453, § 13.

30. *People v. New York, etc., R. Co.*, 5 N. Y. S. 945, affirming 55 Hun 409, 608, 8 N. Y. S. 672, affirmed, without opinion, in 123 N. Y. 635, 25 N. E. 953, affirmed in 165 U. S. 628, 41 L. Ed. 853, 8 Am. & Eng. R. Cas., N. S., 172.

31. Ky. Stat. 1894, § 737; N. Y. Laws 1882, c. 292; Ohio Rev. Stat. 1890, § 3353; R. I. Pub. Stat., p. 407, ch. 158, § 16; 1 S. Car. Rev. Stat. 1893, § 1683; Saub. & B. Ann. Stat. Wis., § 1806.

32. 1 How. Ann. Stat. Mich., § 3433; Minn. Laws 1887, c. 18, § 2; N. Y. Laws 1884, c. 439, § 8; Saub. & B. Ann. Stat. Wis., § 1807.

33. Fla. Rev. Stat., § 2266; Ind. Rev. Stat., § 2298; W. Va. Code 1891, p. 898, § 18; Saub. & B. Ann. Stat. Wis., § 1806.

34. U. S. Rev. Stat., §§ 4278, 4279, 5353, 5355; Saub. & B. Ann. Stat. Wis., § 1805.

35. *United States v. Saul*, 58 Fed. 763.

36. *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280.

37. **Not bound to provide vestibuled cars.**—*United States*.—*Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 734.

Arkansas.—*St. Louis, etc., R. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662; *Chicago, etc., R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875.

Missouri.—*Johnston v. St. Louis, etc., R. Co. (Mo.)*, 130 S. W. 413.

New Jersey.—*Rivers v. Pennsylvania R. Co.*, 83 N. J. L. 513, 83 Atl. 883, reversing 76 Atl. 455, 80 N. J. L. 217.

A carrier is not required by law to vestibule its passenger trains, or any class of its cars, and a failure to do so is not of itself negligence. *Judgment*, 82 N. E. 998, reversed. *Pittsburgh, etc., R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988.

38. **Duty when vestibuled cars furnished.**—*St. Louis, etc., R. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662; *Johnston v. St. Louis, etc., R. Co. (Mo.)*, 130 S. W. 413; *Rivers v. Pennsylvania R. Co.*, 83 N. J. L. 513, 83 Atl. 883, reversing judgment, 76 Atl. 455, 80 N. J. L. 217.

thereby, the company is liable. Thus it has been held to be negligent to leave open an outside vestibule door through which a passenger fell at night.³⁹ Since the chief purpose of a vestibuled train is to furnish passengers a safe means of passage between the cars, it is the duty of train employees to exercise the highest care to see that the trapdoor over the steps of such cars are closed and kept closed while the train is in motion.⁴⁰ And it is held that passengers may presume that vestibuled cars are safe for the purpose intended, and for negligence in these particulars, resulting in injuries to passengers, the company is liable.⁴¹ But a passenger injured through the opening of a vestibule door on a train before his station is reached can not recover on the theory of negligence in opening the door too soon, if it is done at his request.⁴² And where a passenger on a vestibuled rear coach of a railroad train is not led to believe that the rear platform can be used to ride on for observation or other purposes, but stands thereon, and falls through an open vestibule door, and is injured, the carrier is not liable.⁴³ Where rules of a carrier authorized by law require passengers to keep off the platform of the cars until the train stops, it will not be presumed from the use of vestibuled cars that a passenger is impliedly invited to pass at will from car to car of a moving train,⁴⁴ although passengers may pass through from one car to another to obtain a seat.⁴⁵ And that a carrier opened the door and traps of a vestibuled car for about four blocks before reaching the terminal station does not raise the inference that it should have foreseen that a passenger would have been likely to pass through the vestibule in search of a seat, in the absence of evidence thereof.⁴⁶ And where it is not negligent to have the traps open at the place of the accident, then the facts that they have been opened before that is immaterial.⁴⁷

When Train Standing at Station.—In absence of special circumstances, the drop doors over the steps of a vestibuled train need not be kept down when the train is standing at a station for passengers, during which time trainmen must pass on and off the train; and that passengers at stations were habitually resorting to the rear platform without acquiescence of the carrier, shown by keeping the drop door down at stations, though known by the carrier, did not impose on it the duty of foregoing the ordinary use of the appliance.⁴⁸

Failure to Furnish Vestibuled Cars.—It has been held that the placing of a car without vestibules in a vestibuled train is not negligence.⁴⁹ Even if a carrier may be negligent in not having the platform of a car protected by vesti-

39. See *Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 734, wherein the testimony showed that the train was moving rapidly, that the vestibule was poorly lighted and that the passenger mistook the open door for the car door, through which he intended to pass on his way through the train.

40. **Duty as to trap doors.**—*St. Louis, etc., R. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662; *Johnston v. St. Louis, etc., R. Co. (Mo.)*, 130 S. W. 413.

When a railroad has assumed to safeguard passengers using the vestibule between cars by providing a trapdoor, it is bound to use reasonable care to maintain it in proper position. *Rivers v. Pennsylvania R. Co.*, 83 N. J. L. 513, 83 Atl. 883.

41. **Right to presume safety.**—*Chicago, etc., R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875; *Johnston v. St. Louis, etc., R. Co. (Mo.)*, 130 S. W. 413.

42. **Passenger's request.**—*Tudor v. Northern Pac. R. Co.*, 45 Mont. 456, 124 Pac. 276.

43. **Rear platform of vestibule coach.**—*Chicago, etc., R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875.

44. *Rivers v. Pennsylvania R. Co.*, 80 N. J. L. 217, 76 Atl. 455.

45. Under P. L. 1903, p. 666, § 29, providing that a carrier may post notice forbidding passengers to pass from car to car after posting such notices, the only use that passengers could make of vestibule while the train was in motion, was to pass from car to car to obtain a seat. *Rivers v. Pennsylvania R. Co.*, 76 Atl. 455, 80 N. J. L. 217.

46. *Rivers v. Pennsylvania R. Co.*, 76 Atl. 455, 80 N. J. L. 217.

47. *Rivers v. Pennsylvania R. Co.*, 76 Atl. 455, 80 N. J. L. 217.

48. *Clanton v. Southern R. Co.*, 165 Ala. 485, 51 So. 616, 27 L. R. A., N. S., 253.

49. *Sansom v. Southern R. Co.*, 111 Fed. 887, 50 C. C. A. 53.

bule doors, it is not so negligent as to a passenger, who stands on the platform, after being directed by the trainmen to go inside the car where he belongs, while the train is stopped on a trestle.⁵⁰

§ 2422. Palace or Sleeping Cars Forming Part of Train.—The requirement of the law which imposes upon carriers the duty to exercise care in providing safe and suitable vehicles for the conveyance of passengers would lose much, if not all, of its practical value, if carriers were permitted to escape responsibility upon the ground that the cars or vehicles, used by them and from whose insufficiency injury results to passengers, belong to others. Accordingly if cars, although owned and, as to the interior arrangements, controlled by a palace or sleeping car company, constitute a part of a train, the railroad is responsible for their sufficiency and safety to the same extent that it is responsible for the safety and sufficiency of its own vehicles.⁵¹ Applying this rule, a railroad company must be held responsible for an accident caused by the falling of a berth which is defectively constructed or negligently allowed to become out of repair, although the ticket entitling the passenger to ride upon the sleeping car is bought of the palace car company and not of the railroad.⁵² But while a carrier as between itself and the passenger can not transfer or shift its duty to a sleeping car company whose cars it hauls, yet the carrier's duties relate to safe transportation, and do not include the duty to provide dressing rooms for passengers.⁵³

§ 2423. Stage and Hackney Coaches.—A carrier by stage or hackney coach is bound to exercise care to provide a roadworthy coach, good harness, gentle and tractable horses, and a skillful and careful driver.⁵⁴ And it may, in

50. *Louisville, etc., R. Co. v. Gregory*, 133 S. W. 805, 141 Ky. 747, 35 L. R. A., N. S., 317.

51. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225. See *Jenkins v. Louisville, etc., R. Co.*, 104 Ky. 673, 47 S. W. 761, 20 Ky. L. Rep. 865; *Louisville, etc., R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266.

52. *Liability for injuries due to defects in sleeping cars.*—*Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 S. Ct. 1000; *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 90, 35 L. Ed. 97, 11 S. Ct. 490; *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153, 156, 44 L. Ed. 1015, 20 S. Ct. 880; *Cleveland, etc., R. Co. v. Walrath*, 38 O. St. 461, 43 Am. Rep. 433, 8 Am. & Eng. R. Cas. 371.

53. *Duty applies to safety only.*—*Ozanne v. Illinois Cent. R. Co.*, 151 Fed. 900.

54. *United States.*—*McKinney v. Neil*, 1 McLean 540, Fed. Cas. No. 8,865.

Indiana.—*Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125.

Iowa.—*Sales v. Western Stage Co.*, 4 Iowa 547; *Frink & Co. v. Coe (Iowa)*, 4 G. Greene 555, 61 Am. Dec. 141.

Massachusetts.—*Ingalls v. Bills (Mass.)*, 9 Metc. 1, 43 Am. Dec. 346.

South Carolina.—*Caveny v. Neely*, 43 S. C. 70, 20 S. E. 806.

Virginia.—*Farish & Co. v. Reigle*, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

Carriers by stage coach must have safe horses and a competent driver. *Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110, 9 S. Ct. 696.

*In an action by a passenger against an omnibus company the negligence which plaintiff imputed to defendant was the alleged defective construction of the step of the vehicle. It appeared that there was but one step, twenty-two inches long and about sixteen inches wide. It was held in position by two large braces, one on each end, and there was corded rubber covering the step. The back of the step was open and not closed. The charge of negligence was based upon this opening. One of the witnesses testified that the open step was used for large cities, and another that he had never seen a stage with a solid back to its step, except the hotel coaches. The trial court refused to charge that there was no evidence that the step of the stage, or the stage itself, was in any way defective. In holding that this was error, the reviewing court said: "It is quite apparent, from the testimony given, that both kinds of steps are in general use, and that each may have its advantage and disadvantage. With the solid back step there would be no danger of the foot slipping through and catching under the bus, but it would be more liable to fill with mud and snow in traveling over the streets, and thus cause the foot to slip forward. It did not appear that any accident of this character had before occurred by

some case, be the duty of a carrier by stage coach to equip the coach, when traveling by night, with lights.⁵⁵

§ 2424. Carriers by Water.—Carriers by water craft are bound to exercise care to provide good, stanch, and sufficient vessels, equipped with proper and sufficient appliances. Thus, a carrier by ferry boat should provide a safe way by which passengers may enter and leave the boat.⁵⁶ The gates used at the ends of a ferry boat to close the ways by which to enter and leave the boat should be maintained in good order.⁵⁷ But in a case where a passenger on a steam boat stumbled over a gang plank of ordinary construction, which was lying on the deck of the vessel in close proximity to the place where it had to be used, there was no proof that the plank was negligently or unusually, constructed or handled, nor any other proof of any specific negligence of the defendant, which produced the plaintiff's fall; judgment for plaintiff was reversed on appeal, the reviewing court regarding the case as a mere accident not induced by negligence.⁵⁸ Similarly to the obligation which has, in a preceding section of this note,⁵⁹ been shown to rest upon railroads, the duty of a carrier by water to exercise care in providing a safe vessel extends to its interior arrangements. Thus, a steamship company has been held liable to a passenger who, while occupying a lower berth, was injured by the falling upon her of the upper berth.⁶⁰ The passages by which passengers go about the vessel should be safe for the purpose. Thus, it may be negligence on the part of a steamship company to fail to equip the passages of its vessel with handrails to which passengers may cling when necessary.⁶¹ Where a doorway to stairs leading down to the hold of a boat was so situated that passengers might in the nighttime readily suppose that it was an opening leading to the upper deck, it was held, in an action by a passenger to recover for injuries received by falling down the stairway, that the owners of the boat were guilty of negligence in neither adequately lighting, nor placing obstruc-

reason of the use of the open back step. We think, therefore, that the defendant was not chargeable with negligence by reason of its use of the open step, and that its use did not render the omnibus defective." *Frobisher v. Fifth Ave. Transp. Co.*, 151 N. Y. 431, 45 N. E. 839, reversing 81 Hun 544, 30 N. Y. S. 1099. For very similar cases, see ante, this note, II, K.

55. *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125.

56. *Le Barron v. East Boston Ferry Co.* (Mass.), 11 Allen 312, 87 Am. Dec. 717.

57. *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37.

58. *Seddon v. Bickley*, 153 Pa. 271, 25 Atl. 1104.

In a suit to recover for the death of a passenger by falling overboard it appeared that the boat upon which the deceased took passage had a gangway in the forward part about eight feet in width, with a stanchion in the center, which was covered with rails, about three feet high, which were attached by hinges to the bulwarks of the same height, inclosing the residue of the forward part of the boat. The deceased, about dusk, while the boat was running upon her trip, and the deck somewhat icy, and the wind blowing hard, came through a door

from the room immediately in rear of this forward part. His hat was blown off and he sprang to recover it, and while so doing fell down and slipped, under the railing upon the gangway, overboard and was drowned. The only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. In sustaining a judgment nonsuiting plaintiff, the reviewing court said: "Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury; but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years; and there was no proof tending to show that any one had ever before fell and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur." *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1, affirming 6 Lans. (N. Y.) 430.

59. See ante, "Interior of Railroad Coaches," § 2407.

60. *Smith v. British, etc., Packet Co.*, 86 N. Y. 408.

61. See *American, etc., Ins. Co. v. Landreth*, 102 Pa. 131, 48 Am. Rep. 196.

tions in front of, the doorway.⁶² It has been held that the owner of a steamboat, carrying passengers for hire, is chargeable with negligence in failing to equip the vessel with a small boat, and other convenient appliances, for rescuing passengers who may fall overboard.⁶³ And no doubt a passenger who is injured by the falling upon him of a small boat may recover for the injuries sustained if the carrier is chargeable with negligence in failing to securely fasten the boat, and the passenger is in the exercise of due care.⁶⁴ A carrier of passengers by steamboat must, of course, be held liable for injury to a passenger resulting from the explosion of a boiler in consequence of the carrier's negligence.⁶⁵

A ferryman is liable as a common carrier. The keeper of a public ferry is bound to have a boat, safe and sufficient for all the purposes incident to his employment. He is likewise bound, at all times, to have a skillful ferryman, and a sufficient force to manage the boat, and to take proper care of persons, and all kind of property received for transportation. And for all loss or injury occasioned by neglect of these duties and precautions, he is liable.⁶⁶ A ferry company has been held liable for injuries to a passenger caused by the explosion of the boiler upon the boat, in consequence of the use of a higher pressure than that allowed by the certificate of the government inspector.⁶⁷ The fact that the boilers, etc., of a vessel employed in the carriage of passengers have been inspected pursuant to an act of congress by the proper officer, whose certificate shows a compliance with the requirements of the act, does not constitute a defense to an action by a passenger to recover for injuries received in consequence of the carrier's negligent failure to provide a safe vessel; the object of a statute providing for government inspection of steamboats is the greater security of passengers upon steam vessels against disaster, and the common-law duty of the carrier to exercise a high degree of care to provide a safe vessel is not impaired.⁶⁸

§ 2425. Elevators.—The responsibility for the safety of elevators used to carry persons from floor to floor of buildings is governed as a general rule by the same rules as that of passenger carriers.⁶⁹ Ordinarily a duty imposed by a statute for the protection of persons in the use of elevators would rest upon

62. *The Pilot Boy*, 23 Fed. 103.

63. *Lobdell v. Bullitt*, 13 La. 348, 33 Am. Dec. 567.

64. *Simmons v. New Bedford, etc., Steamship Co.*, 97 Mass. 361, 93 Am. Dec. 99.

65. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

66. *Ferryman*.—*Sanders v. Young*, 38 Tenn. (1 Head) 219, 73 Am. Dec. 175.

And this, although by order of the county court, under 1842, 134, 3 (Code, § 1246), he was excused from having "hand rails" for the greater security of stock. *Sanders v. Young*, 38 Tenn. (1 Head) 219, 73 Am. Dec. 175.

67. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, affirming 65 Barb. (N. Y.) 32.

68. *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209, 8 Am. Rep. 541; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

69. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

The jury are authorized to find negligence of defendant where she was having a leaky, hydraulic, plunger passenger elevator operated in her building, the leak requiring the lever by which the elevator was operated to be left forward of the center of the slot, in which the lever worked, to offset the leakage, and where the elevator boy after taking plaintiff, a tailor boy, with his arms full of clothes, up to a room, where he wanted to leave one suit, left the door of the elevator well open, and the lever where it would be pushed backward or forward, or both, if caught by the clothes on plaintiff's arms while re-entering the narrow door of the elevator, and, knowing, as it might be found, that plaintiff was going back to the street on the elevator with his arms full of clothes, stayed away from the elevator so long that he ought to have known that plaintiff would have returned to go down in the elevator, which he did, with the result that the elevator was started, as he entered it, injuring him by its rapid motion. *Toohy v. McLean*, 85 N. E. 578, 199 Mass. 466.

the person using and operating the elevator. A liability for injuries resulting from violation of such a statutory duty would fall upon the person in actual control and possession. Upon common-law principles a duty imposed in connection with the operation of an elevator would be applied to the person controlling the operation and use.⁷⁰ In some instances, statutory provisions exist providing for safety devices, etc., in the use of elevators, and regulate the duties of parties in possession and control as well as owners out of possession. In Rhode Island the statute provides that certain elevators must be fitted with certain devices, and defines the liability of the tenant for a violation of the act, and that of the owner. Under that statute it is held that the tenant is liable for a violation, without notice from the state or municipal inspectors. But under the same statute the liability of the owner out of possession is dependent upon such notice as a condition precedent to his liability.⁷¹ Thus, it is seen that an owner out of possession who would not be liable on common-law premises is made liable by statute after a notice of requirements from a public inspector, and solely by his failure to take action to prevent the illegal use of an elevator upon his premises by either compelling the lessee to comply with the law or providing the proper equipments himself. It has been held that a statute providing that "all elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the said inspectors, whereby the cabs or cars will be securely held in the event of accident to the shipper rope, or hoisting machinery, or from any similar cause," does not impose the duty of having such a mechanical device attached to an elevator as will surely and securely, under all circumstances, hold the cab in the event of an accident such as described in the statute, but that the meaning of the statute is that the elevator is to be provided with some suitable mechanical device, to be approved by the state inspectors of factories and public buildings, designed for the purpose of securely holding the cab in the event of an accident.⁷²

§§ 2426-2434. As to Means of Conveyance—§ 2426. Scope Note.—The object of these sections is to supplement those preceding, and to complete the discussion of the duties of passenger carriers as to their means of conveyance, in regard to the matter of inspection and repair.⁷³

§§ 2427-2432. Inspection and Repair—§ 2427. General Rule.—The duty of a carrier to exercise care to provide safe and suitable means of conveyance is, of course, a continuing obligation, and necessarily includes the duty of exercising care to discover defects therein by reasonable and proper inspection, and to make the necessary repairs.⁷⁴ It should carefully examine its road-

70. *Hart v. Fletcher Land Co.*, 175 Fed. 985.

71. *Hart v. Fletcher Land Co.*, 175 Fed. 985.

"It is so contrary to the ordinary rules of law that an owner, out of possession should be held responsible without notice for a violation of law by a lessee in possession, that it seems a more reasonable construction of the act to hold that as to him notice is a condition precedent to liability." *Hart v. Fletcher Land Co.*, 175 Fed. 985.

72. *Bourgo v. White*, 159 Mass. 216, 34 N. E. 191.

73. The duty of carriers of passengers by rail to provide a safe roadbed and track is discussed in the note to *Whip- pel v. Michigan*, etc., R. Co., 108 Pa. 524, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774, while the duty of carriers to

provide safe vehicles or vessels for the transportation of passengers is discussed in a note to *Herbert v. St. Paul City R. Co.*, 85 Minn. 341, 88 N. W. 996, 3 R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152.

74. **Duty to inspect and repair.**—*Arkansas*.—*St. Louis*, etc., R. Co. v. *Mitchell*, 57 Ark. 418, 21 S. W. 883.

Delaware.—*Smithers v. Wilmington City R. Co.* (Del.), 6 Pen. 422, 67 Atl. 167; *Eaton v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 435, 75 Atl. 369.

Georgia.—*Wright v. Georgia R.*, etc., Co., 34 Ga. 330; *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141.

Illinois.—*Chicago*, etc., R. Co. v. *Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

Indiana.—*Louisville*, etc., R. Co. v. *Snyder*, 117 Ind. 435, 20 N. E. 284, 37 Am. &

bed, track, engines, cars, and other appliances necessary to carry on properly the business of the road.⁷⁵ Thus, it is said that, though a carrier is not an insurer of its passengers, it is not only required to thoroughly examine and test its vehicles, machinery, and all parts and appliances used in transporting passengers, but it is required to further thoroughly examine the vehicle and machinery from time to time to know whether they are deteriorating.⁷⁶ It is said to be the duty of a railway company to maintain its passenger coaches, including the windows and doors, in a reasonably safe condition for the safety, convenience, and comfort of passengers; and, if it fails in its duty in this respect, it will be liable for injuries to passengers directly resulting therefrom.⁷⁷ And carriers operating mixed trains for the carriage of passengers are under precisely the same duty as regards the safety of their cars from defects as where the passengers are carried only on passenger trains.⁷⁸

§§ 2428-2431. Sufficiency of the Inspection—§ 2428. In General.

—In the statement of this duty, the authorities show a great want of harmony, and it is not yet possible to formulate any rule which will even substantially

Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434.

Michigan.—Keating *v.* Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575.

Minnesota.—Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

Texas.—Houston, etc., R. Co. *v.* Summers (Tex. Civ. App.), 49 S. W. 1106, affirmed in 92 Tex. 621, 51 S. W. 324; Houston, etc., R. Co. *v.* Swancey (Tex. Civ. App.), 128 S. W. 677.

Virginia.—Farish & Co. *v.* Reigle, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

Washington.—Cogswell *v.* West, etc., Elect. R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

The various appliances with which the carriers vehicles are equipped must be kept in a safe and suitable condition; and if a passenger is injured, owing to any defect or unsafe condition of the vehicles, carriages, or cars, or of the appliances, the carrier is liable. *Irwin v. Louisville, etc., R. Co.*, 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

The duty of the railway company to inspect the cars would be true whether the plaintiff should be regarded as a passenger or as an employee. The duty of inspecting the condition of cars used in its trains is one of the absolute duties of the railroad company as a master, in relation to its employees. *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141.

Liability for defects discoverable by proper inspection.—Where a passenger injured by the breaking of a defective coupling and the parting of the train showed that an inspection of the coupling might have disclosed the defect, the company was required to show that it made an inspection, and a failure to do so warranted a recovery. *Galveston, etc., R. Co. v. Young*, 100 S. W. 993, 45 Tex. Civ. App. 430.

Where a carrier, in making an inspection of a car wheel, did not exercise due care, and thereby failed to discover a

defect therein, which defect afterwards caused a wreck, the carrier is liable, though, previous to such insufficient inspection, it had made proper tests of the wheel in question, and failed to discover the defect. *Houston, etc., R. Co. v. Summers* (Tex. Civ. App.), 49 S. W. 1106, affirmed in 51 S. W. 324, 92 Tex. 621.

75. International, etc., R. Co. v. Halloren, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Levy v. Campbell* (Tex.), 19 S. W. 438; *Galveston, etc., R. Co. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 993, affirmed in 102 Tex. 583, no op.; *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475; *Houston, etc., R. Co. v. Summers* (Tex. Civ. App.), 49 S. W. 1106, affirmed in 92 Tex. 621.

A charge that it is the duty of a railroad to inspect its passenger trains is not erroneous where injuries complained of are alleged to have been caused by negligence of carrier in failing to furnish safe cars. *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475.

76. Examination for deterioration.—*Indiana Union Tract. Co. v. Scribner*, 47 Ind. App. 621, 93 N. E. 1014; *Houston, etc., R. Co. v. Swancey* (Tex. Civ. App.), 128 S. W. 677.

The carrier is liable for all defects in his vehicle which may exist afterward, its going into use and be discovered on investigation. *Morgan v. Chesapeake, etc., R. Co.*, 32 Ky. L. Rep. 330, 105 S. W. 961.

Where injuries to a passenger, caused by the breaking of a brake rod, were due to the carrier's failure to properly inspect and maintain the brakes of the car, it was liable for the injuries. *De Cecco v. Connecticut Co. (Conn.)*, 83 Atl. 215.

77. Cincinnati, etc., R. Co. v. Lorton, 110 S. W. 857, 33 Ky. L. Rep. 689.

78. Carriers operating mixed trains.—*Morgan v. Chesapeake, etc., R. Co.*, 105 S. W. 961, 32 Ky. L. Rep. 330.

express the result of the authorities. There is as great a variance in the statement of the carrier's duty of inspection as has been shown to exist⁷⁹ in the statements of the degree of care imposed upon passenger carriers. In line with the view that these carriers are bound to exercise the "highest," "greatest," or "most exact" care, it has been said, in effect, that the carrier is responsible for the consequences of accidents which happen because of defects which are discoverable upon the most careful and thorough examination.⁸⁰ On the other hand some of the statements of the duty of inspection are in line with the cases which reject the expressions quoted on the ground that they require a higher degree of care than is imposed by law. Thus it has been said that, in the performance of the duty of inspection, the carrier is chargeable with any omission of the "highest practicable care of capable and faithful railroad men in the circumstances,"⁸¹ and charges requiring "great care and caution"⁸² and "proper" care⁸³ have been upheld. Again, it has been said that it is the duty of the carrier to make as frequent and careful examinations and inspections as can be done consistently with the practical operation of the business.⁸⁴ And some of the courts lean toward the statement that a carrier owes a passenger that high degree of care to keep its engines and appliances in good repair which a very prudent and cautious person would use in similar circumstances,⁸⁵ the standard of care being that attributable to the prudent man.⁸⁶ It is also said that the inspection must be shown to be as thorough as the dangers incident to the business makes necessary.⁸⁷ Basing a statement of the carrier's duty upon the statement of the rule of care which is approved by the authorities,⁸⁸ it might be said that a carrier of passengers is bound to make as frequent and careful inspection of the means of conveyance as can be done consistently with the practical operation of the business, taking into consideration the mode of conveyance employed.⁸⁹ Some of the courts have attempted to state the duty of inspection with reference to the tests and precautions which are to be employed. Thus, it has

79. See note to *West Chicago St. R. Co. v. Tuerk*, 90 Ill. App. 105, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

80. See *Chesapeake, etc., R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859; *Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346; *Missouri, etc., R. Co. v. Mitchell*, 79 S. W. 94, 34 Tex. Civ. App. 394.

It is the duty of a carrier of passengers to keep its cars and appliances in repair, and, in the performance of this duty, the highest degree of care is required. *Dorn v. Chicago, etc., R. Co.* (Iowa), 134 N. W. 855.

81. *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

82. In an action for injuries to a passenger on a street car, an instruction that the defendant owed its passengers the duty of exercising "great care and caution" to keep the machinery and appliances of its cars in a reasonably safe condition and repair, was not objectionable as imposing on the company a higher degree of care than is required by law. *Dallas, etc., St. R. Co. v. Broadhurst*, 68 S. W. 315, 28 Tex. Civ. App. 630, affirmed in 95 Tex. 676, no op.

83. *Missouri, etc., R. Co. v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

84. *Libby v. Maine, etc., R. Co.*, 85 Me.

34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

85. *Missouri, etc., R. Co. v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197. See ante, "Degree of Care Exacted of the Carrier," § 2336.

86. A passenger can not recover for the falling on her of a so-called self-acting window, out of order, in a car, the carrier having earlier in the day of the accident, inspected the window device in the only way practical, and it then having, so far as could be discovered, been in order, and nothing having happened thereafter to give notice to the carrier of the defect, it not being shown that the inspection was negligent, or that the business required a more frequent inspection; the standard of care required of the carrier being that attributable to the prudent man. *Bleiwis v. Pennsylvania R. Co.*, 81 N. J. L. 160, 78 Atl. 1058.

87. *Rouston v. Detroit United Railway*, 151 Mich. 237, 115 N. W. 62.

88. See note to *West Chicago St. R. Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

89. A carrier of passengers is bound to exercise the highest degree of practicable care in the inspection of its cars consistent with the operation of its road. *St. Louis, etc., R. Co. v. Leflar* (Ark.), 149 S. W. 530.

been said that, while it is not the duty of the carrier to adopt every test known to, or such speculative and theoretical precautions as might be thought necessary by, experts, it is the carrier's duty to apply all tests recognized as necessary by experts.⁹⁰ There should, it has been said, be a reasonable and careful inspection, according to the best known tests reasonably practicable.⁹¹ In the inspection of the means of conveyance, any certain or satisfactory test, which is known, and is within reach of the carrier, should be applied,⁹² and it is negligence on the part of a carrier to rely upon a test which is clearly insufficient.⁹³ It has even been declared, in effect, that, while the carrier is not bound to adopt unknown and untested precautions, he must employ such means as science has furnished or disclosed, although not generally used.⁹⁴

§ 2429. Inspection by Employees in Charge of Train or Car.—It can not be said that a carrier of passengers by rail, who causes its cars to be inspected at certain places on its line by persons who are employed for that express purpose, thereby uses all the care which the law imposes on it for the safety of passengers, and wholly relieves those engaged in operating the trains from the duty of examining them in any respect between regular inspection stations.⁹⁵ But, while the employees in charge of the operation of a train may properly be required to have an eye to their surroundings as they go about their business, the observation which these employees may reasonably be relied on to make, being incidental to the performance of other duties, is necessarily cursory and more or less casual. They can not be expected to keep up a careful inspection continuously, or to know at each moment the condition of every part of a train or car.⁹⁶ A conductor, who is told by an ordinary passenger that he has heard an unusual loud noise, and felt a jolt which has made the coach jump and aroused him, and who, after reasonable inspection, inside and outside of the car, does not become conscious of a cause of alarm and danger, is not bound to stop the train for an inspection.⁹⁷ But where the driver of a street car knew that the rear door of the car was out of order, in consequence of the efforts of a drunken man to open it, a passenger who was injured by the falling upon him of glass from the door was permitted to recover damages, on the ground that the driver was guilty of negligence in not examining the door when he learned of its disabled condition.⁹⁸

§ 2430. Inspection of Road after Extraordinary Floods or Storms.—While a carrier is not liable for the act of God or the public enemy,⁹⁹ they are nevertheless under the obligation of exercising care to avoid the consequences of these occurrences. This obligation may sometimes be discharged by a railroad company, which knows, or has reason to believe, that its roadbed and

90. *Robinson v. New York Cent., etc., R. Co.*, 20 Blatchf. 338, 9 Fed. 877.

91. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

92. *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182.

93. **Relying on text clearly insufficient.**—*Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182.

Where the accident was caused by a wheel which had an old flaw in it which could not have been detected by striking the wheel with a hammer while the car was on the track, and it did not appear that an examination of the surface of the wheel was the only method of detecting the flaw, the company should not be

excused by relying upon such a test. *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182.

94. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

95. *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475.

96. *Proud v. Philadelphia, etc., R. Co.*, 64 N. J. L. 702, 46 Atl. 710, 18 Am. & Eng. R. Cas., N. S., 633, 50 L. R. A. 468.

97. *Irelson v. Southern Pac. R. Co.*, 42 La. Ann. 673, 7 So. 800, 44 Am. & Eng. R. Cas. 319.

98. *Allen v. Dry-Dock, etc., R. Co.*, 2 N. Y. S. 738, 19 N. Y. St. Rep. 114.

99. See § 1 of note to *West Chicago St. R. Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

track has been made unsafe by one of these causes, as tempests or floods, by running its trains with a care proportionate to the known or apprehended danger.¹ Thus, it has been said, in effect, that when the roadbed and track is weakened by a sudden and unprecedented flood or similar cause, and there is no time or opportunity for inspecting and ascertaining their condition, the carrier is not responsible for an injury resulting from the track giving way beneath a train run with proper care and skill. But if there is time and opportunity for inspecting and discovering the unsafe condition of the roadbed and track, and the care and prudence which the law exacts of carriers requires the inspection, then the duty rests upon the carrier of making the inspection, and effecting the necessary repairs or warning approaching trains, if the inspection reveals the unsafe condition of the track.² Under circumstances of more than ordinary peril, as in case of violent storms, the carrier should inspect its lines with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. The greater the danger, the greater the vigilance demanded.³ And there may be circumstances, such, for example, as the carrier knowing that there has been a great rise in a stream at a point where it is spanned by a bridge of doubtful strength, which may charge the carrier with negligence in running a train over the point of probable danger, without first making an examination.⁴

§ 2431. Sufficiency of Inspection a Question of Fact.—The question of the sufficiency of the inspection, both as to manner and frequency, is nearly always to be decided by the jury, under proper instructions as to the degree of care required.⁵ But in a case in which it appeared that, half an hour before the

1. See § 4 of note appended to *Frohriep v. Lake Shore, etc., R. Co.*, 131 Mich. 459, 91 N. W. 748, 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532.

2. *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 27 Am. & Eng. R. Cas. 88, 329, 57 Am. Rep. 120.

3. *Libby v. Maine, etc., R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

4. *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609, 50 S. W. 894, 13 Am. & Eng. R. Cas., N. S., 632.

5. In an action by a passenger against a street railway company to recover damages for injuries received in an accident resulting from the fracture of a brake chain, it was held that, in view of expert testimony to the effect that a flaw in a wrought iron chain would be apparent at the surface, it was for the jury to decide whether looking the whole chain over, and testing its strength by winding it up several times, without examining each link, was a sufficient inspection. *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721, 4 Silvernail Ct. App. 214, reversing 14 N. Y. S. 172.

In an action to recover for injuries sustained by a passenger in consequence of the breaking of the spindle of the drawbar on one of the cars, it was proved that the spindle, when on the car, was not accessible to observation or inspection, and the defendant gave evidence tending to prove that, for the purpose of its examination, it was necessary to put

the car into the shop, and take out the drawbar, which it was not customary to do very frequently, and that the spindles and drawheads of this car were renewed two years before the accident. The evidence warranted the conclusion that the broken appliance which was the cause of the injury complained of, was defective, and that, if it did not become so by its use upon the car, it was so when put on it. It was held that the jury was properly allowed to decide whether the carrier had applied the proper tests, when the bar was put in, to ascertain whether it was in all respects fit for the purpose it was intended to serve, and whether the defendant had failed to perform its duty in not taking the bar out of the car, and by proper means inspecting it, with a view to ascertain whether it was or remained in suitable condition for use. *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.), 486, 11 N. Y. St. Rep. 872.

In an action to recover for injuries received in an accident claimed to have been caused by defective insulation of defendant's electric street car, it was held that, in view of the evidence, it was for the jury to decide whether defendant was chargeable with negligence in failing to make frequent application of the megohmmeter or voltmeter test. *Leonard v. Brooklyn Heights R. Co.*, 67 N. Y. S. 985, 57 App. Div. 125.

In an action for damages by a passen-

time when the train on which plaintiff was a passenger arrived at the point where it was derailed, that section of the road had been inspected and found in good condition, and, so far as could be seen, was still in good condition at the time when the wrecked train ran upon it, a judgment for plaintiff was reversed.⁶

§ 2432. Excuses for Failure to Repair.—A carrier of passengers is not liable for injuries to a passenger for reason of want of repairs to its appliances where it is shown that the carrier exercised reasonable care and diligence to procure the material necessary for the repairs but by reason of the circumstances in which the country was placed at the time of the accident, such as a blockade of the ports, the presence of large armies, the engrossment of railroads and other carriers in the service of the government, or the occupation and use by the government of the mills upon which the carrier was compelled to rely for the material, the seizure of the carrier's material by the officers of the government, all of which prevented it from placing its road in a proper state of repair, then the carrier is not liable for the injuries, even though they arise from the want of proper repairs.⁷

§ 2433. Liability for Latent Defects.—In line with the assumption in a few early cases that the common-law liability of carriers of passengers is the same as that of carriers of goods,⁸ it has sometimes been contended that a carrier of passengers is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose, and is responsible for the consequences of his failure to do so, though occasioned by latent defects. This proposition, holding the carrier responsible for the consequences of latent defects in the vehicle used to carry passengers, finds some slight support in several early English cases,⁹ and in a New York case it seems to have been fully accepted.¹⁰ But the theory of the existence of an implied warranty, on the part of a passenger carrier, of the soundness of the vehicle employed in the transportation of passengers, was rejected by the court of exchequer chamber,¹¹ and as a result it was finally

ger, it appeared that the accident in which he received his injuries resulted from the breaking of a car wheel, in which there was a flaw or crack. The wheel had been inspected a short time before the accident, but the only test which the inspectors made was to look over the wheel very carefully. It was not separated from contact with the track, and tested with a hammer. A judgment for plaintiff was sustained. *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182.

6. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

7. **Excuses for failure to repair.**—*Wright v. Georgia R., etc., Co.*, 34 Ga. 330.

8. See § 2 of note appended to *West Chicago St. R. Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

9. *Bremner v. Williams*, 1 C. & P. 414; *Israel v. Clark*, 4 Esp. 259, especially in *Sharp v. Grey*, 9 Bing. 457, 2 M. & Scott 621, 23 E. C. L. 331.

Perhaps the best argument in favor of this view is that made by Blackburn, J., in delivering a dissenting opinion in the leading case of *Redhead v. Midland R. Co.*, L. R., 22 Q. B. 412, 36 L. J. Q. B.

181, affirmed in L. R., 4 Q. B. 379, 38 L. J. Q. B. 169, 5 Eng. Rul. Cas. 436, when the case was before the court of queen's bench.

10. *Alden v. New York, etc., R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, since overruled. *McPadden v. New York, etc., R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705.

11. In *Redhead v. Midland R. Co.*, L. R., 22 Q. B. 412, 36 L. J. Q. B. 181 affirmed in 4 Q. B. 379, 5 Eng. Rul. Cas. 436, Mr. Justice Smith, who wrote the opinion of the court, after declaring that it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods, said: "But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understood it, that a passenger when

settled that a carrier of passengers is not liable for the consequences of latent defects in his vehicle which are not discoverable by the exercise of the high degree of care exacted of passenger carriers, and a similar result was reached in an earlier American case.¹² Thus, it was held that when an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the carrier is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense.¹³ This doctrine has been consistently followed in the late English and American cases, so that the law is now well settled that carriers of passengers are not responsible for latent defects in either the vehicle or any of the component parts of the means of conveyance.¹⁴ But most of the authorities fail to define the term latent defect or otherwise state the rule governing the carrier's exemption from liability. It is, however, apparent that the latent defects for which the carrier is not responsible, are such defects as are not discovered by the exercise of the high degree of care imposed upon the carrier by law.¹⁵ It may, therefore be said that the carrier is not responsible for defects in the means of conveyance which are not discoverable by the exercise of the highest degree of care and diligence consistent with the practical operation of the business, taking into consideration the mode of conveyance employed.¹⁶ Other statements

placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If then there is force in the above reason, why stop short at the carriage in which the passenger happen to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects."

12. *Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346.

13. *Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346.

14. *United States v. Carter v. Kansas City, etc.*, R. Co., 42 Fed. 37; *Anthony v. Louisville, etc.*, R. Co., 27 Fed. 724; *The Nederland*, 14 Fed. 63, affirming 7 Fed. 926.

Alabama.—*Western R. Co. v. Walker*, 113 Ala. 267, 22 So. 182.

Kentucky.—*Chesapeake, etc., R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859.

Louisiana.—*Irelson v. Southern Pac. R. Co.*, 42 La. Ann. 673, 7 So. 800, 44 Am. & Eng. R. Cas. 319.

Maryland.—*Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

New York.—See *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, affirming 65 Barb. (N. Y.) 32.

Pennsylvania.—*Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581.

Texas.—*Texas, etc., R. Co. v. Hardin*, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Gulf, etc., R. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

Vermont.—*Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699.

A street car company is not liable for injuries to a passenger in a derailment, caused by defects in machinery of which it could not have known. *South Covington, etc., St. R. Co. v. Barr*, 144 S. W. 755, 147 Ky. 549.

15. No Liability for defects not discoverable by exercise of high degree of care.

—Where it appears that the accident causing the injuries resulted from a flaw in the axle of defendant's locomotive tender, and that such flaw could not have been discovered by the exercise of the very high degree of care imposed by law, a verdict for plaintiff should be set aside. *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165.

16. See ante, "Nature of Liability and Degree of Care Required," §§ 2276-2350.

of the rule are as follows: A latent defect which will relieve the carrier from responsibility is such only as no reasonable degree of human skill and foresight could guard against;¹⁷ the carrier is not responsible for the consequences of an accident caused by a latent defect which no reasonable degree of human skill and foresight could guard against;¹⁸ a carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects, which could not have been discovered by the most careful inspection.¹⁹ It has been held that a jury is properly instructed that an elevator carrier of passengers is not liable for the consequences of an accident caused by a defect or flaw in the elevator apparatus which could not be discovered on a reasonable and careful examination, according to the best known tests reasonably practicable.²⁰ Of course, the mere fact that the defect is not open to observation is not alone sufficient to relieve the carrier from liability,²¹ and it is said that a crack in a wheel is not such a latent defect such as no reasonable care could discover.²² A charge is erroneous which excludes from the jury the issue of the carrier's want of care in properly testing the appliance while it was in use.²³

§ 2434. Liability for Negligence of Manufacturer or Builder.—Naturally the duty of a carrier of passengers is not discharged by placing the manufacture or construction of the means of conveyance in the hands of, or purchasing the materials, machinery and appliances from, competent and reliable persons; the carrier must himself make a careful inspection of every part of the mechanical instrumentalities employed in the transportation of persons, and apply proper tests to discover the existence of defects therein, and will be responsible for the consequences of accidents caused by defects which he could have discovered by the exercise of the high degree of care which the law imposes upon him.²⁴ This, however, merely amounts to holding the carrier liable for the consequences of his own negligent discharge of the duty of inspection. There arises the further question as to whether the carrier is responsible for defects in the means of conveyance which could not have been discovered by him after the vehicle, road, or appliance came into his possession, but could have been discovered by the application of proper tests during the course of the manufacture or construction. Upon this question there is some slight conflict of opinion. According to one view the carrier who purchases the conveying instrumentalities from, or procures their construction by, competent and reliable persons, is not liable for defects therein which he can not discover by a proper inspection, although they might have been discovered by the manufacturer or builder, by the exercise of due care during the course of the manufacture or construction. Some of the cases which are occasionally cited in support of this view do not go to that extent.²⁵ For example, an early Massachusetts case has sometimes

17. *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.) 486.

18. See *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258.

19. *Buckland v. New York, etc., R. Co.*, 181 Mass. 3, 62 N. E. 955.

20. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

21. *Miller v. Ocean Steamship Co.*, 118 N. Y. 199, 23 N. E. 462.

22. **Crack in wheel.**—*Lowenthal v. Vicksburg, etc., R. Co.*, 117 La. 1007, 42 So. 483.

23. Thus, in an action for injuries to a passenger through the derailment of a

train, a charge that if the derailment was caused by the breaking of a car wheel through a latent defect in the wheel when it was delivered to the carrier, it being conceded that, when it was so delivered, it was without defects, except latent defects, the carrier is not liable, is erroneous. *Houston, etc., R. Co. v. Summers* (Tex. Civ. App.), 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

24. *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434.

25. "While the defendant is bound to exercise the highest degree of care and diligence in providing a car, safe in all its machinery and wheels, yet if the de-

been understood as deciding that the carrier is not responsible for defects in the vehicle which could have been discovered in the course of manufacture, if they were not discoverable by proper examination on the part of the carrier.²⁶ Some slight support is afforded to that view by one of the arguments employed by the court, but it can hardly be said that the case so holds. It does not appear from the report of the case that the point was urged upon the court. All that the case really holds is that the carrier does not warrant the safety or road-worthiness of the vehicle employed to carry passengers. However, the view finds some support in a dictum by the supreme court of Tennessee. The Tennessee case²⁷ was really an action by an employee of defendant railroad company. But, in delivering the opinion, the court criticised the earlier New York case,²⁸ which affirmed the liability of the carrier for the manufacturer's negligence, in the following language: "We are of opinion that the doctrine of the case of Hegeman is justly obnoxious to the exceptions taken to it. The legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein, which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skillful application of the ordinary and approved tests, then the company can not be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests. We hold it unreasonable to assume that the company not only contract to be responsible for its own negligence, but also for that of the manufacturers." This case has been subsequently referred to, without either approving or disaffirming its doctrine.²⁹ This view was distinctly recognized and the point actually decided, by the supreme court of Michigan,³⁰ but the rule favored in these cases is rejected by the

defendant is not a manufacturer of the car wheels, which it used under car 65, at the time of the injury to the plaintiff, and used the proper care in the purchase and inspection of the said wheels, and purchased the same from a competent and reliable manufacturer and carefully inspected the wheel which broke, on the day in question, a reasonable time before the plaintiff became a passenger on said car, it is not liable for any injury resulting from any hidden or latent defect in said wheel which it could not have discovered and provided against in the exercise of due care and diligence." *Cleveland, etc., Tract. Co. v. Ward*, 6 O. C. C., N. S., 385, 17-27 O. C. D. 761, affirmed in 73 O. St. 395, 78 N. E. 1122.

Care in discovering defects.—In an action by a passenger to recover for personal injuries, it is not error to charge that if in selecting and furnishing material, machinery and all appliances necessary for the safety of its passengers, the defendant, acting through its officers and agents (as all corporations must), used proper care and diligence to ascertain by proper inspection and tests whether or not the machinery and appliances were sound or defective, and furnished none but what appeared to be free from defect, and were adapted to the purpose intended, so far as such examination

enabled them to determine, then they filled the measure of their duty in this respect, and would not be liable for any injury which may have occurred; and that this is the rule, notwithstanding the casualty may have resulted from actual defect in any of the appliances so furnished (as in a coupling pin), provided such defect, if it existed, was so hidden as not to be discernible by careful examination. Such an instruction is as favorable to the carrier as it could, with legal propriety, have been, and clearly points out the care and diligence which would excuse it for the use of defective machinery in the running and operation of its road and cars. *Central R. Co. v. Freeman*, 75 Ga. 331.

²⁶ *Ingalls v. Bills* (Mass.), 9 Metc. 1, 43 Am. Dec. 346.

²⁷ *Nashville, etc., Railway v. Jones*, 56 Tenn. (9 Heisk.) 27, overruling *Nashville, etc., R. Co. v. Elliott*, 41 Tenn. (1 Coldw.) 616, 78 Am. Dec. 506.

²⁸ *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. 353.

²⁹ *Knoxville Iron Co. v. Dobson*, 75 Tenn. (7 Lea) 367; *Guthrie v. Louisville, etc., R. Co.*, 79 Tenn. (11 Lea) 372, 15 Am. & Eng. R. Cas. 209, 47 Am. Rep. 286.

³⁰ *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321. In

decided weight of authority and can not be supported upon principle. It ignores the nature of the positive duty imposed upon the carriers to exercise a high degree of care in providing his passengers with a safe means of conveyance, and permits him, in a measure, to rid himself of responsibility for the due performance of that duty by assigning it to another. If the carrier should take upon himself the manufacture or construction of any of the instrumentalities employed in the transportation of passengers, he would certainly be responsible for the exercise of a high degree of care, while, by the operation of this rule, he materially lessens his responsibility by having the work done by a competent independent contractor, and the passengers are deprived of the guaranties for their safety which it is the policy and intent of the law to give them.³¹ The true rule, then, is that, so far as passengers are concerned, the carrier is responsible for the negligence of the manufacturer; he is responsible for the consequences of accidents caused by defects in the means of conveyance which might have been discovered by the exercise of due care and the application of reasonable tests during the course of the manufacture or construction, even

that case, the accident in which plaintiff was injured was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. There was evidence that the flaw was entirely within the axle, and that it was covered by a small thickness of sound metal. In reversing the court below, which had held that no diligence or care on the part of the railroad company could exempt it from want of care on the part of the manufacturers of the cars and axles, Campbell, C. J., in delivering the opinion of the court, said: "This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons. There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers."

31. In this connection the remarks of

Hannen, J., in *Francis v. Cockrell*, L. R. 52, B. 184, are instructive. That was a case in which plaintiff sued to recover for an injury occasioned by the fall of a grand stand at a race course. The stand fell because of defects in its construction, attributable to the negligence of the contractor who had built it for defendant. The learned judge, likening defendant's position to that of a carrier of passengers, said: "In the ordinary course of things, the passenger does now know whether the carrier has himself manufactured the means of carriage, or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulations and take what sureties he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier. *Longmeid v. Holliday*, 6 Exch. 761, 20 Law J. Exch. 430. See *George v. Skivington*, L. R. 5 Exch. 1. Unless, therefore, the presumed intentions of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief."

though they are not discoverable by the carrier's reasonable and usual inspection.³² Thus, it has been held that a carrier by elevator is not released from responsibility for defects in the apparatus merely by the fact that the elevator in use was constructed by a competent and skillful manufacturer.³³ And it has been held that a street railway company whose road crosses a bridge, constructed and owned by the state, and which forms a part of the highway, by using the bridge makes it a part of the superstructure of the road, and becomes responsible for defects therein which could have been discovered by the exercise of proper care during the construction of the bridge, even though they were not discoverable after the bridge was erected and in operation.³⁴ A railroad company is not relieved of responsibility for the consequences of an accident caused by the washing away of a defective embankment, simply because the embankment was constructed by a competent engineer.³⁵ Similarly, in an action by a passenger against a railroad company for damages resulting from the breaking down of a bridge whilst the train was passing over it, it was held that, whilst it was a question for the jury whether the defendant had engaged competent engineers who had adopted the best method and used the best materials in the construction of the bridge, yet the mere fact of its having engaged such persons would not relieve it from the consequences of an accident arising from a deficiency in the work.³⁶

§§ 2435-2489. Receiving and Discharging Passengers—§ 2435. Regulations as to Time and Place of Receiving.—A common carrier of passengers may establish reasonable rules and regulations in regard to the times and places of receiving passengers.³⁷

§ 2436. Rules and Regulations as to Entering Trains.—No doubt a carrier has the right to pass rules and regulations in regard to the admission of passengers to its trains,³⁸ provided such rules are reasonable rules,³⁹ and do

32. *English*.—*Burns v. Cork, etc., R. Co.*, 13 Ir. C. L. 543.

California.—*Siemsen v. Oakland etc., Elect. Railway*, 134 Cal. 494, 66 Pac. 672, 23 Am. & Eng. R. Cas., N. S., 564; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Kentucky.—*Morgan v. Chesapeake, etc., R. Co.*, 32 Ky. L. Rep. 330, 105 S. W. 961; *Chesapeake, etc., R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859.

New York.—*Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. 353. See, also, *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun 486; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, affirming 56 Barb. 425; *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369, reversing 29 Barb. 602.

33. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

34. *Birmingham v. Rochester, etc., R. Co.*, 59 Hun 583, 14 N. Y. S. 13, 37 N. Y. St. Rep. 317.

35. *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. 351, 6 Am. & Eng. R. Cas. 407, 39 Am. Rep. 787.

36. *Grote v. Chester, etc., R. Co.*, 2 Exch. 251.

37. **Regulations as to time and place of receiving passengers.**—*Birmingham R., etc., Co. v. Anderson*, 3 Ala. App. 424, 57 So. 103.

A rule of a street railroad company, that where its cars stop beyond the crossing they should not be backed to receive a person who has properly signaled, is unreasonable, when applied to a passenger on a rainy night, with a muddy road, the car forty feet beyond the crossing, and the passenger having seven blocks to walk unless he got passage. *Jackson Elect. R., etc., Co. v. Lowry*, 30 So. 634, 79 Miss. 431, 23 Am. & Eng. R. Cas., N. S., 103.

38. **Right to make rules and regulations.**—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

A railroad company has the right to establish rules requiring passengers to produce their tickets before entering the cars, and may direct the brakemen of the train to require observance of such rules. *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 472.

39. **Rules must be reasonable.**—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

A regulation of a railroad company, requiring trainmen to examine the tickets

not subject the passengers to unnecessary inconvenience and annoyance.⁴⁰ It may, for its protection, require a passenger to exhibit his ticket to a gateman in passing through to a train,⁴¹ and the latter may, in exercise of his judgment refuse to allow one to pass through the gate on a defaced or otherwise invalid ticket.⁴² But in this, as in other like matters, the carrier is responsible for the wrongful and injurious exercise of the discretion vested in its gatemen.⁴³ And where a person attempts to pass through in violation of such rule the gatekeeper may seize him, using no more force than is necessary, and make him show his ticket, even though he has succeeded in passing the gate.⁴⁴

Preventing Passenger Wrongfully Boarding Train.—Where a person has passed the gate of a union depot company with the intention of boarding a moving train, in violation of a rule of the company forbidding any one to board a train on its premises while in motion, the gatekeeper may seize hold of and detain him, to prevent the violation of such rule, if he use no more force than is necessary.⁴⁵

§§ 2437-2438. Duty to Stop and Take Up—§ 2437. In General.—A carrier which has sold a passenger a ticket of transportation on a certain train, commits a breach of public duty towards him, as well as a violation of the contract, by causing the train to leave from the station yards without coming to the depot, where it is accustomed to receive passengers into the train, and without giving the passenger a reasonable opportunity of getting aboard.⁴⁶ And a carrier is bound to stop its trains at way stations where it advertises to, or is accustomed to, stop, in order that persons may get on or off; and any one who desires to take passage at such a station, and there presents himself at the proper time, and the train does not stop, may recover in an action founded in tort,⁴⁷ for a breach of a general duty, and not for a breach of a special contract,⁴⁸ damages sustained by him in consequence of the carrier's failure to

of passengers and allow no one to get aboard without a ticket or pass, is a reasonable one. *International, etc., R. Co. v. Goldstein*, 2 Texas App. Civ. Cas., § 274.

40. Inconvenience and annoyance.—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

In an action against a railroad company to recover damages, where a gateman refused to allow plaintiff to pass to a train because the date on his ticket was illegible, whereby he lost the train, plaintiff is not obliged to present his ticket to a ticket receiver if in the same condition as when received from defendant's agent, such a rule of the company being unreasonable. *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

41. Rule requiring exhibition of ticket.—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

42. Discretion of gateman.—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

43. Liability for erroneous exercise of discretion.—*Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449.

Mistake of gateman.—The mistake of

a gate keeper in a railroad station as to his duties, under the rules of the depot, is no defense to an action against a railroad company for damages for refusal of the gate keeper to allow a passenger to pass through the gate to reach the train, where the passenger has a right to pass through the gate at the time he made the attempt. *Baltimore, etc., R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052.

44. Right to use force to restrain passenger.—*Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907.

45. Preventing passenger wrongfully boarding train.—*Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907.

46. Failure to stop at station.—*Payton v. Gulf Line R. Co.*, 62 S. E. 469, 4 Ga. App. 762.

47. Duty to stop and take up.—*Ballard v. Cincinnati, etc., R. Co.*, 15 Ky. L. Rep. 703; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

48. Action founded in tort.—An action against a common carrier for a failure to stop at a certain place and take passengers, according to a written notice made known to the public, is founded in tort, for the violation of a general duty, and not for a breach of a special contract. *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588.

carry him. A carrier may be liable for the damages sustained from failure to comply with a well-established custom to stop trains at certain stations for the purpose of taking up passengers, though such stations are not embraced in its time-tables or otherwise advertised as passenger stations.⁴⁹ The custom of a railroad company may estop it to claim that persons waiting for trains at a place where it might reasonably be anticipated that any part of the train adopted to the accommodation of passengers would stop, were trespassers.⁵⁰

A street railroad company was liable for failure to stop and take up a passenger, if, in the exercise of due care, it might have seen the passenger or if it was grossly negligent in failing to see him.⁵¹

Excuses.—A carrier can not escape liability on the ground that there was not sufficient room in the train, if it appears that by reasonable diligence it might have provided proper extra cars.⁵²

§ 2438. Flag Stations.—A carrier is bound to stop its passenger trains in response to proper signals at a flag station at which it is in the habit of stopping trains.⁵³ And if it negligently fails to stop at a station where a signal to stop is displayed, it is liable to one who wished to board the train.⁵⁴ And it is the duty of those in charge of a passenger train, on approaching a station where such trains stop, upon being flagged, to be on the alert and lookout for such signal, and stop when it is given.⁵⁵ A carrier is liable for the negligence of its agent in failing to furnish a prospective passenger with a ticket and flag the train that he might board, it being a regular flag station.⁵⁶ A railroad company which has established the custom of stopping at a certain station on signal is liable for the neglect of its servants to keep a lookout for signals and stop the train for a passenger.⁵⁷ Where those in charge of a train saw, or might have seen, a signal to stop at a signal station, and failed to do so, the company is liable to a prospective passenger that is left behind, because of its general duty to the public; and this, though the passenger had a ticket conditioned for passage between stop stations only, since he might have elected to pay his fare.⁵⁸ But in order that a carrier may be held liable for failure to stop on flag a proper signal must have been given. Thus, it has been held that waving a valise and a white flag after night was not sufficient. The proper signal at

49. *Morse v. Duncan*, 14 Fed. 396, 8 Am. & Eng. R. Cas. 374; *Chicago, etc., R. Co. v. Fisher*, 66 Ill. 152; *Illinois Cent. R. Co. v. Siddons*, 53 Ill. App. 607; *Wilson v. New Orleans, etc., R. Co.*, 63 Miss. 352.

Custom to stop trains at certain station on signal.—Where a railroad has been for a long time in the habit of stopping trains at a certain station on signal, such custom imposed the duty on the company to stop a train on being signaled, and the duty on its employees operating the train to exercise care to observe signals. And a failure to perform such duty, where a ticket had been purchased on the faith that they would do so, creates as clear a liability as where a train has been advertised to stop at a station and fails to do so. So held in *Illinois Cent. R. Co. v. Siddons*, 53 Ill. App. 607.

50. **Effect of custom.**—*Lake Shore, etc., R. Co. v. Ward*, 35 Ill. App. 423, affirmed in 135 Ill. 511, 26 N. E. 520.

51. **Street railway.**—*Godfrey v. Meridian R., etc., Co.* (Miss.), 58 So. 534.

52. **Excuses.**—*Purcell v. Richmond, etc.,*

R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

53. **Flag stops.**—*Southern R. Co. v. Wallis*, 133 Ga. 553, 66 S. E. 370, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67; *San Antonio, etc., R. Co. v. Safford* (Tex. Civ. App.), 48 S. W. 1105.

54. **Excuses.**—*Morse v. Duncan*, 14 Fed. 396, 8 Am. & Eng. R. Cas. 374.

55. *Morse v. Duncan*, 14 Fed. 396, 8 Am. & Eng. R. Cas. 374.

56. **Failure of agent to flag train.**—At 10 o'clock at night a married woman, just recovering from a spell of sickness, missed a train going to her home, through the station agent's negligence in failing to get a ticket for her and to signal the train to stop. She had to walk two miles to find a place to stay, by reason whereof she became sick and remained so for a long time. Held, that the railroad company was liable. *Houston, etc., R. Co. v. Rand*, 1 Texas App. Civ. Cas., § 255.

57. **Flag stop—Custom.**—*Illinois Cent. R. Co. v. Siddons*, 53 Ill. App. 607.

58. **Effect of possession of ticket calling only for stop stations.**—*Wilson v. New Orleans, etc., R. Co.*, 63 Miss. 352.

night is a light.⁵⁰ And as a carrier is entitled to have trains started and stopped by its employees, if it maintains an agent at a flag station, whose duty it is to signal trains to stop, the engineer's failure to stop a train on the signal of a prospective passenger is not negligence; and hence, in an action for damages for failure to stop, it was error to submit the question whether the engineer should have obeyed a signal made by others than the agent.⁶⁰

Possession of Ticket Not Good for Train.—A passenger may have certain rights outside of his special contract, and if he signal a train, and the station is one where such train should stop if signaled and his signal is seen, or might be seen, by those in charge of the train, and is disregarded by them, the carrier is liable on the ground of a violation of a general duty which it owes to the public, although a passenger may have in possession a ticket not good for the train flagged; and if the trainmen willfully, recklessly, or capriciously refused to stop the train, the company was thereby rendered liable for exemplary damages.⁶¹

§§ 2439-2449. Duty to Carry to and Stop at Destination—§ 2439.

In General.—It may be laid down as a general rule that the duty of a railroad company as a common carrier of passengers is not performed until it delivers its passenger at the station to which he has paid his fare.⁶² And in regard to street railway it is held that on payment of fare, the contract of carriage is complete, and a passenger is entitled to ride to the end of a line to which, under the city ordinances, he is entitled to be transferred.⁶³ In some cases street railways contract to give the passenger continuous passage to his destination, furnishing transfer when a change of cars is required,⁶⁴ while in other cases no transfer is provided for, in which cases the passenger is required to take, in the first place, the car going to his destination, and if he takes a car scheduled to stop short of his destination there is no breach of contract.⁶⁵

59. Proper signal necessary.—St. Louis, etc., R. Co. v. Berryhill, 3 Texas App. Civ. Cas., § 319.

60. Agent's authority and duty to flag trains.—St. Louis, etc., R. Co. v. Garner, 96 Miss. 577, 51 So. 273.

61. Rights outside of special contract.—Wilson v. New Orleans, etc., R. Co., 63 Miss. 352.

62. General rule.—Birmingham R., etc., Co. v. Seaborn, 168 Ala. 658, 53 So. 241; Renfro v. Texas Cent. R. Co. (Tex. Civ. App.), 141 S. W. 820.

It is incumbent on a railroad to carry passengers to their destination, and it is immaterial who owns the track on which it runs its cars into the station. Southern R. Co. v. Miller, 110 S. W. 351, 33 Ky. L. Rep. 505.

63. Street railways.—Morrill v. Minneapolis St. R. Co., 115 N. W. 395, 103 Minn. 362.

While a street railway company is not obliged to run its cars so as to make a continuous passage, a passenger may not be put off before his destination on the line is reached, without a transfer being furnished, the company's franchise authorizing it to charge only one fare from one part of the city to another, merely because it is desired to send the car for a crowd, which is waiting to get into the center of the city. Frankfort, etc., Tract.

Co. v. Marshall, 98 S. W. 1035, 30 Ky. L. Rep. 431.

A street railroad must transport for a single fare a passenger whose fare is accepted on any car to any point on its line reached by cars running in that direction, regardless of whether or not the car boarded is a short-service or a long-service car. Judgment, 102 N. Y. S. 746, reversed. Baron v. New York City R. Co., 105 N. Y. S. 258, 120 App. Div. 134.

64. Lawshe v. Tacoma R., etc., Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350; see Braymer v. Seattle, etc., R. Co., 35 Wash. 346, 77 Pac. 455.

65. Where a street car company operated some of its cars on a certain line from A. to C., and others only from A. to B., a point intermediate between A. and C., and plaintiff, whose destination was C., boarded a car bound only for B., without asking the conductor whether the car went to C. or not, and there was no system of transfers from cars going only to B. to those going beyond to C., and plaintiff did not ask for any such transfer, even if there had been such a system, there was no contract to carry plaintiff beyond B. Braymer v. Seattle, etc., R. Co., 77 Pac. 495, 35 Wash. 346.

Where a street car bound only for B. was boarded by a passenger for C., who made no inquiry as to the destination of the car, it was immaterial, on the ques-

Waiver of Refusal to Carry to Destination.—Where a passenger has paid his fare to a certain point, and, before the journey is completed, the carrier refuses to transport the passenger to such point, and tenders him the fare for the uncompleted part of the journey, which the passenger receives under protest, he must be considered as waiving his right to further carriage, and to damages for nonperformance of the contract.⁶⁶

§ 2440. Putting Passenger Off at Wrong Station.—A passenger on a railroad train has the right to rely on the information given by the carrier's authorized agent, on the train, that it has reached the station to which he is destined; and if, relying on such information, he leaves the train at the wrong station, the company is liable for all the proximate damages which may ensue therefrom,⁶⁷ notwithstanding the carrier's agent may have made an honest mistake in announcing the station.⁶⁸ But the carrier's agent is not bound to know or ascertain the destination of a particular passenger, unless inquiry is made of him by such passenger, and, where one of the passengers walks to the car platform on the arrival of the train at a station, he has a right to assume that the passenger knows that the station is his destination, and the fact that he assists such passengers to alight does not render the company liable for failure to carry the passenger to his station further on.⁶⁹ A female passenger's cause of action against a carrier for being wrongfully put off of the train at an improper place is not defeated by her husband's telling the carrier to put her off at that point, it being done without her knowledge or authority.⁷⁰

Negligent Announcement of Station.—See post, "Announcement of Stations or Stopping Places," § 2475.

§§ 2441-2449. Failure to Stop at Destination—§ 2441. In General.

—A person who boards a train, with a ticket to a given station, is entitled to be put off at that station if the train usually stops there to receive or discharge passengers.⁷¹ So a railway passenger, having a ticket entitling him to get off at a

tion of his contract of carriage, that the car which he boarded left at about the time that the car for C. ordinarily left. *Braymer v. Seattle, etc., R. Co.*, 77 Pac. 495, 35 Wash. 346.

66. Waiver of refusal to carry to destination.—*Florida, etc., R. Co. v. Katz*, 23 Fla. 139, 1 So. 473.

67. Putting off at wrong station.—*Louisville, etc., R. Co. v. Jenkins*, 15 Ky. L. Rep. 239; *Louisiana, etc., R. Co. v. Rider* (Ark.), 146 S. W. 849.

Both brakeman and conductor informed a passenger who was unacquainted with the line of road that the next station was her destination, when it was not, and she, stopping there, took a severe cold from unavoidable exposure. Held, that the company was liable. *Pennsylvania Co. v. Hoagland*, 78 Ind. 203.

The owner of a steamboat, the custom on which was to notify passengers when their landings were reached, held to be liable for the negligence of two parties—one representing the officers of the boat, and the other representing the clerk—in directing a lady to disembark at a wrong landing in the night. *Carson v. Leathers*, 57 Miss. 650.

68. Honest mistake of conductor.—A carrier is not excused for inducing a passenger to leave the train at the wrong

station by the fact that the conductor is honestly mistaken in making the announcement thereof. *Tennessee Cent. R. Co. v. Brasher*, 97 S. W. 349, 29 Ky. L. Rep. 1277.

69. Assisting passenger to alight.—*Louisville, etc., R. Co. v. Cook*, 38 N. E. 1104, 12 Ind. App. 109.

Where a girl fifteen years old, a passenger on a train, voluntarily leaves it, by mistake, at a station, before her destination is reached, there is no duty of the conductor to discover this fact, and have her return to the train. *Cain v. Louisville, etc., R. Co.*, 84 S. W. 583, 27 Ky. L. Rep. 201.

70. Excuse for putting off at improper place.—*Baltimore, etc., R. Co. v. Pixley*, 61 Ind. 22.

71. Failure to stop at destination—In General.—*Texas, etc., R. Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454.

Custom to stop trains at certain station — Carried beyond destination. — In *Chicago, etc., R. Co. v. Fisher*, 66 Ill. 152, it appeared that a certain freight train was in the habit of carrying passengers to a certain station, and, before the company had made any different rule or regulation in this respect, plaintiff purchased a ticket for such station, but was informed by the conductor that he would

particular station, who is carried, without his consent, beyond the station, without being allowed a reasonable opportunity to leave the train, has a right of action against the company for whatever damages he may have sustained in consequence.⁷² And a carrier is liable in damages to a passenger who was wrongfully carried past his destination, and then ejected from the train.⁷³ The same general rule applies to street cars⁷⁴ and steamboats.⁷⁵ But the rule laid down in a number of adjudicated cases respecting steam railroads, that, where a passenger is wrongfully ejected from a train at a place between stations, the carrier is liable for injuries that may result to him while walking back to its station on the railroad track,⁷⁶ can not be applied so as to hold a street railway company liable for injuries received by a person in slipping on an icy sidewalk while he was walking back to his home after being negligently carried beyond his usual stopping place.⁷⁷

Law Providing for Stopping Trains—Acceptance of Fare.—Where a conductor accepts a passenger's fare after having been informed at what station he desires to alight, it is his duty to stop the train there, and permit the passenger to alight,⁷⁸ and if the passenger is obliged to alight at some other point he

not stop there, and advised to take passage on an extra train, to which he applied and was refused passage, and that then plaintiff entered the first mentioned train, informing the conductor of the facts, and was by it carried to the next station beyond the one named in the ticket. It was held that compensatory damages were recoverable against the carrier for the delay.

72. Right of action.—Illinois Cent. R. Co. v. Chambers, 71 Ill. 519.

Where a conductor whose freight train was in the habit of carrying passengers to M. station, without any change of the regulations, refused to stop at M., although seasonably informed by a passenger that he had purchased a ticket for M., but carried him to the next station beyond, held, that the railroad company was liable in compensatory damages. Chicago, etc., R. Co. v. Fisher, 66 Ill. 152.

M. took passage on a railway freight train, which was occasionally used for the transportation of passengers, paid his passage money, and was carried, without fault on his part, beyond his destination, and put off at the next station, which was five miles distant. He had to walk back through the rain, and, being subject to chronic rheumatism, was injured in health thereby. Held that, on a demurrer to the evidence, M. was entitled to a judgment against the company. Mobile, etc., R. Co. v. McArthur, 43 Miss. 180.

A carrier is liable for injuries to a passenger owing to his having been carried by his station. Rawlings v. Wabash R. Co., 71 S. W. 535, 97 Mo. App. 511.

73. Ejection after passing destination.—Dave v. Morgan's, etc., Steamship Co., 47 La. Ann. 576, 17 So. 128, 2 Am. & Eng. R. Cas., N. S., 127.

Plaintiff purchased a ticket over defendant's road, entitling her to passage on its train to one of its stations, but the

train carried her a quarter of a mile beyond her destination, and against her objection the conductor ejected her at that point, and she was obliged to walk back to her station, from which exposure she became sick. Held, that defendant was liable for damages for breach of contract. Evansville, etc., R. Co. v. Kyte, 6 Ind. App. 52, 32 N. E. 1134.

A railway passenger who is, through no fault of his, carried some distance beyond his station, on a dark night, and there put off the train, and in going back to the station falls through a cattle guard or trestle and is injured, may recover the damage from the railway company. Winkler v. St. Louis, etc., R. Co., 21 Mo. App. 99.

74. Street cars.—Braymer v. Seattle, etc., R. Co., 35 Wash. 346, 77 Pac. 495.

75. Steamboats.—Defendant railroad company also owned a line of steamboats running on the Mississippi river, and sold tickets good between stations and landings either on the railroad or steamboats, and entitling passengers to be carried either to the station named or to the one nearest on the opposite bank. Having sold plaintiff such a ticket, defendant, in retaliation for his refusal to give the boat line his entire freight, refused to land him at the landing opposite the station named in the ticket, saying that they had abandoned the landing. Held, a breach of the contract embodied in the ticket, for which plaintiff was entitled to at least nominal damages. Brulard v. Alvin, 45 Fed. 766.

76. See post, "Failure to Stop Train at Station," § 2453.

77. Does not apply to street cars.—Haley v. St. Louis Transit Co., 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295.

78. Acceptance of fare with notice of destination.—Caldwell v. Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

has a right of action for damages.⁷⁹ Where the law provides that the train shall stop at the station, if it fails to do so any passenger having the right to alight therefrom has a right of action.⁸⁰

§ 2442. Flag Stations.—A statute providing that trains shall stop at stations for the accommodation of passengers, does not apply to flag stations, but only to regular advertised stopping places.⁸¹ The sale of a ticket to a passenger amounts to a contract to carry him to the designated destination and let him off at that place, though it be merely a flag station.⁸² In some cases it is held that a carrier is conclusively presumed to know of its undertaking to carry a passenger to a particular station and to stop the train for such passenger to alight, and that the carrier can not relieve itself from the obligation thereunder by showing that the train was crowded and that the carrier's agent would not have sufficient time to reach the passenger and receive his ticket before the station was passed.⁸³ But it seems to be the more reasonable rule that the mere sale of a railroad ticket to a flag station where trains stop only on signal or notice to the conductor, is not of itself notice to the carrier that the holder of the ticket desires to alight at such station.⁸⁴ However the taking up by a conductor of a ticket to a flag station is sufficient notice to him that the passenger desires to get off at that station, and it is the duty of the conductor to take up the tickets within a reasonable time after leaving a station.⁸⁵ And when a railroad company sells a ticket to a flag station at which its trains do not stop unless signaled to do so for the purpose of receiving or discharging passengers, it is ordinarily the duty of the conductor, before reaching the station, to ascertain from the passenger holding such ticket his destination, and to stop the train there for the purpose of allowing the passenger to leave the train.⁸⁶ But the fact that the passenger fails to notify the conductor or any other employee of the carrier that he wishes to alight at a flag station which is passed before the conductor reaches him in taking tickets may absolve the carrier from liability for carrying him by.⁸⁷

79. When a passenger goes on a train and pays his fare to a point on the road, and the conductor, before the journey is completed, tells the passenger that the train will not go to that point, and that he can either get off at the station where the train was then stopping, or go to some other point, whereupon the passenger leaves the train, he has a right of action against the company for damages. Florida, etc., R. Co. v. Katz, 23 Fla. 139, 1 So. 473.

80. Under South Carolina Gen. St., § 1486, providing that railroad companies shall cause all their trains for passengers to entirely stop at all their stations advertised as stations for receiving passengers, for a time sufficient to receive and let off passengers, a railroad company which receives a passenger on board a mixed train, and collects his fare, is obliged to transport him safely, and stop the train at the station to which he has paid his fare. Thomas v. Charlotte, etc., R. Co., 38 S. C. 485, 17 S. E. 226.

81. Construction of statute requiring trains to stop—Flag stop.—Milhouse v. Southern Railway, 52 S. E. 41, 72 S. C. 442, 110 Am. St. Rep. 620.

82. Sale of ticket to flag station.—Missouri, etc., R. Co. v. Glass, 46 Tex. Civ. App. 126, 102 S. W. 447.

83. Carrier presumed to know of undertaking.—Missouri, etc., R. Co. v. Glass, 46 Tex. Civ. App. 126, 102 S. W. 447.

84. More reasonable rule—Sale of ticket on notice.—Rock Island, etc., R. Co. v. Stevens, 84 Ark. 436, 105 S. W. 1032, 108 S. W. 517, 16 L. R. A., N. S., 1132.

85. Notice to conductor—Taking up ticket.—Louisville, etc., R. Co. v. Seale, 160 Ala. 584, 49 So. 323.

86. Duty resting on conductor.— Chattanooga, etc., R. Co. v. Lyon, 89 Ga. 16, 15 S. E. 24, 32 Am. St. Rep. 72, 15 L. R. A. 857.

By the sale of a ticket from one station to another, a flag station, a railroad company undertakes to carry the purchaser to his destination, and let him off there, and is bound to fulfill its obligation. San Antonio, etc., R. Co. v. Dykes (Tex. Civ. App.), 45 S. W. 758.

Where the point of destination of a passenger is a flag station to which the carrier sold him a ticket, the carrier is charged with the duty of stopping at such station, and a failure so to do renders the carrier liable in tort. Ft. Smith, etc., R. Co. v. Ford (Okla.), 126 Pac. 745, 41 L. R. A., N. S., 745.

87. Failure of passenger to notify agent.—A passenger purchased a ticket to a station known by her to be a flag station, and only fifteen miles distant.

And this is especially true in cases where the conductor could not reasonably be expected to reach the passenger before arriving at the station,⁸⁸ or where there are other indications that the conductor would not obtain notice by taking up the ticket or otherwise in time to stop the train at the desired point.⁸⁹

§§ 2443-2448. Station at Which Train Does Not Stop—§ 2443. In General.—In the absence of statutory regulations,⁹⁰ a railroad company may adopt reasonable regulations⁹¹ that certain passenger trains, running regularly

The conductor overlooked her, and carried her beyond her destination, but she had made no effort to surrender her ticket, though the conductor had passed through the train several times. Held, that it was error to instruct, without qualification, that the jury must determine, from the evidence, whether, by the exercise of extraordinary diligence, the conductor could have ascertained the destination of the passenger, since it was the duty of the passenger to have exercised ordinary care, under the circumstances, to surrender her ticket, so as to inform the conductor of her destination. *Central, etc., R. Co. v. Dorsey*, 32 S. E. 873, 106 Ga. 826.

A passenger holding a ticket to a flag station boarded a train with knowledge that the train did not stop there unless signaled. The conductor failed to collect her ticket, and he had no knowledge of her presence on the train. She did not notify any train employee of her destination, but attempted to stop the train by giving a signal, but failed to do so, and she was carried to the next station, where she alighted and walked back. Held, that she could not maintain an action for the damages sustained resulting from her being carried beyond the flag station. *Illinois Cent. R. Co. v. Walker*, 108 S. W. 278, 32 Ky. L. Rep. 1248.

Where the holder of a ticket to a flag station, at which trains stopped only on notice to the conductor, failed to inform him or any other employee of her destination until she had been carried almost a mile beyond her station, and the conductor then offered to take her on to the next station and send her back, but, instead of accepting that offer, she voluntarily left the train, and suffered no serious inconvenience therefrom, she had no cause of action against the company, and can not complain of the instructions given to the jury. *Pence v. Louisville, etc., R. Co.*, 64 S. W. 905, 23 Ky. L. Rep. 1207.

In an action for damages against a railroad company for carrying plaintiff beyond his station, it appeared that he knew when he bought his ticket that the station was a flag station, where trains stopped only on notice to the conductor; that he neither notified him nor any employee of the company, and he was carried two miles beyond the sta-

tion before he notified any of the employees as to where he wanted to get off; that the conductor then proposed to carry plaintiff to the next station, which was four miles further, or put him off there; and that he agreed to get off, and walk back. Plaintiff testified that he was not sick, and felt no ill effects from walking. The weather was pleasant, and the road dry, and he got off the train about sundown. Held, that the evidence did not support a verdict for plaintiff. *Gulf, etc., R. Co. v. Ryan*, 4 Texas App. Civ. Cas., § 305, 18 S. W. 866.

88. *Rock Island, etc., R. Co. v. Stevens*, 84 Ark. 436, 105 S. W. 1032, 108 S. W. 517, 16 L. R. A., N. S., 1132.

89. *Rock Island, etc., R. Co. v. Stevens*, 84 Ark. 436, 105 S. W. 1032, 108 S. W. 517, 16 L. R. A., N. S., 1132.

90. Legislative control.—"The power of a railroad company to adopt or enforce such regulation is subject to legislative control. *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Shields v. State*, 26 O. St. 86; *State v. New Haven, etc., Co.*, 43 Conn. 351; *New Haven, etc., Co. v. State*, 44 Conn. 376." *Pennsylvania Co. v. Wentz*, 37 O. St. 333.

"In the state of Texas there is no statutory provision, prohibiting railway companies from making such regulations." *Texas, etc., R. Co. v. Ludlam*, 6 C. C. A. 454, 57 Fed. 481.

91. Reasonable regulation.—*United States.*—*Kyle v. Chicago, etc., R. Co.*, 105 C. C. A. 151, 182 Fed. 613.

North Carolina.—*Hutchinson v. Southern R. Co.*, 140 N. C. 123, 52 S. E. 263.

Oklahoma.—*Noble v. Atchison, etc., R. Co.*, 4 Okla. 534, 46 Pac. 483.

South Carolina.—*Black v. Atlantic, etc., R. Co.*, 82 S. C. 478, 64 S. E. 418.

Texas.—*Texas, etc., R. Co. v. White*, 4 Texas App. Civ. Cas., § 259, 17 S. W. 419; *Lindley v. Texas, etc., R. Co. (Tex. Civ. App.)*, 17 S. W. 421.

Virginia.—*Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620.

Wisconsin.—*Plott v. Chicago, etc., R. Co.*, 63 Wis. 511, 23 N. W. 412.

Regulations as to the running and stopping of trains are in fact absolutely necessary for the transaction of the company's business, and for the safety of the employees and passengers, and their violation, at the will of the employee, or

on its road, shall stop only at designated places,⁹² and it is the duty of an intending passenger to inform himself of such regulations;⁹³ and he would not

for the convenience of the passenger, ought not to be tolerated. *Texas, etc., R. Co. v. Ludlam*, 6 C. C. A. 454, 57 Fed. 481.

A railroad company has the right to make and enforce reasonable regulations for the running of its trains, and a passenger who boards a train which is not scheduled to stop at the station to which he has purchased a ticket can not recover damages because of a refusal of the conductor to stop the train at such station. *Louisville, etc., R. Co. v. Miles*, 37 S. W. 486, 100 Ky. 84, 18 Ky. L. Rep. 580.

92. Station at which train does not stop.—*United States*.—*Texas, etc., R. Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454.

"A railroad company is not bound to stop and allow a passenger to get off, except at a regular station or stopping place. *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37." *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703.

A railroad company is not bound to stop a train and allow a passenger to get off except at a regular station or stopping place. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Sellers v. Cleveland, etc., R. Co.*, 40 Ind. App. 319, 81 N. E. 1087.

93. Duty of passenger to inform himself.—*United States*.—*Texas, etc., R. Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454.

Illinois.—*Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60.

Indiana.—*Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540.

Oklahoma.—*Noble v. Atchison, etc., R. Co.*, 4 Okla. 534, 46 Pac. 483.

Tennessee.—*Trotlinger v. East Tennessee, etc., R. Co.*, 79 Tenn. (11 Lea) 533.

Wisconsin.—*Boehm v. Duluth, etc., R. Co.*, 91 Wis. 592, 65 N. W. 506.

It is the duty of a passenger to inquire whether a train on which he intends to ride will stop at the station to which he desires to go, and if the train does not stop he can not require the employees of the railroad to stop it there. *Chicago, etc., R. Co. v. Claunts*, 99 Ark. 248, 138 S. W. 332.

It was the duty of the appellee to inform himself when, where, and how he could go, or stop, according to the regulations of the appellant's trains, and if he made a mistake, which was not induced by the appellant, he has no remedy. *Cheney v. Boston, etc., R. Co. (Mass.)*, 11 Metc. 121, 45 Am. Dec. 190; *Boston, etc., R. Co. v. Proctor (Mass.)*, 1 Allen 267, 79 Am. Dec. 739; *Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *Cleveland, etc., R. Co. v. Bartram*, 11 O. St. 457. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703.

The holder of a railroad ticket is bound to inform himself, before taking passage, as to whether the train is scheduled to stop at his destination. *Dillman v. Chicago, etc., R. Co. (Ind. App.)*, 88 N. E. 873, judgment reversed on rehearing 90 N. E. 22.

In the absence of statutory provision to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road, shall not stop at designated stations or places, and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540; *Ohio, etc., R. Co. v. Swarthout*, 67 Ind. 567; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60; *Pennsylvania Co. v. Wentz*, 37 O. St. 333.

A passenger purchasing a ticket and boarding a train is bound to know whether the train is scheduled to stop at his destination. *Caldwell v. Lake Shore, etc., R. Co.*, 8 Pa. Co. Ct. Rep. 467.

A railroad company may adopt a rule that a certain train shall not stop at designated stations, and a passenger is bound to inquire whether the train which he takes stops at his destination. *Black v. Atlantic, etc., R. Co.*, 64 S. E. 418, 82 S. C. 478.

A railroad company is not bound, in the absence of contract or statute, to stop all its trains at every station, and a passenger, with means at his command of ascertaining before he enters a train whether it will deliver him at his destination, must avail himself of the opportunity, and enter the proper conveyance. *Texas, etc., R. Co. v. Bell*, 39 Tex. Civ. App. 412, 87 S. W. 730.

"It was the duty of the plaintiff to ascertain the right train before taking passage upon it and if he negligently failed to do so and got upon the wrong train, the railway company only owed him the duty of ordinary care to refrain from injuring him. *Texas Pac. R. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347; *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37; *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239, 9 Am. & Eng. R. Cas. 307; *Rorer on Rys. 984*." *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106.

Where passenger negligently failed to ascertain proper train.—Where passenger, through his own mistake, boarded the wrong train and elected to be put off rather than pay his fare to the next station, the railroad company owed him no duty to take him to the next station

without an agreement,⁹⁴ or special contract,⁹⁵ to stop, have any right to insist upon the company's changing the course of their business for his accommodation, and to serve his convenience,⁹⁶ but the circumstances may be such as to mislead the passenger, and if the carrier is at fault the passenger may recover,⁹⁷ as where the carrier has so acted as to induce the passenger to believe that regulations prohibiting the stopping has been abrogated.⁹⁸ However, if a person

nor to a place where he could rest in comfort and return on the next train. *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106.

In an action for ejection of a passenger, who boarded one of defendant's through trains to be carried to a station at which the train was not scheduled to stop, an instruction that, if the jury believed that plaintiff boarded the train without making inquiry to ascertain whether or not it would stop at her destination, and without reasonable grounds to believe that the train would stop to permit her to alight, the jury should find for defendant, was proper. *Albin v. Gulf, etc., R. Co.*, 95 S. W. 589, 43 Tex. Civ. App. 170.

94. Absence of agreement.—Chicago, etc., R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831.

Where at the time plaintiff bought his ticket there was an express agreement between him and defendant's agent that he might travel to V. on the train which he took, action will lie for his being put off, before arriving at V., on the ground that the train did not stop at that station. Judgment (Tex. Civ. App.), 80 S. W. 426, reversed. *Gulf, etc., R. Co. v. Moore*, 83 S. W. 362, 98 Tex. 302.

95. Absence of special contract.—A railroad company is not bound to stop its train at a point other than a station, and where its trains are not accustomed to stop, unless it makes a special contract to carry to that point. *Wells v. Alabama, etc., R. Co.*, 67 Miss. 24, 6 So. 737.

Where a carrier issues a special contract to carry a passenger on a particular train to a particular place, it can not refuse to stop the train at that station; no other train being run between the points in question on which the passenger might be transported. *Dillman v. Chicago, etc., R. Co.* (Ind. App.), 88 N. E. 873.

A carrier can not, as against a limited contract refuse to stop all of its trains at a station to which it has sold transportation. *Dillman v. Chicago, etc., R. Co.* (Ind. App.), 88 N. E. 873.

Defendant carrier sold plaintiff a commutation ticket between certain points good for twenty-five rides within sixty days, and stamped "not good on trains 3, 4, 5, 6, 9, or 10." The only other trains operated between the points were trains 7 and 8. Held, that the refusal of the conductor of train No. 7 to accept the

ticket for passage, and the ejection of plaintiff from the train for refusal to pay his fare, because the train had received orders not to stop at plaintiff's destination, constituted a violation of duty for which plaintiff could recover. *Dillman v. Chicago, etc., R. Co.* (Ind. App.), 88 N. E. 873.

The ticket agent at M. refused to sell plaintiff a ticket to R., because R. was not a stopping place. Plaintiff then entered the train, and told the conductor that she wished to go to R. He collected twenty-five cents, and told her that the train did not stop at R. Twenty-five cents was the prescribed fare for any distance not exceeding eight miles. W., the nearest stopping place and also R., were within eight miles of M. Held, that there was no special contract to carry to R. *Wells v. Alabama, etc., R. Co.*, 67 Miss. 24, 6 So. 737.

In the absence of an express contract to the contrary, a railroad company is not bound to stop a train and discharge a passenger at a station where, under reasonable rules of the company, the train does not stop. *Plott v. Chicago, etc., R. Co.*, 63 Wis. 511, 23 N. W. 412.

96. Course of business can not be changed.—Chicago, etc., R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; *Caldwell v. Lake Shore, etc., R. Co.*, 8 Pa. Co. Ct. Rep. 467.

97. Carrier at fault.—Where a person having a ticket calling for a regular station as her destination was permitted without objection to take a train which did not stop at that station, and she did not know that the train did not stop there, and there was nothing on the face of the ticket to show that it was not good on that train, it was the duty of the company to stop the train at that station to permit her to alight. *Hutchinson v. Southern R. Co.*, 52 S. E. 263, 140 N. C. 123.

98. Rule abrogated by practice.—A passenger, before boarding a train, is bound to inform himself as to whether, under the regulations of the carrier, it will stop the train at his destination, unless the carrier, by habitually stopping the train at that place, has induced the passenger to believe that its rule that the train should not stop there except under exceptional circumstances had been abrogated. *Albin v. Gulf, etc., R. Co.*, 95 S. W. 589, 43 Tex. Civ. App. 170.

by his own fault,⁹⁹ mistake,¹ or purposely, with a knowledge of the regulation,² gets upon such a train, he can not recover damages from the carrier. Thus if he makes a mistake, not induced by the company, against which ordinary diligence would have protected him, he has no remedy for the consequences against the company.³ The mere fact that a railroad company receives a passenger on

99. Passenger's fault.—Ohio, etc., *R. Co. v. Applewhite*, 52 Ind. 540.

1. Fault or mistake of passenger.—Where a person who has purchased of a railroad company a ticket for passage to a certain station, by his own fault or mistake, got upon a train, which, by the regulations of the company, did not stop at that station, he could not recover damages of the company for the refusal and failure of the conductor to stop the train and let him off at said station. Ohio, etc., *R. Co. v. Applewhite*, 52 Ind. 540.

In an action against a carrier for damages for refusal to stop a train and permit plaintiff to alight at a point to which she had purchased a ticket, evidence considered, and held, that plaintiff was not misled into getting upon the wrong train. Texas, etc., *R. Co. v. Bell*, 87 S. W. 730, 39 Tex. Civ. App. 412.

2. Carriers, within reasonable limitations, may designate the stations at which trains will stop for passengers; and a traveler, who, without any agreement or arrangement, or without acting on information furnished by some authorized agent of the company, takes passage on a train, scheduled not to stop at the station to which he desires to go, can not recover for its not stopping there, as, under such circumstances, he must inform himself as to where the train will stop. Louisville, etc., *R. Co. v. Scott*, 133 S. W. 800, 141 Ky. 538, 34 L. R. A., N. S., 206, Ann. Cas. 1912 C, 547.

In an action against a railroad company for damages for carrying plaintiff past a station, the evidence was that the company had the day before put into effect a new time card, by which its night train each way was no longer scheduled to stop at the said station as theretofore; that the two day trains, however, were unaffected by the change; and that these latter gave ample accommodations for the business at that and other small points along the line. Plaintiff testified that the agent told him when he bought his ticket that the train he was intending to take would not stop at his station, and that the conductor told him the same thing before it started, and requested him to get off, which he refused to do. The conductor remarked to him that he "was hunting a lawsuit." The train carried him past his station to the one beyond, where he boarded the returning train, although informed that it made no stop, and was again carried past to the point from which he started. Notice of the change was posted at the station. Held, that the regulation that one train

each way should not stop at all stations was reasonable, within Rev. St. art., 4226, and that inasmuch as it had been published, and plaintiff was informed of it, he was not entitled to recover. Texas, etc., *R. Co. v. White*, 4 Texas App. Civ. Cas., § 259, 17 S. W. 419; *Lindley v. Texas, etc., R. Co.* (Tex. Civ. App.), 17 S. W. 421.

It was error to refuse defendant's request that the regulation was reasonable, and one which the company had a right to make; that it was sufficient if plaintiff was informed of it by the agent or conductor; that if plaintiff, after such notice, refused to leave the train, he was a trespasser, and was not entitled to recover for the failure to have it stopped at his destination; and that, if he took offense unnecessarily at the language of the conductor, he was not entitled to recover for injury to his feelings. Texas, etc., *R. Co. v. White*, 4 Texas App. Civ. Cas., § 259, 17 S. W. 419; *Lindley v. Texas, etc., R. Co.* (Tex. Civ. App.), 17 S. W. 421.

Plaintiff got on defendant's train without a ticket to go to a place which he knew was not a stopping place. The auditor collected his fare, but upon being informed by the conductor that the train did not stop at that station, informed plaintiff of his mistake, and gave him an opportunity to get off at the next station one mile before reaching the one to which he wished to go. Held, that defendant was under no obligation to stop its train at a place which was not a stopping place to allow plaintiff to alight. St. Louis, etc., *R. Co. v. Townsend*, 45 Tex. Civ. App. 616, 101 S. W. 455.

3. Nature of mistake excusing.—Ohio, etc., *R. Co. v. Applewhite*, 52 Ind. 540; Texas, etc., *R. Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454; *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239, 9 Am. & Eng. R. Cas. 307.

Where a person purchases a ticket for a station, without ascertaining what train stops at that station, and takes his seat in a train which, according to the regulations of the company, does not stop at that station, and refuses to pay his fare, on demand of the conductor, to the next station at which the train is to stop, and refuses to leave the train when requested so to do by the conductor after he has stopped the train at a suitable place, such person is a trespasser, and may be ejected. Atchison, etc., *R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780. See post, "Ejection of Passengers," chapter 25.

a train without protest, and that the passenger does not know that the train does not stop at the station for which he holds a ticket, does not entitle the passenger to damages, but he must also show that he exercised ordinary care to ascertain that the train was the proper train.⁴ And it is said to be the duty of one about to take passage on a street car to ascertain whether the rules of the carrier will permit a stop at that particular point where he may desire to get off.⁵ In view of this duty the mere failure of the conductor to inform him, at the first opportunity, that the train can not stop there, so that he can exercise the right to leave at any station he chooses, before reaching his destination, can not be said to be a breach of the company's obligation, so as to render it liable for damages caused to the passenger by being put off at the last preceding station, where he is subjected to great inconvenience and exposure.⁶

Question for Jury.—Where there is evidence upon which a special contract to stop might be based, the question should be left to the jury.⁷

§ 2444. Statutory Regulations.—The power of a carrier to adopt rules and regulations as to the stopping of its trains at stations is subject to legislative control.⁸ Hence, the statute may provide that trains shall stop at certain places,⁹ and an agreement between the carrier and a passenger recognizing the validity of a regulation to disregard the statutory provision, is clearly illegal.¹⁰

§ 2445. Contract with Reference to Usage.—Where it appears that the company has abandoned its old depot, the running of the trains uniformly to a new depot since the change will be considered as a usage of the company, in reference to which plaintiff must be considered to have contracted, especially where he knows of the change at the time of procuring his ticket.¹¹

§ 2446. Misrepresentation or Inducement.—Passengers have a right to rely, until differently informed, on the information received by them from ticket agents in answer to their inquiries as to the stoppages of trains; but they must not disregard reasonable means of information.¹² A carrier has no right to sell

4. Receiving passenger without protest.

—*St. Louis, etc., R. Co. v. Campbell*, 69 S. W. 451, 30 Tex. Civ. App. 35.

5. Duty to inform himself as to stops.

—*Conner v. Citizens' St. R. Co.*, 45 N. E. 662, 146 Ind. 430.

6. Duty of conductor as to informing passenger.—*Texas, etc., R. Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454.

7. Question for jury.—Plaintiff purchased a ticket for the train known as the "Vestibule Limited" from M., in Tennessee, to C., in Mississippi; and his evidence showed that the ticket agent who sold him the ticket knew that it was to be used on the "Vestibule Limited." Defendant railway company showed that this train did not stop at C., which fact plaintiff knew, but there was some evidence that it was an established custom to stop this train at C. to let off a passenger holding a ticket purchased outside this state, and from the agents of some connecting railway. Held, that the jury should have been permitted to say whether plaintiff had a special contract to be carried to C. on that particular train, and whether there was a custom known to the traveling public to stop there to let off foreign travelers. *Humphries v. Illinois Cent. R. Co.*, 70 Miss. 453, 12 So. 155.

8. See ante, "In General," § 2443.

9. Validity of statute.—Ohio act of 1852, § 26 as amended in 1867, Rev. Stat., § 3320.

10. *Spurgeon v. McElwain*, 6 O. 442, 27 Am. Dec. 266; *State v. Findley*, 10 O. 51; *Bloom v. Richards*, 2 O. St. 387; *Huber v. United, etc., German Congregation*, 16 O. St. 371; *Delaware v. Andrews*, 18 O. St. 49; *Hooker v. De Palos*, 28 O. St. 251; *Leake on Con.* 723. *Pennsylvania Co. v. Wentz*, 37 O. St. 333.

A passenger on a railroad holding a ticket good "only on such trains as stop regularly at both stations" was ejected between the stations because the train did not stop. Held, that the proviso having been issued since the statute commanding the company to stop, and he having bought the ticket supposing the train did stop, he could recover. *Pennsylvania Co. v. Wentz*, 37 O. St. 333.

11. Contract with reference to custom.—*Martindale v. Kansas, etc., R. Co.*, 60 Mo. 508.

12. Right to rely on information.—*Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157.

A passenger has a right to rely on the representations of a local ticket agent, and those of the railroad company's agents in charge thereof, that a train will

a passenger a ticket for a particular station and then refuse to stop at that station; and the act of the ticket agent in selling such ticket to a passenger is the act of the company, and if the conductor refuses to allow the passenger to disembark at such station for which he holds a ticket, if he obeys the company's regulation, he is exonerated, but the company is responsible for the act of the agent who sold the ticket and wrongfully received the money for it. So it may be conceded that if a passenger buys a ticket which is not good on a certain train and he insists on riding on that train, he is not riding under his contract, which was that he might ride on other trains.¹³ Where a passenger is induced to enter a train which does not stop at his destination, by the misrepresentations of the agent who sold him his ticket, he can recover when ejected short of his destination.¹⁴ And if trains habitually stop at a certain station, and an agent of the company sells a return ticket to that station, to a person who has been informed of the custom, and relies on it, and the agent knows that the purchaser intends to use the ticket to return on a train which does not stop at that station, but does not inform him of the fact, the company is liable.¹⁵ However a passenger who is informed that a certain train will stop at the station for which he holds a ticket, but finds that the train does not stop at such station, should either get off at the station preceding the one to which his ticket reads, or pay fare to the one next beyond; and the conductor can not be required to deviate from his orders as to stoppage at particular stations on the passenger's statement of an alleged agreement with the company conflicting therewith.¹⁶

stop at a point to which he has purchased a ticket; and the company is liable to such passenger, if he is compelled to leave the train before arriving at his destination, because such train is not scheduled to stop at such station. *Kansas, etc., R. Co. v. Little*, 71 Pac. 820, 66 Kan. 378, 61 L. R. A. 122, 97 Am. St. Rep. 376.

The fact that plaintiff asked the ticket agent when a certain train was due, and received a reply, and then purchased a ticket for L., an intermediate station, at which said train was not scheduled to stop, did not require the company to stop the train at that station to permit plaintiff to alight, on the ground either that the agent led plaintiff to believe that the train stopped there, or that there was an implied agreement to stop. *Noble v. Atchison, etc., R. Co.*, 46 Pac. 483, 4 Okla. 534.

Where, in an action by a passenger for being carried beyond his station, defendant shows that he boarded the wrong train, plaintiff may show that he was directed by the station agent to board the train. *Trapp v. Southern Railway*, 51 S. E. 919, 72 S. C. 343.

13. *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. 432, 10 Am. Rep. 711.

When a railroad company has sold a passenger a ticket to a particular station, it has no right to refuse to stop its train there, and is liable for such refusal. *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620.

14. Misrepresentations of agent. — A passenger by mistake entered a train

which was not allowed to carry passengers beyond a station ten miles short of his destination, and he was so informed by the conductor on presenting his ticket. Plaintiff declined to leave the train, though offered an opportunity, but traveled to the station ten miles short of his destination, where he was ejected by the conductor. Held, that plaintiff could recover if he was induced to enter the train by having it pointed out as his train by the agent who sold him his ticket. *South, etc., R. Co. v. Huffman*, 76 Ala. 492, 52 Am. Rep. 349.

Plaintiff, before purchasing a ticket, inquired of the agent if a certain train stopped at C., and was answered in the affirmative and given a timetable showing such stop. Held, that he had a contract right to have the train stop at C., and his ejection at the last preceding station was wrongful. *McDonald v. Central R. Co.*, 62 Atl. 405, 72 N. J. L. 280, 2 L. R. A., N. S., 505.

15. Custom and knowledge thereof by passenger.—*St. Louis, etc., R. Co. v. Adcox*, 52 Ark. 406, 12 S. W. 874.

16. Passenger should get off at regular stopping place.—*Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *Chicago, etc., R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775.

A passenger insisted upon being left at B., where the conductor told him the train did not, and would not, stop. The train reached A., the last station at which it stopped this side of B.; and, upon the refusal of the passenger to pay fare to a station beyond, the conductor put him off the train. Held, that the conductor was justified in so doing. *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663.

Causes of Action Distinct.—A passenger's right to recover damages which he may have sustained by being misled by the ticket agent is a right of action altogether different and distinct from one which arises out of an assault and battery committed upon him by the conductor in ejecting him from the train with needless violence.¹⁷

§ 2447. Acceptance of Ticket or Fare as Contract.—The taking of a passenger's ticket by the conductor does not constitute a contract to stop the train at the station mentioned thereon, at which the passenger knows that by the rules of the company the train is forbidden to stop.¹⁸ But it seems that the taking up and canceling of the ticket waives the condition and constitutes a valid agreement to stop unless the holder thereof has actual notice that the conductor has no authority in that regard.¹⁹

§ 2448. Promises of Conductor.—Where a passenger has sufficient notice that any agreement the conductor might make to put him off at his destination, he not having been able to obtain a ticket, would be a violation of the rules of the company, no recovery can be had of the company because of the conductor's failure to keep his agreement.²⁰ Thus, it is held that such an agreement to let a passenger off at a station at which the published regulations of the company do not allow the train to stop is not binding.²¹ And in view of the general rule that a carrier of passengers is not bound to stop and allow a passenger to get off except at a regular station or stopping place,²² it is not competent for a conductor to agree with an individual passenger to carry him to a particular place, and stop at said place to allow him to leave the train, and thus bind the carrier. It seems that such a power can not be implied, as within the proper duties of a conductor; nor would it be consistent with public policy, as the duty of a conductor is to run his train according to the public arrangement. Hence, it may be said that a passenger has no right in the absence of circumstances to justify him,²³ to infer that the conductor has any such power, from his general duties as a conductor, and no reason to suppose that he could bind the carrier by any such agreement.²⁴ To make the contract of the conductor binding on his principal, he must have had power, or the apparent power, to

17. *Chicago, etc., R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775. See post, "Ejection of Passengers," chapter 25.

18. **Acceptance of ticket as contract.**—*St. Louis, etc., R. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468.

Plaintiff, who held a special excursion ticket entitling him to ride on certain trains, took a train which he should have known did not stop at his destination, and was carried by and compelled to pay fare for the additional distance. Held, that he had no right of action against the company, and that none was shown by reason of the conductor having taken up and punched his ticket after having told him that the train would not stop at the point named thereon. *Trotlinger v. East Tennessee, etc., R. Co.*, 79 Tenn. (11 Lea) 533.

19. A passenger presenting a ticket to a certain station is entitled to stop at such station if the conductor takes up and cancels the ticket, and the passenger has no knowledge that the conductor has no authority to stop at such station. *Haskins v. Lake Shore, etc., R. Co.*, 7 O. Dec. 679, 4 Wkly. L. Bull. 951.

20. It was so held on the following facts: Plaintiff applied to defendant's ticket agent for a ticket to go on the limited train to a certain point. The ticket was refused, because the limited train did not stop at that point. Plaintiff then applied to the conductor, who told her to get on the limited train without a ticket, and that he would let her off at her destination; but she was carried to the station beyond her destination. It appeared that there was another daily train which stopped at plaintiff's station. *Alabama, etc., R. Co. v. Carmichael*, 90 Ala. 19, 8 So. 87, 9 L. R. A. 388.

21. **Published schedule.**—*Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12.

22. See ante, "In General," § 3441.

23. **Circumstances justifying inference.**—This matter will be treated in the next succeeding sections.

24. **Power of conductor to agree to stop train—Inference of authority.**—approval from *Ohio, etc., R. Co. v. Hattersellers v. Cleveland, etc., R. Co.*, 40 Ind. App. 319, 81 N. E. 1087, quoting with ton, 60 Ind. 12.

make it.²⁵ What conductors frequently do in the course of their employment in the conduct of the business of the principal, in so far as the traveling public are concerned, must be deemed to be done in the exercise of power conferred by the principal, though, in fact, the principal may forbid the act.²⁶ In such matters the frequent exercise of power, which from its nature must have been known to the principal, may be regarded by persons dealing with the agent as sufficient evidence of the real existence of the power which the agent assumes to exercise.²⁷ And it has been held that a conductor agreeing to put a passenger off at a place not a regular station is bound to stop the train at that place, so that the passenger can get off in safety, even though his ticket is only to the last station passed before reaching it; additional fare being receivable, if demanded.²⁸ And the same rule has been held applicable in a case where the passenger entered the train and paid a cash fare.²⁹

§ 2449. Excuses for Failure to Stop at Destination.—Where a passenger on a railroad train has been carried by her station, the fact that the conductor did not know of her presence on the train does not excuse the carrier.³⁰

Return Free of Charge.—Where a carrier negligently fails to put a passenger off at his destination, the passenger being rightfully entitled to alight at that point, the fact that the carrier hauls him back free of charge is no excuse.³¹ Nor is an offer by the conductor to furnish the passenger a pass on another train an excuse for failure to stop his train at the passenger's destination.³²

25. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831.

26. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831.

Where a passenger, after getting upon a train, tells the conductor that he wishes to be put off at a point not a regular station, but where the trains, to defendant's knowledge, were in the habit of stopping and putting off passengers, and pays the fare claimed for transporting him to that place, and the conductor afterwards refuses to put him off there, and carries him to the next station, there is a violation of the contract of carriage. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831.

27. *Texas*.—*Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831.

"The rule is thus stated by a late elementary writer: 'Where carriers transact their business through agents, either general or local, it is equally competent for such agents to bind them by such contracts as the public have a right to suppose they are authorized to make, from the manner in which they are employed, or are seemingly intrusted by their principals; and, as most of the carrying business is now done by corporations, which can act only through the instrumentality of agents, it is necessary for the protection of those who have goods to send by them that this should be so.' Hutch. Carr. 267-269. The correctness of this rule has been recognized by this court many times, *Kohn Bros. v. Washer*, 64 Tex. 131; *Merriman v. Fulton*, 29 Tex. 97, and has the support of the elementary writers. (Storey, Ag. p. 143, § 127; Lawson, Carr., §§ 229, 230.)"

Hull v. East Line, etc., R. Co., 66 Tex. 619, 2 S. W. 831.

28. **Conductor agreeing to stop at place not regular station.**—*Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577; *Western R. Co. v. Young*, 51 Ga. 489.

29. **Person paying cash fare.**—Where a person entering a train without a ticket pays his fare to the conductor under an agreement that he may be put off at an intermediate point before reaching the destination to which fare was paid, the conductor will be bound to afford him opportunity to leave the train, and to extraordinary diligence in seeing that he does not stop the train and induce the passenger to leave at a different place from that named in the stipulation. *Williamson v. Central, etc., R. Co.*, 56 S. E. 119, 127 Ga. 125.

30. **Knowledge of conductor.**—*Rawlings v. Wabash R. Co.*, 71 S. W. 535, 97 Mo. App. 511. See post, "Failure to Stop Train at Station," § 2453.

31. **Returning passenger free of charge.**—Plaintiff, a passenger on the defendant's train, paid fare to B., but the train, instead of stopping at B., ran two miles past, to a water tank. The conductor then gave plaintiff the privilege of riding to the next station and returning to B. free of charge. The train upon which he returned ran about one hundred and fifty yards beyond the station, where plaintiff voluntarily jumped off without injury. In an action for damages, the court sustained a demurrer by the defendant to this evidence. Held error. *Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315, 19 Am. Rep. 12.

32. **Offer of pass.**—Under Act July 1, 1879, requiring a railroad to stop its reg-

Custom.—Where a passenger, by her train failing, though scheduled, to stop, at midnight, at her station, was carried to another station, and was inconvenienced, distressed, and made sick by being compelled to spend the rest of the night there, the company was liable, though it was customary, and passengers usually preferred, to be taken on to such other station, and then taken back in the morning free of charge, it not appearing that the passenger had notice of this custom.³³ That a majority of travelers preferred this arrangement—to be carried on to Louisville and brought back to the junction next morning free of charge, rather than that the train be stopped at the junction at this hour of the night—is no reason for violating the company's duty to stop its trains where it said to the public it would stop them. The regulation relied on, providing such an arrangement, may be reasonable enough, but the public should have some notice of it.³⁴

Danger Incident to Stopping.—If a carrier of passengers, expressly contracts to land a passenger at a particular place, with knowledge of the danger attending it, such danger will be no defense to an action for damages for non-fulfillment of the contract.³⁵

§§ 2450-2489. Duties and Liabilities in Taking on and Letting Off Passengers—§ 2450. Scope of Treatment.—A discussion of the duties of passenger carriers, in taking up and setting down passengers, might very properly embrace a consideration of the duties of carriers in providing facilities for getting on and off the vehicles, including their duties with respect to providing suitable entrances and exits to and from the vehicles, and in providing suitable stopping places and stations. Under these sections, however, the means of getting on and off the vehicles, will be considered only as they are connected with management of the means of conveyance, and the supervision of the entrance and exit of passengers, by the servants of the carriers.

§ 2451. General Rule—Reasonable Opportunity.—It may be affirmed as a general rule that the implied duties of passenger carriers to exercise care to carry their passengers safely includes the duty to afford them a reasonable opportunity to get on or off the means of transportation in safety, and, if the carriers violate this part of their duty, they are guilty of negligence.³⁶ Thus, it is

ular passenger trains at county seats, and making it liable in damages to any person aggrieved by its failure to stop, where a passenger held a ticket to a county seat an offer of the conductor to furnish the passenger with a pass on another train is no excuse for its failure to stop. *Ohio, etc., R. Co. v. People*, 29 Ill. App. 561.

33. Custom.—*Louisville, etc., R. Co. v. Cayce*, 17 Ky. L. Rep. 1389, 34 S. W. 896.

34. Hopperton v. Louisville, etc., R. Co., 17 Ky. L. Rep. 1322, 34 S. W. 895.

35. Danger incident to stopping.—*Porter v. New England*, 17 Mo. 290.

36. Delaware.—*Smithers v. Wilmington City R. Co. (Del.)*, 6 Pen. 422, 67 Atl. 167.

Missouri.—*Moeller v. United R. Co.*, 133 Mo. App. 68, 112 S. W. 714.

Pennsylvania.—*Fairmount, etc., R. Co. v. Stutler*, 54 Pa. 375, 93 Am. Dec. 714.

South Carolina.—*Appleby v. South Carolina, etc., R. Co.*, 60 S. C. 48, 38 S. E. 237, 20 Am. & Eng. R. Cas., N. S., 581.

Texas.—*St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas, etc.,*

R. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

Virginia.—*Norfolk, etc., R. Co. v. Prinrell*, 1 Va. Dec. 626, 3 S. E. 95, 30 Am. & Eng. R. Cas. 574.

It is the duty of a railroad to use the highest degree of care in transporting passengers, and a failure to stop a train at the destination of a passenger and give him an opportunity to alight with safety is culpable negligence. *Walters v. Missouri Pac. R. Co.*, 109 Pac. 173, 82 Kan. 739, 28 L. R. A., N. S., 1058.

It is the duty of the street railway to use extraordinary care and caution to see that passengers are not injured in getting on or off its cars when stopped at a regular point for stopping. *Richmond Tract. Co. v. Williams*, 102 Va. 253, 46 S. E. 292.

It is as much the duty of a railroad company, by the exercise of a high degree of care, to safely land as it is to safely carry its passengers. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 92 Tex. 668, no op.

said to be the duty of a carrier of passengers to exercise the strictest vigilance in receiving, conveying and setting a passenger down safely at the termination of his journey.³⁷ There is no difference between the liability of a trolley line company operating its cars through the country, and that of a company operating a steam railroad, for negligence in receiving and discharging its passengers at fixed points or stations.³⁸

Safe Place to Alight.—See ante, "Safe Place to Board or Alight and Intervening Tracks, etc.," §§ 2371-2372.

Duty to Assist.—See post, "Assisting Passengers to Board or Alight," § 2477.

Degree of Care.—It is incumbent upon a carrier to use that high degree of care previously laid down, to prevent a passenger from being injured in attempting to board or alight from its cars.³⁹ It is said that, when letting passengers on and off, a street car company is bound to use all reasonable care to secure their safety.⁴⁰ The degree of care required of carriers as to alighting passengers is proportionate to the nature and risk of the business, and is such as would ordinarily be exercised by persons of great care under similar circumstances,⁴¹ and this is, in most cases, if not in all, a question for the jury.⁴²

Breach of Contract.—A failure to give a passenger an opportunity to board or leave a train at an established station gives a cause of action to any person injured thereby.⁴³ And a street railroad company owes a duty to the public to stop at its regular crossings, on a seasonable signal, to receive those desiring passage.⁴⁴

37. *Walthour v. Pennsylvania R. Co.*, 40 Pa. Super. Ct. 252.

38. *District of Columbia*.—*Dixon v. Great Falls, etc.*, R. Co., 38 App. D. C. 591, 598.

39. **Degree of care.**—*Illinois*.—*Sorenson v. Illinois Cent. R. Co.*, 155 Ill. App. 606; *Chicago, etc., R. Co. v. Noble*, 132 Ill. App. 400.

Iowa.—*Johnston v. Cedar Rapids, etc., R. Co.*, 141 Iowa 114, 119 N. W. 286.

Montana.—*Robinson v. Helena, etc., R. Co.*, 33 Mont. 222, 99 Pac. 837.

Texas.—*St. Louis, etc., R. Co. v. Tittle* (Tex. Civ. App.), 115 S. W. 640.

A carrier is required to exercise the same degree of care for the passenger's safety while he is leaving its conveyance as is required while in transit; but the carrier is not the insurer of the safety of the passenger, who is held to exercise reasonable care for his own safety. *Craig v. Wabash R. Co.*, 126 S. W. 771, 142 Mo. App. 314.

Highest care.—Carriers of passengers must exercise the highest degree of care in allowing passengers to alight safely from trains. *Illinois Cent. R. Co. v. Dallas*, 150 S. W. 536, 150 Ky. 442.

The care required of a carrier for a passenger's safety while he is leaving the train is as high as that required during transit, and it must use extraordinary care to put passengers off at a reasonably safe place. *Rearden v. St. Louis, etc., R. Co. (Mo.)*, 114 S. W. 961.

40. *Delaware*.—*Butler v. Wilmington City R. Co.*, 2 Boyce's (25 Del.) 262, 78 Atl. 871; *Elliott v. Wilmington City R. Co. (Del.)*, 6 Pen. 570, 73 Atl. 1040.

41. **Degree of care.**—*Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *Missouri, etc., R. Co. v. Wolf*, 40 Tex. Civ. App. 381, 89 S. W. 778.

Generally, as to the degree of care required of carriers of passengers, see ante, "Degree of Care Exacted of the Carrier," § 2336.

42. **Question for jury.**—Whether carrier has exercised due care as to passengers alighting is a question for the jury. *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 88, 15 S. W. 266; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367; *Rapid Transit R. Co. v. Strong* (Tex. Civ. App.), 108 S. W. 394.

Where a passenger was injured by a sudden starting of the train while he was attempting to board it, the question as to whether or not the plaintiff was injured in consequence of the defendant's failure to exercise due care and diligence for the safety of its passenger was one for determination by the jury. *Southern R. Co. v. Dean*, 128 Ga. 366, 57 S. E. 702.

43. **Right of action for injury.**—*Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831; *Texas, etc., R. Co. v. Gray* (Tex. Civ. App.), 71 S. W. 316, affirmed in 97 Tex. 648, no op.

44. **Street car.**—*Jackson Elect. R., etc., Co. v. Lowry*, 30 So. 634, 79 Miss. 431, 23 Am. & Eng. R. Cas., N. S., 103.

§§ 2452-2457. Duty to Receive and Discharge Passengers at Usual Place—§ 2452. General Rule.—This right of passengers to have a reasonable opportunity to get on or off the means of conveyance, entitles them, generally speaking, to be taken up and set down at the usual stopping places.⁴⁵ And it is held that the failure to stop a passenger train at the usual place for letting off passengers is *prima facie* negligence.⁴⁶ However, it is not meant by this that the mere stopping at another than the usual place in receiving or discharging passengers is itself negligence which will alone give a passenger a cause of action against the carrier, but only that it is one of the facts to be considered in determining the question of the carrier's negligence in taking up or setting down passengers.

§ 2453. Failure to Stop Train at Station.—The application of the above-stated rule may be first illustrated by cases in which it appeared that the trains were stopped at such a distance from the station, and under such circumstances, as not to mislead the passengers as to their true positions. In cases which may, for the sake of convenience, be thus classified, it has been held that if a train runs past, and is stopped at a distance from, the station, it is the conductor's duty to cause it to be returned in order that a passenger may alight at the station, and if that duty is not waived by the passenger and is not performed, the passenger has a cause of action against the carrier,⁴⁷ especially if the passenger is ordered, or otherwise compelled, to leave the train.⁴⁸ Thus, it is held that where

45. Delaware.—*Coyle v. People's R. Co.* (Del.), 7 Pen. 454, 80 Atl. 638; *Madden v. Port Royal, etc., R. Co.*, 41 S. C. 440, 19 S. E. 951, 20 S. E. 65, 2 Am. & Eng. R. Cas., N. S., 384; *S. C.*, 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855, 52 Am. & Eng. R. Cas. 286.

A carrier of passengers must stop its trains at stations it has designated as places for stopping. *Kansas, etc., R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173.

A carrier of passengers is bound to afford a passenger a reasonable opportunity to alight at the usual depot, and can not require him to alight at an unusual place, as a side track or a switch. *White Water R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599, 34 Am. & Eng. R. Cas. 467.

In an action against a railroad company for personal injuries caused by defendant negligently putting plaintiff off the train before she had reached her destination, it appeared that plaintiff went on the platform, with her child, and began looking to see where she was, whereupon the brakeman told her to hurry up and get off. She replied that she did not wish to get off unless they had reached her station, but he caught her by the arm and hurried her off. Held, that a verdict for plaintiff would not be disturbed. *Louisville, etc., R. Co. v. Cook*, 12 Ind. App. 109, 38 N. E. 1104.

It is the duty of a carrier to discharge passengers at regularly appointed stations, and it is liable for damages and costs, and, where necessary elements exist, punitive damages, on failure so to do. *Ft. Smith, etc., R. Co. v. Ford* (Okla.), 126 Pac. 745, 41 L. R. A., N. S., 745.

There is a cause of action against a carrier where it refuses to deliver a passenger at the usual station platform, but puts her off 300 yards from it, in the mud and rain, she being old, crippled, and going on crutches. *Kinney v. Yazoo, etc., R. Co.*, 92 S. W. 1116, 116 Tenn. 450.

46. Prima facie evidence of negligence.—*Martin v. Southern Railway*, 77 S. C. 370, 58 S. E. 3.

47. Louisville, etc., R. Co. v. Dancy, 97 Ala. 338, 11 So. 796; *Alabama, etc., R. Co. v. Sellers*, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17; *Freeman v. Puckett*, 56 Tex. Civ. App. 126, 120 S. W. 514.

48. Alabama.—*Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796.

Indiana.—*Evansville, etc., R. Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. 1134.

Louisiana.—*Dave v. Morgan's, etc., Steamship Co.*, 47 La. Ann. 576, 17 So. 128, 2 Am. & Eng. R. Cas., N. S., 127.

New Haven.—*Foss v. Boston, etc., R. Co.*, 66 N. H. 256, 21 Atl. 222, 47 Am. & Eng. R. Cas. 566, 49 Am. St. Rep. 607, 11 L. R. A. 367.

South Carolina.—*Samuels v. Richmond, etc., R. Co.*, 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

Texas.—*Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *International, etc., R. Co. v. Sampson* (Tex. Civ. App.), 64 S. W. 692.

Plaintiff was carried four hundred yards by his station, where his trunk was put off uninjured. He requested the conductor to back up his train to the station platform, which he refused, and threatened to carry the plaintiff to the next station if he did not alight. Plaintiff alighted in the mud and a slight rain and walked back to the station. A verdict

a passenger is wrongfully or negligently carried past his destination it is the duty of those in charge of the train to either back it to the station or to notify the passenger how and when to alight, warn him of any dangers incident to alighting at that point, and give him such assistance or instructions as may be necessary to assure his safe return, and if, without the fault of the passenger, he is injured in making his way back to the station the company is liable.⁴⁹

for plaintiff was sustained. *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785.

Where a train was not stopped long enough to enable plaintiff, a woman with four children, all under the age of six years, in her charge, to get off, and she was compelled to alight, about five o'clock on a cold winter morning, at a place where the ground was wet about six hundred yards from the station, and to walk back with the children, carrying one of them in her arms, it was held that the train should have been backed to the station and that the company was chargeable with negligence. *Fordyce v. Dillingham* (Tex. Civ. App.), 23 S. W. 550.

Where a train was not stopped at, but some distance from, the station, and the conductor directed the passengers to get off, a passenger who, while in the exercise of due care, was injured in alighting in consequence of the place where the passengers were required to alight being dangerous and unsuitable for the purpose, was held to have a cause of action against the carrier. *Hinshaw v. Raleigh, etc., R. Co.*, 118 N. C. 1047, 24 S. E. 426, 3 Am. & Eng. R. Cas., N. S., 558.

And a railroad company has been held liable to a passenger who was carried by a point where a road crossed the track, and where it was customary to put off passengers, and who was put off, in the nighttime, at a place which, under the circumstances, was more dangerous than the crossing. *Houston, etc., R. Co. v. Smith* (Tex. Civ. App.), 32 S. W. 710, 2 Am. & Eng. R. Cas., N. S., 177, motion for rehearing overruled in 33 S. W. 896.

Plaintiff was negligently and wrongfully carried beyond and away from the usual stopping place, where it was customary to receive and discharge passengers, into the switching yard, where there were no accommodations for passengers in getting on or off the cars, and where there were special risk and hazards. The carrier, it was held, was, under the circumstances, bound to use every precaution for plaintiff's protection, the question as to whether it did or did not do so being for the jury, and a verdict for plaintiff, who, just after alighting, and while crossing an adjoining track, had been run into by an engine and injured, was sustained. *Franklin v. Southern California Motor Road Co.*, 85 Cal. 63, 24 Pac. 723.

An action was brought by a husband against a railroad company for damages which his wife had sustained by reason

of the negligence of the conductor of the train upon which she had taken passage from Meridian to Newton, in not stopping the train at that station, to which she had a ticket as a passenger, and in failing to give her notice when the train reached there, in consequence of which she was carried about two miles past that place, and the conductor, refusing to take the train back to the station, put her off at the place where the train had stopped, late at night, and, she being without a protector, placed her under the charge of two strange negro men, in whose company she was compelled to walk back late at night, over strange roads and dangerous bridges, in great bodily exposure and terror of mind. It was held that the action was maintainable. *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

49. Duty to passengers negligently carried beyond destination.—*Birmingham R., etc., Co. v. Seaborn*, 168 Ala. 658, 53 So. 241.

In an action for personal injuries to a passenger carried beyond her station, received while attempting to walk back to the station, it is immaterial whether the carrier's conductor knew that the passenger did not know of a safe route from the point where she alighted back to the station, or that the trainmen had reason to believe that the passenger would encounter danger. *Alabama, etc., R. Co. v. Cox*, 173 Ala. 629, 55 So. 909.

Where a street car passenger on a dark night signaled the conductor to let her off at a regular stopping place, and the conductor understood, but failed to let her off there, and let her off beyond, where the track was very rough, and while attempting to cross the track fell and was injured, the company was negligent, entitling her to recover, unless she was guilty of contributory negligence in crossing the track, or unless she assumed the risk. *Melton v. Birmingham R., etc., Co.*, 153 Ala. 95, 45 So. 151, 16 L. R. A., N. S., 467.

A passenger on a street railway, who, having informed the conductor of her destination, is carried by owing to the conductor's failure to announce her destination, and on discovery is induced to alight by the representation of the conductor that she can reach her destination in safety by following his directions, remains constructively a passenger until she reaches her destination, and may recover for any injuries sustained from following negligent directions. *Stevens v.*

In order to charge the carrier with liability in these cases it is not necessary that force shall have been used to compel the passenger to alight.⁵⁰ A passenger may even be justified in alighting from the train after the conductor has had a reasonable opportunity to make known his intention of returning, but does not offer to return, or manifest any intention of so doing.⁵¹ And if it becomes necessary to carry a passenger beyond his station, it is the duty of the carrier to notify him of its purpose as to returning to the station; and, if it failed to do this, it is negligent, and any damage caused to a passenger as the direct result makes the company liable therefor.⁵² But if the conductor offers, or manifests a purpose, to return, and the passenger will not wait the necessary time, or otherwise waives the right to be returned, and voluntarily leaves the train, no action will lie against the carrier.⁵³ And if a passenger is given a proper opportunity to alight at the station but neglects to do so, and is carried a short distance beyond the station, the train need not be returned and the passenger may, in the absence of a statutory inhibition, be put off at a proper place and in a proper manner.⁵⁴ It is the duty of the conductor to know when he has a passenger for a station, to have the name of the station announced, and to stop the train. He has no right to assume, because he does not see the passenger in the passenger coach, that he has left the moving train before reaching his destination.⁵⁵ The

Kansas City Elevated R. Co., 105 S. W. 26, 126 Mo. App. 619.

If by defendant's fault plaintiff was carried by the depot a distance of a mile, according to plaintiff's testimony, and 250 yards, according to others, and was not fully informed of the difficulties in the way of getting back, burdened as she was with two children, and without money, and the time being about midnight, it was not her duty to go to the next city, rather than to attempt to get back home. Galveston, etc., R. Co. v. Crispi, 73 Tex. 236, 11 S. W. 187.

Where, through defendant's negligence, a passenger is carried by her station, making it necessary for her to walk back from the point where the train stopped, defendant is liable for her injuries, notwithstanding the train stopped at the station. Texas, etc., R. Co. v. Polard, 2 Texas App. Civ. Cas., § 481.

50. Alabama, etc., R. Co. v. Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17. See Freeman v. Puckett, 56 Tex. Civ. App. 126, 120 S. W. 514.

The rule that where a passenger, knowing that he has been carried beyond his destination, voluntarily leaves the conveyance, he thereby terminates his relation as a passenger, and the carrier can not be held liable for injuries afterwards sustained in traveling to his destination, does not obtain where the carrier's servants coerce or persuade the passenger to alight. Stevens v. Kansas City Elevated R. Co., 105 S. W. 26, 126 Mo. App. 619.

51. Louisville, etc., R. Co. v. Dancy, 97 Ala. 338, 11 So. 796; Gadsden, etc., R. Co. v. Causler, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258. See Case v. Delaware, etc., R. Co., 191 Pa. 450, 43 Atl. 319.

52. Duty to notify passenger.—Natchez, etc., R. Co. v. Lambert, 99 Miss. 310, 54 So. 836, 37 L. R. A., N. S., 264.

53. Louisville, etc., R. Co. v. Dancy, 97 Ala. 338, 11 So. 796.

If plaintiff got off without objection, and without requesting the conductor or other agent of the carrier to run the train back to the depot, he can recover no damages by reason of having to walk back to the depot. Gulf, etc., R. Co. v. Head, 4 Texas App. Civ. Cas., § 209, 15 S. W. 504.

54. St. Louis, etc., R. Co. v. Lewis, 69 Ark. 81, 61 S. W. 163, 20 Am. & Eng. R. Cas., N. S., 483.

Negligence of passenger.—Where a passenger falls asleep, and is carried past his destination, it is not the duty of the company to carry him to the next station unless he pays his fare thereto. Texas Pac. R. Co. v. James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

A passenger on a train, after being carried beyond his station while asleep, was awakened, and, at his request, the train was stopped that he might get off and walk back. While so walking, he narrowly escaped being run into by a freight train on a trestle. He was afterwards sick from the effects of the excitement. Held, that he had no redress against the company, though the conductor misled him as to the exact place where the train was when he got off. Wilson v. New Orleans, etc., R. Co., 68 Miss. 9, 8 So. 330.

55. Mississippi.—Louisville, etc., R. Co. v. Mask, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564.

Where a passenger left his seat as the train approached his station, with a view of getting off, and went to the rear platform, whereupon the conductor, looking into the car, failed to see him, and supposing that he had got off, omitted to call the name of the station, and ordered the train, which had not stopped, to move on, whereby the passenger was compelled

responsibility of those having in charge a train are heavy and they must of necessity act upon their own judgment, which is usually better than that of courts and juries. It should not be the policy of the law to encourage carelessness upon the part of trainmen or companies, and where an honest judgment is exercised in an emergency reasonably justifying it, the convenience of the passenger must yield.⁵⁶

§ 2454. Failure to Stop Train Alongside Station Platform.—Generally speaking it would seem that a railroad train should be stopped alongside the station platform to enable passengers to get on or off with safety.⁵⁷ Thus, it has been held that where trains of a railroad company were accustomed to stop at a platform, though it was neither constructed nor owned by the company, there is an implied contract that passengers may stop there.⁵⁸ But such is not an unqualified rule, for in furnishing its passengers a reasonably safe and convenient place at which to alight from or enter its cars, a railroad company is not bound to stop its passenger coaches at any particular part of the station platform, or at the platform at all, provided the place where they are stopped be reasonably safe and convenient.⁵⁹ So where the train is not properly stopped at the platform, the carrier should exercise care that the place selected is safe, or that the passengers are afforded necessary assistance in getting on and off the cars.⁶⁰ The cases are numerous in which railroad companies have been held liable for injuries sustained by passengers in consequence of trains not being stopped alongside station platforms so that the passengers could step directly from the trains to the platforms, or vice versa.⁶¹ It is a question of fact, ordi-

to alight some distance beyond his station, and in consequence incurred injuries from which he died, held, that the company was liable in substantial damages. *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564.

56. Act in emergency.—It is a "just and legal excuse" for not stopping at a station to let off three passengers—laborers who had been drinking—that it was after dark, the snow was deep and drifting, and that, as the engineer and conductor knew, a freight train was close behind, and the only place near the station where they could stop without danger of being stalled by the snow was on a bridge and elevated track. *Reed v. Duluth, etc., R. Co.*, 100 Mich. 507, 59 N. W. 144.

57. Indiana.—*Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322.

Kentucky.—*Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134.

Maryland.—*Baltimore, etc., R. Co. v. Leapley*, 65 Md. 571, 4 Atl. 891, 27 Am. & Eng. R. Cas. 167.

Texas.—*International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152.

It is the duty of a carrier to stop its trains at its platforms. *St. Louis, etc., R. Co. v. Briggs*, 87 Ark. 581, 113 S. W. 644.

58. Custom implied agreement.—*Louisville, etc., R. Co. v. Johnston*, 79 Ala. 436.

59. Rule qualified.—*Le Duc v. St. Louis, etc., R. Co.*, 159 Mo. App. 136, 140 S. W. 758; *Austin v. St. Louis, etc., R.*

Co. (Mo. App.), 130 S. W. 385; *Deskins v. Chicago, etc., R. Co. (Mo. App.)*, 132 S. W. 45.

60. International, etc., R. Co. v. Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152; *International, etc., R. Co. v. Smith (Tex.)*, 14 S. W. 642, 44 Am. & Eng. R. Cas. 324.

In *International, etc., R. Co. v. Smith (Tex.)*, 14 S. W. 642, 44 Am. & Eng. R. Cas. 324, it was held to be negligence for the defendant to stop its train for passengers to get off at an unusual place for receiving passengers, where no provision has been made for the safety of passengers in alighting from its cars.

A railroad must exercise such a high degree of care as would be used by very cautious, prudent, and competent persons under similar circumstances, in selecting a suitable place for a passenger to alight, who had, by mistake, entered a wrong train, and in stopping the train and assisting her off. *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576.

61. In a case in which it appeared that neither end of the car in which plaintiff was riding was opposite the platform when the train stopped, and the only way in which plaintiff, a woman, could step from the train to the platform was to pass through the smoker, a judgment for plaintiff, who was injured in getting off, in the dark, at the rear end of the car where there was a depression in the ground which caused her, in stepping down, to break her hold on the hand rod and fall, was sustained. *Cartwright v.*

narily, from the circumstances, whether a passenger on a train is justified in supposing that he was alighting in the night time at a proper place.⁶² Where the car, in which plaintiff was riding, was stopped so that the front end was opposite the platform but the rear end was not, and the passengers were not warned of that fact or directed to leave by the front door, a judgment for plaintiff, who was injured while alighting, in the dark, at the rear end of the car, was sustained.⁶³ But in a very similar case, in which it appeared that the accident occurred in the daytime, it was held that a passenger who elected to alight at the end of the car which was not opposite the platform had no action against the company.⁶⁴

Chicago, etc., R. Co., 52 Mich. 606, 18 N. W. 380, 16 Am. & Eng. R. Cas. 321, 50 Am. Rep. 274.

Plaintiff, a female, was a passenger; on the arrival of the train at her station the engine and part of the carriage in which she was riding were driven past the end of the platform and came to a standstill, the door of her compartment being beyond the end of the platform. Upon the train stopping she arose and opened the door, and stepped on the iron step; she looked out and saw the station master, who was the only attendant at the station, putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for some one to help her until she became afraid of the train moving away; and no one then coming she tried to alight by getting onto the footboard; she had her back to the carriage, and she had hold of the door with her right hand, while her left held several small bundles, and got one foot onto the footboard, and whilst endeavoring to get the other foot onto the board, she lost her hold of the door, and slipped and fell, and was injured. It was held that the jury could find that the expectation of being carried beyond her station was reasonably entertained by her, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting, and that the defendants were therefore liable for the injury which had been caused by their neglect of duty. *Robson v. North Eastern R. Co.*, L. R. 10 Q. B. 271.

Where a train stopped so that the rear car, in which plaintiff was riding, was not opposite the platform, and plaintiff was injured, although it was in the daytime, while stepping from the bottom step of the car to the ground, a distance of about three feet, and plaintiff testified that it was defendant's custom not to allow passengers to go forward from one car to another in getting out at stations, and there was evidence that other passengers had previously been injured while getting out at the same place, the question of defendant's liability was left to the jury. *Bullard v. Boston, etc., Railroad*, 64 N. H. 27, 5 Atl. 838, 27 Am. &

Eng. R. Cas. 117, 10 Am. St. Rep. 367.

Plaintiff, a woman passenger, was injured by stepping off the platform, while attempting to board the car for women, which had been stopped so that the front end of the car, which was the end nearest the platform, was about two feet away from the end of the platform. It was in the nighttime, and no stationary lights were provided for lighting the platform. A judgment for plaintiff was sustained. *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

Where a declaration alleged, in effect, that a train upon which plaintiff was a passenger was negligently stopped at a place where defendant was accustomed to take on and let off passengers so that the last two cars, in one of which plaintiff was a passenger, stood on a trestle quite a distance from the ground; that it was night and dark and no lights were provided; that no warning was given the passengers of the position of the cars and no assistance offered them to avoid the dangers of alighting; that plaintiff unaware of the danger of alighting, in doing so, fell and was injured; it was held that the declaration stated a cause of action. *Falk v. New York, etc., R. Co.*, 56 N. J. L. 380, 29 Atl. 157, 58 Am. & Eng. R. Cas. 191.

The train was not stopped at the platform of the station, and a passenger carrying an infant and a valise was injured in alighting. He thought the train had arrived at the usual stopping place, the night being dark. He was familiar with such place, and could have alighted there with safety, incumbered as he was. He did not discover his mistake until he had placed one foot where he thought the platform should have been, when he attempted to recover himself, but could not, and had to step to the ground. Held, that he was not guilty of contributory negligence. *Texas, etc., R. Co. v. Porter* (Tex. Civ. App.), 41 S. W. 88.

⁶² *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285.

⁶³ *McDonald v. Illinois, etc., R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263.

⁶⁴ *Eckerd v. Chicago, etc., R. Co.*, 70 Iowa 353, 30 N. W. 615, 27 Am. & Eng. R. Cas. 114.

§ 2455. When Passengers Are Carried on Freight or Mixed Trains.

—In particular cases, a railroad company may be chargeable with negligence in stopping a freight train for the purpose of taking on or letting off passengers at a place other than the station platform or regular place for receiving and discharging passengers,⁶⁵ and it has been said that this is the rule, in the absence of any rule, regulation or custom to the contrary.⁶⁶ But as there is no rule of law requiring railroad companies carrying passengers on a freight train to afford passengers an opportunity to get on or off at the station platform it seems that a carrier fulfills all legal requirements when it affords the passengers a sufficient opportunity to board or leave the train at a reasonably safe and convenient place upon the station grounds, although not at the station house or platform,⁶⁷ or where it requires a passenger to board or alight from the train at some appropriate and convenient place not connected with the platform,⁶⁸ unless

65. Alabama, etc., *R. Co. v. Sellers*, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17; *White Water R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599, 34 Am. & Eng. R. Cas. 467; Memphis, etc., *R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

66. In the absence of any rule, regulation, or custom to discharge passengers from freight trains different from those applicable to passengers on regular passenger trains, a railroad company incurs the duty of transporting a passenger safely to the place where its passengers are usually received and discharged in the course of its business, at the station of his destination, and a conductor, in requiring a passenger to get off a freight train at a distance from the station to which he had paid his fare, was guilty of a breach of this duty. *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105.

67. *Hemmingway v. Chicago, etc., R. Co.*, 67 Wis. 668, 31 N. W. 268, 28 Am. & Eng. R. Cas. 216.

Bringing train to platform.—A railroad which has issued a pass to a shipper of live stock to enable him to accompany it and care for it is under no obligation to stop the stock train at the station platform, unless there is a custom to this effect; and its failure so to do does not render it liable to him for damages sustained by the stock because of his inability to accompany it, since it was his duty to board the train in the yard where it was made up. *Ohio, etc., R. Co. v. Brown*, 46 Ill. App. 137.

Plaintiff's husband bought for her a regular ticket, to be used on a freight train with passenger coach attached, which was run under special regulations posted at the stations, to the effect that the train could not be required to stop at the platforms of stations to take on or put off passengers. Special tickets, in accordance with such regulations, were sold for this train, but the agent at the time had none on hand, and the husband was acquainted with the regulations. Plaintiff and her husband waited on the

platform for the train to be pulled up, not because they expected it to do so as a custom, but because they had been informed by a bystander that he had requested the conductor to do so, and the train pulled out and left them. Plaintiff then bought another regular ticket for the passenger train, which did not pass till night, and brought an action against the company for damages. Held that, as the regulation prescribed was a reasonable one, plaintiff was not entitled to recover. *Connell v. Mobile, etc., R. Co.* (Miss.), 7 So. 344.

One who takes passage upon a freight train to a designated city is entitled to carriage thereon only to the point or place in such city or its suburbs at which the run of such train on its usual and regular schedule is terminated, and can not demand the right to be transported thereon to a station to which only passenger trains of the company are carried. *Southern R. Co. v. Howard*, 36 S. E. 213, 111 Ga. 842.

Under Sand. & H. Dig., § 6284, (Arkansas Statute) providing that local freights shall carry passengers from and to their stations, a railroad company running a local freight must, at any event, carry the passengers to the yard of the station at his destination, at a place not unreasonably distant from the station platform. *St. Louis, etc., R. Co. v. Neal*, 51 S. W. 1060, 66 Ark. 543.

Under North Carolina Code, § 1963, requiring railroad companies to carry all passengers offered at "the usual stopping places established for receiving and discharging way passengers for that train," it is not an unreasonable regulation to require passengers to get on the coach attached to freight trains at a point other than the platform for embarking on passenger trains. *Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544.

68. *United States*.—*Eddy v. Wallace*, 1 C. C. A. 435, 49 Fed. 801, 52 Am. & Eng. R. Cas. 265.

Georgia.—*Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

Indiana.—*New York, etc., R. Co. v.*

there is a usage or custom amounting to an agreement to the contrary.⁶⁹ But the mere fact that passengers are carried on a freight train does not relieve the carrier of the duty to exercise care in affording them a safe and convenient place for getting on or off, and guarding them against the dangers incident to passing to and from the train.⁷⁰ It has been held that where a freight train was

Doane, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157.

North Carolina.—Browne v. Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544.

Passengers were permitted to ride on a freight train under special regulations, which were posted in its stations, to the effect that they could not require the passenger coach attached to the train to be pulled up alongside the platforms at the stations. Plaintiff's husband, who was with her and who purchased the tickets for the train, had notice of the regulations. In plaintiff's suit to recover damages for being left at the station because the train was not pulled up to the platform, it was held that the action would not lie. *Connell v. Mobile, etc., R. Co. (Miss.)*, 7 So. 344.

Where plaintiff suffered alleged injuries from being discharged from a freight train on which he was a passenger at a place other than a station, it was error for the court to refuse to charge, at defendant's request, that if plaintiff was a passenger on the freight train, and the train stopped at the station with the caboose, in which passengers were carried, reasonably near the platform of the station, due regard being had to the surrounding situation and location, and stopped a sufficient length of time to enable plaintiff to alight in safety, and plaintiff refused to alight because the caboose had not reached the platform, the defendant was not liable. *Chicago, etc., R. Co. v. Stoncipher*, 90 Ill. App. 511.

69. Freight trains carrying passengers are not required, in the absence of usage, to receive and discharge passengers at the platform of the passenger depot before doing necessary switching. *Cleveland, etc., R. Co. v. Maxwell*, 59 Ill. App. 673.

70. *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157; *Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544.

A freight train was stopped, about half past nine o'clock on a dark and stormy night, so that a cattle guard, which was partly uncovered, intervened between the station platform and the caboose, or passenger car. Plaintiff, who had been accustomed to taking the train with the caboose standing some distance from the platform but who had never taken it while the caboose was so far away as to be beyond the cattle guard, which he had

not noticed and of which he had no knowledge, was injured in attempting to pass from the platform to the caboose by suddenly and unexpectedly walking and falling into the open cattle guard. It was held that the facts clearly warranted the jury in finding that defendant was guilty of negligence. *Hartwig v. Chicago, etc., R. Co.*, 49 Wis. 358, 5 N. W. 865, 1 Am. & Eng. R. Cas. 65.

Where plaintiff, a passenger upon a freight train in charge of stock, was obliged to return to a station which the train had passed and where the cars containing his cattle had been left by mistake and without his knowledge, and the conductor, in transferring him to a train which would take him back, instead of stopping the caboose in which plaintiff was riding at a regular station as he had promised, stopped it in close proximity to a place of danger, and directed him to get off, without notifying him that he was at a place other than the regular station, or warning him of, or affording him any means of discovering and avoiding, the dangers to which he would be exposed in going from the one train to the other, it was held that defendant was liable for the injuries received by plaintiff in making the transfer. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, 11 S. W. 559.

Where a freight train on which plaintiff was a passenger stopped a quarter of a mile short of the station, and he broke his leg in passing from the train to the station, in getting over a flat car which stood on a bridge which he had to cross, it was held that defendant's negligence was a question for the jury. *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105.

In a somewhat similar case, plaintiff was a passenger on a freight train which arrived at the end of his journey between eleven and twelve o'clock on a dark night. The train did not stop at the platform of the station but at a place where, along the side of the track and some three or three and a half feet from it, there was a retaining wall. The height of the wall on the side next the track was from five to eight inches from the ground, but on the other side it was from fifteen to twenty feet from the ground. Plaintiff was told to leave the train, but no light was furnished him and no notice given him of the proximity of the wall. In following an employee connected with the train, who took his luggage and proposed to guide him to the

stopped at a dangerous, instead of the usual and safe, stopping place on a dark night, and the name of the station announced, the act of the conductor, in leaving the caboose with the light, by which the passenger could or might have seen the danger, made his failure to warn and inform passengers of the dangerous character of the surrounding premises gross negligence.⁷¹

Mixed Train.—A carrier carrying passengers on passenger or mixed trains, without making any distinction between them, either by its rules or custom, must stop either class of trains at the usual stopping place long enough to permit its passengers to alight in safety; and a passenger on a mixed train, in the absence of any distinction between passengers and mixed trains, may act on the belief that the carrier will stop its train at a usual stopping place to permit him to alight.⁷² Where a mixed train is stopped, so that the passenger coaches are some distance from the station, freight being unloaded and engines switched, and it is the custom of the road to either stop the train, in the first instance, so that the passenger coaches would be near the station, or, if they were away from the station, to move them down, and then give the passengers an opportunity to enter the cars, it is negligence to leave the station without again stopping the passenger coaches; and the railroad company is liable for injuries received by a passenger who, relying on the custom, waits at the station for the passenger coaches to stop, and attempts to board the moving train when he sees there will be no stop.⁷³ It is held in such cases the unloading of freight and switching of cars is not notice to the passenger that he is expected to board the train at an unusual place.⁷⁴

§ 2456. Street Railways.—A street railway company in letting passengers on and off must stop its cars at the usual stopping place.⁷⁵ A street railway company is under a duty to the public to stop at its regular crossings, on a seasonable signal, to receive those desiring to take passage.⁷⁶ And it can not avoid this duty by any practice or rules of its own.⁷⁷ A motorman and conductor can

station, he fell over the wall to the ground below and was severely injured. A verdict for plaintiff was sustained. *Smith v. Central R., etc., Co.*, 80 Ga. 526, 5 S. E. 772, 34 Am. & Eng. R. Cas. 456.

A passenger on a freight train brought suit for damages alleging negligence on the part of the railroad company in directing her to leave the train at a place of danger. It appeared that the conductor, knowing the danger to which she would be exposed, directed her to leave the train in the nighttime at a place several hundred feet from the platform at her station; that she was thus compelled to walk along a side track, in which there was an open culvert, into which she fell and was injured; and that, while endeavoring to extricate herself, she was frightened by the approach of cars on the side track. A judgment for plaintiff was sustained. *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 187.

71. *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706.

72. Mixed train.—*Kansas, etc., R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173.

73. *Le Duc v. St. Louis, etc., R. Co.*, 159 Mo. App. 136, 140 S. W. 758.

74. *Le Duc v. St. Louis, etc., R. Co.*, 159 Mo. App. 136, 140 S. W. 758.

75. *Reiss v. Wilmington City R. Co.* (Del.), 67 Atl. 153; *Coyle v. People's R. Co.* (Del.), 7 Pen. 454, 80 Atl. 638; *Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040.

76. *Jackson Elect. R., etc., Co. v. Lowry*, 79 Miss. 431, 30 So. 634, 23 Am. & Eng. R. Cas., N. S., 103; *Bell v. Central Elect. R. Co.*, 125 Mo. App. 660, 103 S. W. 144.

77. Plaintiff signaled an approaching street car, while he was standing at the crossing of two intersecting streets, which was a regular stopping place on defendant's line, and the signal was seen by the employees of defendant, but for some reason the car did not stop at the crossing, but ran on thirty or forty feet beyond. The conductor on the car beckoned to plaintiff to come ahead, which plaintiff at first undertook to do, but finding the ground wet and muddy, refused to go, and demanded that the car should be backed to the crossing. The conductor refused to do so on the ground that it was against the rules of the company to back cars, and, plaintiff still refusing to go through the mud to the car, the car moved on and left him standing at the crossing. Judgment for plaintiff was sustained, the court saying that the rule of the company, though it might be reasonable in some cases, was unreasonable when applied in the particular case,

not be expected to heed signals to stop from other places than the regular stops, and are not held to the necessity of seeing with a view of stopping for those who give the signal while the train is running.⁷⁸ A person giving a signal to a motorman to stop should stand at or reasonably near the place at which it is usual to stand to signal a car.⁷⁹

§ 2457. Waiver by Passenger or Right to Be Set Down at Usual Place.—A passenger who voluntarily alights from a train, knowing, or having reason to believe, that the train has not stopped at the place where it is customary to take on and let off passengers, may, in a proper case, be held to waive his right to be put off at the regular stopping place, and to assume the risks incident to getting off at the place where the train has stopped.⁸⁰ It has been said that if a train is stopped at a point other than the platform, and the passenger voluntarily elects to get off at that place, notwithstanding the offer of the conductor to bring the train alongside the platform, the original obligation of the carrier as to the place for setting down the passenger is changed to the extent of substituting a new place for its performance, and precludes a recovery for injuries received by the passenger in alighting, unless, indeed, the carrier is guilty of negligence in the discharge of the new obligation.⁸¹ It has been held that a person who gets on a wrong train by mistake and, on the train being stopped for him a half or three-quarters of a mile out from the station, voluntarily alights to walk along the track to the proper train standing not far off, assumes the risks incident to doing so and can not recover for injuries sustained in consequence of falling into a cattle guard.⁸² Where a passenger who is carried by his station while asleep, is awakened after the train has gone about a mile and elects to get off there to walk back, and has a narrow escape from being run over by a freight train on a trestle, we can not recover damages for the fright sustained.⁸³ But the fact that a passenger, who was carried a distance beyond her station through the negligence of the carrier and was not fully informed of the difficulties in the way of returning, elected to get off and walk back rather than to be carried to the next station, she being incumbered with two children and being without money, did not, it has been held, debar her of a right to recover damages.⁸⁴

§ 2458. Duties When Passengers Are Received at Other than Usual Place.—If a railroad company does not receive passengers at the platform or regular place provided for that purpose, but suffers or directs passengers to get on its cars at other places, it must exercise care to prevent accidents to the passengers while entering.⁸⁵ Although a street railway has provided regular stations, if its trains are stopped at other places, as where they are stopped in compliance with a statutory requirement at intersecting railways, and if the public is in the habit of entering or quitting the cars at such places, without objection from the company's servants, passengers entering the cars at such places are

in which it appeared that the night was dark and rainy, the road muddy, the car standing thirty or forty feet beyond the crossing, and the passenger, as was known to the employees on the car, would have to walk seven squares unless he got passage. *Jackson Elect. R., etc., Co. v. Lowry*, 79 Miss. 431, 30 So. 634, 23 Am. & Eng. R. Cas., N. S., 103.

78. Signal at other than regular stops.—*Pitard v. New Orleans R., etc., Co.*, 120 La. 925, 45 So. 943.

79. Sufficiency of signal.—*Pitard v. New Orleans R., etc., Co.*, 120 La. 925, 45 So. 943.

80. *St. Louis, etc., R. Co. v. Lewis*, 69

Ark. 81, 61 S. W. 163, 20 Am. & Eng. R. Cas., N. S., 483; *Gulf, etc., R. Co. v. Jordan* (Tex. Civ. App.), 33 S. W. 690; *Gulf, etc., R. Co. v. Head*, 4 Texas App. Civ. Cas., § 209, 15 S. W. 504.

81. *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017.

82. *Finnegan v. Chicago, etc., R. Co.*, 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399.

83. *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9, 8 So. 330.

84. *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187.

85. *Allender v. Chicago, etc., R. Co.*, 43 Iowa 276.

entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular stations, except so far as it may be relieved therefrom by obvious risks, incident to the nature and conditions of such place of customary use.⁸⁶ But when a passenger attempted to board a slowly-moving train at a place other than a place for receiving passengers and is injured by a sudden movement of the train, the carrier is not liable unless it was known at the time to some employee in charge of the train that he was endeavoring to board, in accordance with a custom at that point.⁸⁷ And where, while the work of preparing a train is going on, necessitating dangerous switchings and couplings of the cars, he enters one of the coaches at a point where the carrier is not accustomed to receive passengers, and without notice to or invitation by any officer of the carrier with authority, and in attempting to go from one coach to another is injured by a jolt given the coaches in making a switch or coupling, the carrier is not liable.⁸⁸

§ 2459. Management of Train in Drawing Up to Platform or Stopping Place.—Railroad companies are bound to manage trains with care in drawing up to platforms or stopping places so as not to mislead passengers as to the proper time to get on or off. But since a train may sometimes come to a stop short of, or may overshoot, the exact point at which it should be stopped, on account of the condition of the track or other causes, without any negligence in providing proper brakes and other appliances or in the management of the train, the mere fact that a train, in approaching a station, is temporarily stopped at a point short of, or beyond, the proper place, before coming to a final stop for the purpose of taking on or letting off passengers, is not of itself negligence.⁸⁹ To amount to negligence the stop must be of such duration and be made under such circumstances as reasonably to constitute an invitation to passengers to board or alight, and the movement forward or backward must be made without warning, while passengers are getting on or off in response to the invitation.⁹⁰ If the temporary stop is of such duration, and is made after the name of the station has been announced and under such circumstances, as to indicate an invitation to passengers to get off, and no warning is given them that the stop is not final or other steps taken to prevent them from acting upon the apparent invitation, the carrier's negligence becomes a question for the jury, and the facts will justify a recovery by a passenger who is injured, while in the exercise of

⁸⁶. *North Birmingham St. R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

⁸⁷. It was the custom of a railway company to slow down its trains before reaching a crossing, and either to come to a full stop at the crossing or run over it. Persons intending to take passage on its trains at the crossing usually grasped the handrail on a coach, and walked along with the train, and boarded the car at the moment of stopping. A person went to the crossing, intending to take passage on a train which slowed down before reaching the crossing. He caught the handrail of a coach, and while holding onto the rail and walking along with the train, intending at the moment of its stopping to step onto the steps of the coach, the train suddenly jerked forward, and he was thrown to the ground. Held, that he was not entitled to recover for the injury sustained, without showing that he was seen by an employee in charge of the train. *Collins v. Southern R. Co.*, 89 Miss. 375, 42 So. 167.

⁸⁸. *Raines v. Chesapeake, etc., R. Co.*, 68 W. Va. 694, 70 S. E. 711, 33 L. R. A., N. S., 583.

⁸⁹. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489, affirming 4 Hun 765.

It is not required that the carrier in stopping its cars shall so stop them as to avoid danger to passengers who undertake to alight before the stoppage is complete. *Blodgett v. Bartlett*, 50 Ga. 353.

The company can not be held liable for injuries received by a passenger while attempting to alight, without notice to the company's employees, from a train which had stopped momentarily at a point distant from any station and which was not the destination of the passenger. *Georgia Southern, etc., R. Co. v. Murray*, 113 Ga. 1021, 39 S. E. 427.

⁹⁰. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374, 46 N. W. 773, 44 Am. & Eng. R. Cas. 337.

due care, by the sudden starting of the train while he is in the act of alighting.⁹¹ But where a train was first stopped so that the baggage car was a little short of the baggage on the platform, and, while plaintiff was standing on the platform of one of the cars supporting himself by resting his hand on the facing of the door, the train moved a little forward, gently, and without jerking, and stopped as it ordinarily stopped, without jerking, the carrier was not liable for injuries received in consequence of the door shutting on his hand when the second stop was made.⁹² Even though the announcement of the station may have been made by some unauthorized person, it is a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to give counterwarning that passengers are not yet to leave the train, and whether it is negligence to fail to do so.⁹³ On the ground that there is no rule of law requiring a train to be stopped when it first reaches the station platform, it has been held that it is not negligence to run a train by the platform without stopping, in accordance with a regular custom of running the train a distance beyond the platform to allow another train, going in the opposite direction, to pass, and then backing the train to the platform for the purpose of setting down passengers and discharging baggage.⁹⁴ But as to whether the conductor was negligent in failing to inform a boy of ten years of age, who was a passenger on the train, that the train would be run by, and then returned to, the platform, to afford him an opportunity to alight, or taking other proper steps to prevent

91. Illinois.—*McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, reversing 31 Ill. App. 100.

Massachusetts.—*Floytrup v. Boston, etc., Railroad*, 163 Mass. 152, 39 N. E. 797, 2 Am. & Eng. R. Cas., N. S., 273.

Michigan.—*Wood v. Lake Shore, etc., R. Co.*, 49 Mich. 370, 13 N. W. 779, 8 Am. & Eng. R. Cas. 478; *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374, 46 N. W. 773, 43 Am. & Eng. R. Cas. 337.

Missouri.—*Leslie v. Wabash, etc., R. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229.

New Jersey.—*Central R. Co. v. Van Horn*, 38 N. J. L. 133.

New York.—*Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489, affirming 4 Hun (N. Y.) 765.

In a case in which it appeared that, after the name of the station had been announced, the train was stopped a little short of the platform and then started again for the purpose of drawing up alongside of the platform, and plaintiff, believing that the platform had been reached, and, being so dark that he could not see that it had not been reached, got off at the first stop and was injured, the company was held liable. *Devine v. Chicago, etc., R. Co.*, 100 Iowa 692, 69 N. W. 1042.

Similar circumstances may justify a recovery even by a passenger upon a freight train, notwithstanding that it is not to be expected, considering that the great length and weight of freight trains and the appliances necessary to their operation render them less easy to control, that there will be the same particularity in drawing up to a station by a train of that character as by a train devoted exclusively to passenger service. A freight

train, upon which plaintiff was a passenger shortly after the name of the station had been called, came to a stop at the platform for a moment and then was jerked forward, coming to a stop farther on. Plaintiff, having heard the station announced in the usual manner and observing the train come to a standstill at the station platform, arose from her seat when the first stop was made, was thrown to the floor of the car by the forward movement of the train, and seriously injured. A judgment for plaintiff was sustained. *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313.

The train upon which plaintiff was a passenger was stopped near plaintiff's station and she was notified by those in charge of the train to alight. She went out upon the platform but found that it was impossible for her to alight at that place. She was then told by the servants of defendant to remain on the platform. While she was thus upon the platform, in the dark, with a child in her arms, the train was started with a violent jerk, which caused the door of the car to violently close upon and injured her fingers. A verdict of judgment for plaintiff was sustained. *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338.

92. Skinner v. Wilmington, etc., R. Co., 128 N. C. 435, 39 S. E. 65, 22 Am. & Eng. R. Cas., N. S., 32.

93. Floytrup v. Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797, 2 Am. & Eng. R. Cas., N. S., 273.

94. Hemmingway v. Chicago, etc., R. Co., 67 Wis. 668, 31 N. W. 268, 28 Am. & Eng. R. Cas. 216.

him from alighting when the train first passed the platform, was held to be a question for the jury.⁹⁵

§ 2460. Duty to Stop Train or Street Car.—It is sometimes provided by statute that trains shall be brought to a standstill at stations for the purpose of receiving and discharging passengers.⁹⁶ And it has been declared in cases which were apparently governed solely by common-law principles, unaffected by statutory provisions, that a carrier should not merely run a train of cars by a station or usual stopping place, slowly, but should bring it to a standstill opposite the platform or place for receiving and discharging passengers.⁹⁷ And this rule has been applied to flag stations.⁹⁸ It has been held that it is negligence for an officer or agent of a railroad company to induce a passenger to leave a train which is in motion.⁹⁹ But it probably was not meant, and it can scarcely be true, that this is an absolute duty, so that the mere failure to bring a train to a full stop to take on or let off passengers will, in every case, be alone sufficient to charge the railroad with negligence. While there may be a general duty to stop trains, and while a passenger may reasonably expect and have a right to demand that a train be stopped, the negligence of the railroad in failing to do so, must, in particular cases, be a question for the jury. Thus it has been held that the question of whether it was negligence on the part of a railroad company, under the circumstances of the case, to fail to bring its train to a stop at a flag station where a passenger was to be set down, should have been left to the decision of the jury.¹ It certainly is not negligence as a matter of law for the driver of a street car merely to slacken the speed of the car to enable a passenger, who does not indicate any desire to have the car stopped, to get on. That the failure to stop a street car is not negligence per se "is clearly indicated by the daily custom of drivers upon street cars to merely slacken the speed of

95. *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 37 N. W. 804, 33 Am. & Eng. R. Cas. 511, 7 Am. St. Rep. 823.

96. *South Carolina Gen. Stat.*, § 1486; *Thomas v. Charlotte, etc., R. Co.*, 38 S. C. 485, 17 S. E. 226.

97. *Arkansas*.—*St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. Cas. 198, 40 Am. Rep. 105.

Georgia.—*Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577.

Indiana.—*Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477, 58 Am. & Eng. R. Cas. 232.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919.

Missouri.—*Price v. St. Louis, etc., R. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Bell v. Central Elect. R. Co.*, 125 Mo. App. 660, 103 S. W. 144.

New York.—*Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327.

Texas.—*Galveston, etc., R. Co. v. Thornsberry (Tex.)*, 17 S. W. 521.

And see the case of *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284, 13 S. Ct. 557, 58 Ann. & Eng. R. Cas. 380.

A street railway company is bound to stop its cars and wait a reasonable time for the passengers to get on, and to use all reasonable care to secure their safety; but it is not an insurer of safety. *File*

v. Wilmington City R. Co. (Del.), 80 Atl. 623.

Slacking speed.—It is not sufficient that the speed of the cars is slackened. And if, after passing the station, the speed of the cars is again slackened that the passenger may get off, and, under the direction of the conductor, he does get off, and, in so doing gets injured, the company is liable. It is not want of ordinary care if a passenger prudently uses the means which the company affords him to get off the train. *Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577.

98. Application of rule to stops at flag stations.—It is the duty of a railroad company to stop its passenger train at a flag station a reasonable time to allow a passenger to alight. *San Antonio, etc., R. Co. v. Dykes (Tex. Civ. App.)*, 45 S. W. 758.

99. *Lake Erie, etc., R. Co. v. Huffman*, 177 Ind. 126, 97 N. E. 434, citing *Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303; *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435, 52 Am. & Eng. R. Cas. 265; *Jones v. Chicago, etc., R. Co.*, 42 Minn. 183, 43 N. W. 1114; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *S. C.*, 59 N. Y. 351; *Bucher v. New York Cent., etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361.

1. *Treat v. Boston, etc., R. Corp.*, 131 Mass. 371, 3 Am. & Eng. R. Cas. 423.

their cars in order to take on passengers, without any injury resulting."² But under given circumstances, it has been held that the court was justified in assuming negligence in failing to stop a street car in response to the signal given.³ But a finding by the jury that it was negligence for the driver of a street car to fail to stop the car at the place where a boy, ten years of age, intended to get off, has been sustained.⁴

§§ 2461-2471. Allowing Reasonable Time to Get On or Off—§ 2461. General Rule.—Whether a train or street car is merely slowed up or it is brought to a standstill for the purpose of taking on and setting down passengers, passengers must be allowed a reasonable time to get on or off the train or car in safety.⁵

§ 2462. When the Train or Street Car Is Merely Slowed Up.—Where a railroad train has been slowed up to allow passengers an opportunity to get on or off, the speed of the train must not be increased before a passenger has had a reasonable time to board, or alight from, the train,⁶ and it is negligence to suddenly and violently increase the speed of the car before the passenger can alight in safety.⁷ Where it is customary for trains merely to be slowed up at a station for which a passenger has a ticket, the passenger, who is, by the announcement of the station, called to the platform for the purpose of alighting, is entitled to damages received by falling from the steps of the car in consequence of the carrier's negligence in suddenly increasing the speed of the train, when it should have been slowed or stopped.⁸ If, while a passenger is in the act of boarding a slowly moving train with the knowledge, and by the direction, of the conductor, the speed of the train is suddenly increased, and the passenger, who is in the exercise of due care, is thereby injured, the carrier is liable.⁹ According to plaintiff's testimony, plaintiff, after the name of his station had been called, went to the front door of the car to get off, and, the door opened for him by the porter, stepped down to the last step of the car. While plaintiff was standing there, the porter, who was standing behind him with a light, said, "All right, sir." Plaintiff then stepped off, and was injured. It was dark, and he could not tell whether the car was moving. It was held that, under the evi-

2. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas., N. S., 293. See *Weber v. New Orleans, etc., R. Co.*, 104 La. 367, 28 So. 892.

3. **Application of rule to street railways.**—Where, in an action for injuries to a person in alighting from a moving street car, his testimony that he rang the bell a number of times for the car to stop before he alighted was uncontradicted, and other passengers on the car testified, but failed to state anything with reference to the ringing of the bell, and the motorman was not called to answer whether he heard the bell or not, the court was justified in assuming that the company was guilty of negligence in failing to stop the car in response to the signal. Judgment, *Dallas Rapid Transit R. Co. v. Payne* (Tex. Civ. App.), 78 S. W. 1085, reversed. *Dallas Rapid Transit Co. v. Payne*, 82 S. W. 649, 98 Tex. 211.

4. *Brennan v. Fairhaven, etc., R. Co.*, 45 Conn. 284, 29 Am. Rep. 679.

5. Cases set out below, see post, "When the Train or Street Car Is Merely Slowed Up," § 2462; "When the Train or Street Car Is Stopped," §§ 2463-2469.

6. *Distler v. Long Island R. Co.*, 151 N. Y. 424, 45 N. E. 937, 6 Am. & Eng. R. Cas., N. S., 235, 35 L. R. A. 762; *Filer v. New York, etc., R. Co.*, 68 N. Y. 124; *Texas, etc., R. Co. v. Elliott*, 26 Tex. Civ. App. 106, 61 S. W. 726. See *Houston, etc., R. Co. v. Runnels*, 92 Tex. 305, 47 S. W. 971, 12 Am. & Eng. R. Cas., N. S., 800, reversing 46 S. W. 394.

7. When a car has slackened its speed to enable a passenger to alight therefrom in obedience to notice by him of his purpose to the persons in charge of the car, and the car is running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care for his own safety might attempt to alight, it is negligence to suddenly and violently increase the speed of the car before the passenger has had reasonable opportunity to alight. *Sandlin v. Lexington R. Co.*, 110 S. W. 374, 33 Ky. L. Rep. 518.

8. *Brashear v. Houston, etc., R. Co.*, 47 La. Ann. 735, 17 So. 260, 49 Am. St. Rep. 382.

9. *Missouri Pac. R. Co. v. Foreman* (Tex. Civ. App.), 46 S. W. 834. See *Rome Rv., etc., Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468.

dence, the question of defendant's negligence was properly submitted to the jury.¹⁰ Very, naturally, street railway law is especially rich in cases of this character in which it is held that when a street car has been slowed up in response to a signal, the person signaling the car to stop must be given a reasonable opportunity to get on or off, and the carrier is liable for injuries which he sustains in consequence of the speed of the car being negligently increased while he is in the act of boarding, or alighting from, the car.¹¹ Where a street car, which had almost stopped at a signal to the motorman by plaintiff who intended to take passage, suddenly started forward without warning while plaintiff was getting aboard, the company did not know of plaintiff's position, it being his duty to inform himself thereof.¹² And it was held that where, on the signal of a passenger for a stop, the speed of a street car was slackened to the speed at which it was usual for passengers to alight, it was negligence for the operatives of the car to then cause it to start suddenly forward.¹³ It is immaterial that the motorman of the street car was not negligent, because he did not know that anyone was alighting, when the conductor was negligent.¹⁴

§§ 2463-2469. When the Train or Street Car Is Stopped—§ 2463. General Rule.—When the vehicle is stopped for the purpose of setting down or taking up passengers, the carrier should give the passengers while in the exercise of reasonable care, a reasonable time to get on or off, before starting the train or car.¹⁵ And any unnecessary sudden jerking of a train while a passenger is rightfully alighting is negligence,¹⁶ in the absence of notice to the passenger.¹⁷ And in the absence of contributory negligence by a passenger, the carrier is liable for injuries resulting from a failure to do so.¹⁸ It has been

10. *Hodges v. Southern R. Co.*, 120 N. C. 555, 27 S. E. 128, 8 Am. & Eng. R. Cas., N. S., 46.

11. *Indiana*.—*Conner v. Citizens' St. R. Co.*, 105 Ind. 62, 4 N. E. 441, 26 Am. & Eng. R. Cas. 210, 55 Am. Rep. 177; *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Citizens' St. R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446.

Kentucky.—*Central, etc., R. Co. v. Rose*, 15 Ky. L. Rep. 209, 22 S. W. 745.

Minnesota.—*Sahlgard v. St. Paul City R. Co.*, 48 Minn. 232, 51 N. W. 111.

New Jersey.—*Schmidt v. North Jersey St. R. Co.*, 66 N. J. L. 424, 49 Atl. 438.

New York.—*Morrison v. Broadway, etc., R. Co.*, 130 N. Y. 166, 29 N. E. 105, affirming 8 N. Y. S. 436; *Eppendorf v. Brooklyn, etc., R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780.

Pennsylvania.—*Linch v. Pittsburgh Tract. Co.*, 153 Pa. 102, 25 Atl. 621; *Picard v. Ridge Ave., etc., R. Co.*, 147 Pa. 195, 23 Atl. 566.

Rhode Island.—*Rathbone v. Union R. Co.*, 13 R. I. 709, 13 Am. & Eng. R. Cas. 58.

Texas.—*Christie v. Galveston, etc., R. Co.* (Tex. Civ. App.), 39 S. W. 638.

12. *Nilson v. Oakland Tract. Co.*, 10 Cal. App. 103, 101 Pac. 413.

13. *Little Rock R., etc., Co. v. Doyle*, 79 Ark. 378, 96 S. W. 353.

14. *Moeller v. United R. Co.* (Mo. App.), 147 S. W. 1009.

15. *Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213, 58 Am. & Eng. R. Cas. 239, 21 L. R. A. 354; *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Kansas, etc., R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173; *Yazoo, etc., R. Co. v. Beattie* (Miss.), 49 So. 609.

It is the duty of a carrier to allow a passenger a reasonable opportunity to alight, while in the exercise of reasonable diligence to do so. *St. Louis, etc., R. Co. v. Trotter*, 101 Ark. 183, 142 S. W. 189.

Reasonable care, under the circumstances, is required of a carrier in setting down passengers at stations. *Serviss v. Ann Arbor R. Co.* (Mich.), 135 N. W. 343.

16. *Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

To start a car with a sudden jerk while the passenger is alighting is evidence of negligence, in an action by the passenger for resulting injuries. *Cooke v. Springfield Tract. Co.* (Mo. App.), 129 S. W. 265.

17. It is negligence in the operation of a passenger train to suddenly and violently move it forward without notice to the passengers alighting from it. *Louisville, etc., R. Co. v. Deason*, 96 S. W. 1115, 29 Ky. L. Rep. 1259.

18. **Liability in absence of contributory negligence.**—*Choctaw, etc., R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271.

said that a railroad company is presumed to know that passengers are in the act of alighting, where a train has stopped for that purpose.¹⁹

§ 2464. Allowing Time to Board Railroad Train.—The application of the general rule is illustrated by a number of cases in which railroad companies were held liable for negligently starting trains before intending passengers had been afforded a time reasonably sufficient to enable them to get aboard.²⁰ But the duty to hold a train at stations for a time reasonably sufficient for passengers to get on applies only to passengers who present themselves for carriage before the signal to start has been given; if a passenger comes after that signal has been given the train need not be held for the purpose of allowing him to get on.²¹ It is a carrier's duty to give passengers a reasonable opportunity to board

19. Presumed to know passengers alighting.—*St. Louis, etc., R. Co. v. Malone* (Ark.), 150 S. W. 116.

20. Arkansas.—*St. Louis, etc., R. Co. v. Wright*, 105 Ark. 269, 150 S. W. 706.

Delaware.—*Coyle v. People's R. Co.* (Del.), 7 Pen. 454, 80 Atl. 638.

Georgia.—*Poole v. Georgia R., etc., Co.*, 89 Ga. 320, 15 S. E. 321; *Gainesville Mid. Railway v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007.

Massachusetts.—*Dawson v. Boston, etc., R. Co.*, 156 Mass. 127, 30 N. E. 466.

Missouri.—*Evans v. Interstate, etc., R. Co.*, 106 Mo. 594, 17 S. W. 489; *Swigert v. Hannibal, etc., R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322.

New York.—*Hickenbottom v. Delaware, etc., R. Co.*, 122 N. Y. 91, 25 N. E. 279.

Ohio.—*Pennsylvania R. Co. v. Peoples*, 31 O. St. 537.

Oklahoma.—*Atchison, etc., R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681.

Pennsylvania.—*Giovanelli v. Erie R. Co.*, 228 Pa. 33, 76 Atl. 424.

Texas.—*Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636; *Texas Mid. Railroad v. Brown* (Tex. Civ. App.), 58 S. W. 44.

Texas.—*Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 2 S. W. 831; *Houston, etc., R. Co. v. Copley*, 38 Tex. Civ. App. 568, 87 S. W. 219, affirmed in 101 Tex. 641, no op.; *Texas, etc., R. Co. v. McGilvary* (Tex. Civ. App.), 29 S. W. 67 (see 93 Tex. 741, no op.); *Central, etc., R. Co. v. Holloway* (Tex. Civ. App.), 54 S. W. 419, affirmed in 93 Tex. 726, no op.

Virginia.—*Norfolk, etc., R. Co. v. Grose-close*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

Wisconsin.—*Detroit, etc., R. Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141.

A railway company selling a ticket at a way station for a train soon to pass, is bound to stop the train long enough to afford the purchaser reasonable time to board it in safety; and if he, without any delay beyond that which is forced upon him by passengers coming out of the car and crowding upon the platform, endeavors to get aboard just as the train is starting off, and is injured in conse-

quence of the too hasty starting of the train which caused the door of the car to be closed suddenly, it not being securely fastened back, he is prima facie entitled to recover. *Poole v. Georgia R., etc., Co.*, 89 Ga. 320, 15 S. E. 321, distinguishing *Hardwick v. Georgia R., etc., Co.*, 85 Ga. 507, 11 S. E. 832.

Where a person was at the station of a railroad for the purpose of taking passage on one of its trains and upon signaling the engineer to stop the train, which came to a stop, he went to the rear end of the passenger coach, where he could most conveniently enter the car, and taking hold of the hand rail, he placed one foot upon the lower step, when the train started suddenly forward, causing him to lose his balance, and threw him back violently against the side of the car, thereby inflicting serious injuries upon him, and it was also shown that the conductor saw him in the act of getting upon the train, it was held that the above evidence was sufficient to authorize the jury to find for plaintiff. *Southern R. Co. v. Dean*, 128 Ga. 366, 57 S. E. 702.

21. Paulitsch v. New York, etc., R. Co., 102 N. Y. 280, 6 N. E. 577, 26 Am. & Eng. R. Cas. 162, reversing 50 N. Y. Super. Ct. 241.

A carrier must stop its trains a reasonable time for passengers demanding passage to have a reasonable opportunity to board it, and where a train stopped the usual length of time for passengers to board it, and a passenger failed to present himself at the train, he can not recover for being left at the station, though he did not present himself by reason of the crowd at the station. *Chesapeake, etc., R. Co. v. Austin*, 126 S. W. 144, 137 Ky. 611.

Where a carrier has stopped long enough to allow passengers at a regular station to get off or to get on, it owes no duty to hold its train for a belated passenger. *Pickett v. Southern R. Co.*, 48 S. E. 466, 69 S. C. 445.

In general railroad companies should stop their trains at stations long enough to allow all passengers who present themselves at the proper place to board, the cars in safety, and it is the latter's

a train; and the mere moving of the train, whether by an ordinary and usual, or an unusual and unnecessary, jerk, while the passenger is on the car steps, and before he has had a reasonable opportunity to reach a place of safety, whereby the passenger is injured, is negligence.²² It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on it.²³ If a person, entitled to the rights of a passenger on a railway train is, without being guilty of contributory negligence, injured in the effort to get on the train, which has started from a stopping place before the time designated to the passenger by the conductor in charge, the company is liable in damages for the injury.²⁴ An element of negligence in these

correlative duty to present themselves at such place for getting on, and exercise reasonable expedition in so doing after the train stops. *St. Louis, etc., R. Co. v. Anderson* (Tex. Civ. App.), 125 S. W. 628.

In a case in which it appeared that a train came to a full stop at a station and remained standing for a time which was not shown to have been insufficient to enable a passenger, who walked the length of the car and got on the rear platform of the car, to have gotten on by the front platform, where passengers were getting on and off, and to have safely entered the car, and no reason was shown for walking the whole length of the car instead of getting on at the usual place, and the testimony of all witnesses, except the passenger, was that the train started off slowly, it was held that the evidence was insufficient to show negligence on the part of the railroad company. *Houston, etc., R. Co. v. Stewart*, 21 Tex. Civ. App. 33, 50 S. W. 580.

A freight train, with a cab attached for the accommodation of passengers, stopped, for a purpose other than that of taking on passengers, at a place where the train did not usually stop to receive passengers, and the conductor distinctly announced in the hearing of persons assembled that passengers would not get aboard there, but that the train would move on and stop for them at another place. Plaintiff, who did not hear the announcement, attempted to board the train and was injured, in consequence of the starting of the train while he was upon the platform of the cab, and before he could pass or had passed from thence to the inside of the vehicle. Neither the conductor nor any other person engaged in moving the train or controlling its movements was aware that plaintiff intended to get aboard, or that he was endeavoring to do so, at the time he sustained the injury. It was held that he could not recover. *Curry v. Georgia, etc., R. Co.*, 92 Ga. 293, 18 S. E. 422.

22. Moving train.—*Chesapeake, etc., R. Co. v. Borders*, 140 Ky. 548, 131 S. W. 388.

Where the call of a passenger conductor, "All aboard," was an express invi-

tation to those who had not yet boarded the train to do so, and the train started without giving them an opportunity to board in safety, the act in moving the train was negligence for which the carrier was liable, if it resulted in injury to a passenger attempting to board the train. *Roberts v. Atlantic, etc., R. Co.*, 155 N. C. 79, 70 S. E. 1080.

Unusual jerk.—Where, in an action against a carrier for injuries to a passenger at a station, in attempting to board the train, there was evidence to justify the jury in finding that defendant was negligent in giving the train an unusual jerk while the passenger was attempting to board it, and the jury finds for plaintiff, it is conclusive that he was not guilty of contributory negligence. *Texas, etc., R. Co. v. Gray* (Tex. Civ. App.), 71 S. W. 316, affirmed in 97 Tex. 648, no op.

A carrier admitting passengers on the rear coach of a train while coaches are being coupled thereto fails to exercise the high care imposed on it for the safety of its passengers when the coaches are shoved against the train with dangerous violence. *Wise v. Wabash R. Co.*, 115 S. W. 452, 135 Mo. App. 230.

23. Duty v. Chesapeake, etc., R. Co., 70 W. Va. 14, 73 S. E. 331.

24. Texas Pac. R. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636; *Galveston, etc., R. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204; *Houston, etc., R. Co. v. Copley*, 38 Tex. Civ. App. 568, 87 S. W. 219.

Recovery may be had by passenger injured by the sudden jerking of train as he was attempting to get on, though the engineer did not know of his presence, the conductor having told him to get aboard. *Missouri Pac. R. Co. v. Foreman* (Tex. Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

In an action for injuries to plaintiff caused by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised 10 minutes by the conductor in which to check her baggage, and the train started before that time expired, then they should find for the plaintiff, is not erroneous as laying too much stress on the time promised

cases may be the failure of the company to give passengers a reasonable opportunity to buy tickets before the train is started. A railroad company should put tickets on sale a reasonable time before the departure of a train, and, especially if such companies are required by statute to open their ticket offices a specified time before the departure of their trains, persons who wish to purchase tickets may assume that the company will obey the law, or, at least, that it will allow them a reasonable time to buy tickets and board its trains in safety, and a failure to do so, resulting in injury, constitutes actionable negligence.²⁵ Where a passenger was instructed by the conductor of a train to get off at an intermediate station and purchase a ticket, it was held that the company was negligent in not holding the train long enough for him to be able to purchase his ticket and get back on the train.²⁶

Moving Train or Cars Prior to Time of Departure.—Notwithstanding the duty of a railroad company to have a train stand at the station a reasonable time before the hour announced for departure to permit people to enter, the train may, before the arrival of the time when passengers may be expected to get aboard, be moved back and forth as may be required by the convenience of the company in making up and stationing other trains.²⁷ And where a train has not been fully made up and has not been drawn up to the platform of the station but is standing at a distance therefrom, and it is not customary for passengers to board the train at that point, a passenger who, without being invited to do so, nevertheless boards the car, can not recover for injuries received while so doing, in consequence of the jolting of the cars in making up the train.²⁸ But a passenger who, in pursuance of an established and recognized custom, boards a train which has not been fully made up, and which has not been drawn up to the platform of the station, but is standing at a distance from the platform, is entitled to care on the part of the trainmen to prevent jolting of the cars in making up the train and the carrier is liable to the passenger for injuries sustained while getting on, in consequence of the cars being negligently jolted.²⁹

§ 2465. **Allowing Time to Alight from Railroad Train.**—It is the duty of the carrier to stop the train at the point of the passenger's destination a sufficient length of time to allow him to leave the train³⁰ with safety to his life and person,³¹ under the usual and ordinary circumstances,³² without subjecting

her by the conductor. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

25. *Gulf, etc., R. Co. v. Fox* (Tex.), 6 S. W. 569, 33 Am. & Eng. R. Cas. 543.

26. *St. Louis, etc., R. Co. v. Germany* (Tex. Civ. App.), 56 S. W. 586.

27. *Flint, etc., R. Co. v. Stark*, 38 Mich. 714.

28. *Curry v. Georgia, etc., R. Co.*, 92 Ga. 293, 18 S. E. 422; *Jones v. New York, etc., R. Co.*, 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490.

29. See *Jones v. New York, etc., R. Co.*, 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490.

30. **Time to leave vehicle.**—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Fordyce v. Dillingham* (Tex. Civ. App.), 23 S. W. 550.

It is sufficient if passengers are given a reasonable time to alight from the train in safety, the train need not be kept waiting until they have left the platform at the station. *Louisville, etc., R. Co. v. Ricketts*, 18 Ky. L. Rep. 687, 37 S. W. 952.

It is the duty of a railroad company, when a passenger train stops at a station, not to start before passengers have a reasonable time and opportunity to alight in safety. *Lamson v. Great Northern R. Co.*, 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914 A, 15.

31. *United States.*—*McSloop v. Richmond, etc., R. Co.*, 59 Fed. 431.

Alabama.—*Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258; *Central R., etc., Co. v. Miles*, 88 Ala. 256, 6 So. 696, 41 Am. & Eng. R. Cas. 149.

Arkansas.—*St. Louis, etc., R. Co. v. Person*, 49 Ark. 182, 4 S. W. 755, 30 Am. & Eng. R. Cas. 567.

California.—*Raub v. Los Angeles Terminal R. Co.*, 103 Cal. 473, 37 Pac. 374; *Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213, 58 Am. & Eng. R. Cas. 239, 21 L. R. A. 354.

Georgia.—*Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534; *Caldwell*

32. *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77.

v. Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678; *Daniels v. Western, etc., R. Co.*, 96 Ga. 786, 22 S. E. 956; *Killian v. Georgia R., etc., Co.*, 97 Ga. 727, 25 S. E. 384; *Georgia R., etc., Co. v. Keating*, 99 Ga. 308, 25 S. E. 669; *Sanders v. Southern R. Co.*, 107 Ga. 132, 32 S. E. 840.

Illinois.—*Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *T. W. & W. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71.

Indiana.—*Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477, 58 Am. & Eng. R. Cas. 232; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 560, 32 N. E. 809.

Kansas.—*Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768.

Kentucky.—*Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134; *Chesapeake, etc., R. Co. v. Robinson (Ky. App.)*, 123 S. W. 308; *Lexington R. Co. v. Lowe*, 143 Ky. 339, 136 S. W. 618; *Bullitt v. Louisville R. Co.*, 142 Ky. 670, 134 S. W. 1153.

Louisiana.—*Jones v. Texas, etc., R. Co.*, 47 La. Ann. 383, 16 So. 937; *Lehman v. Louisiana, etc., R. Co.*, 37 La. Ann. 705.

Massachusetts.—*Merritt v. New York, etc., R. Co.*, 162 Mass. 326, 38 N. E. 447.

Michigan.—*McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553, 53 N. W. 724, 52 Am. & Eng. R. Cas. 290; *Stone v. Chicago, etc., R. Co.*, 66 Mich. 76, 33 N. W. 24, 30 Am. & Eng. R. Cas. 600.

Mississippi.—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

Missouri.—*Straus v. Kansas, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384; *Clothworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Kirby v. St. Louis, etc., R. Co. (Mo. App.)*, 130 S. W. 69.

Nebraska.—*Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976, 54 Am. & Eng. R. Cas. 640.

New Hampshire.—*Emery v. Boston, etc., Railroad*, 67 N. H. 454, 36 Atl. 367.

New York.—*McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. Rep. 437, affirming 6 N. Y. St. Rep. 691, 43 Hun 637; *Bartholomew v. New York, etc., R. Co.*, 102 N. Y. 716, 7 N. E. 623, 1 Silvernail Ct. App. 72, 27 Am. & Eng. R. Cas. 154.

North Carolina.—*Parlier v. Southern R. Co.*, 129 N. C. 262, 39 S. E. 961.

Ohio.—*O'Neil v. Baltimore, etc., R. Co.*, 2 O. C. C. 504, 1 O. C. D. 610.

Oklahoma.—*Atchison, etc., R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681.

Pennsylvania.—*Leggett v. Western New York, etc., R. Co.*, 143 Pa. 39, 21 Atl. 996; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 18 Atl. 759, 41 Am. & Eng. R. Cas. 154, 15 Am. St. Rep. 701; *Pennsylvania R. Co. v. Peters*, 116 Pa. 206, 9 Atl. 317, 30 Am. & Eng. R. Cas. 607;

Pennsylvania R. Co. v. Kilgore, 32 Pa. 292, 72 Am. Dec. 787; *Bockelcamp v. Lackawanna, etc., R. Co.*, 232 Pa. 66, 81 Atl. 93.

South Carolina.—*Appleby v. South Carolina, etc., R. Co.*, 60 S. C. 48, 38 S. E. 237, 20 Am. & Eng. R. Cas., N. S., 581; *Dobson v. Receivers*, 90 S. C. 414, 73 S. E. 875; *Martin v. Southern Railway*, 77 S. C. 370, 58 S. E. 3.

Tennessee.—*Southern R. Co. v. Mitchell*, 98 Tenn. (14 Pickle) 27, 40 S. W. 72; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713.

Texas.—*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; *Houston, etc., R. Co. v. Moss (Tex. Civ. App.)*, 63 S. W. 894; *Martin v. St. Louis, etc., R. Co. (Tex. Civ. App.)*, 56 S. W. 1011; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Ft. Worth, etc., R. Co. v. Viney (Tex. Civ. App.)*, 30 S. W. 252; *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Atchison, etc., R. Co. v. Frier (Tex. Civ. App.)*, 22 S. W. 6.

Virginia.—*Norfolk, etc., R. Co. v. Prinell*, 1 Va. Dec. 626, 3 S. E. 95, 30 Am. & Eng. R. Cas. 574; *Richmond, etc., R. Co. v. Morris*, 72 Va. (31 Gratt.) 200.

It was a railway conductor's duty to stop his train at a passenger's destination long enough to enable the passenger to alight. *Dilburn v. Louisville, etc., R. Co.*, 156 Ala. 228, 47 So. 210.

Where a carrier has not exercised the highest degree of practicable care to afford the usual sufficient time to alight, and a passenger is carried to the next station or is injured in alighting, the carrier is responsible. *Louisville, etc., R. Co. v. Dilburn (Ala.)*, 59 So. 438.

A railroad company owed a passenger the duty to allow her a reasonable time to alight at destination before starting the train, and was negligent for failure to do so. *Lake Erie, etc., R. Co. v. Beals (Ind. App.)*, 98 N. E. 453.

Where passenger is encumbered.—*Harris* sued the Tallulah Falls Railway Company for damages, alleging that he was a passenger upon one of its trains, and when the train reached the terminus of the road he started to alight, and the train suddenly started at a rapid rate, and was jerked in such a way as to cause the passengers alighting to lose their balance, and the plaintiff, seeing his danger, endeavored to recover himself, but, being burdened with luggage, he could not do so, and lost his balance, and he was thrown violently to the ground, receiving the injuries set forth in detail in the petition. Held, that "in this case the questions as to the defendant's negli-

him to the danger likely to ensue from a sudden jar or movement of the car.³³ And the passengers are bound, on their side, to use reasonable care and diligence to leave the vehicle, and to avail themselves of the opportunity offered them to do so.³⁴ If, before a passenger, who in the exercise of due diligence, has had a reasonably sufficient time to alight from a train, the cars are jolted through the negligence of the employees in making a coupling, and the passenger is injured, the carrier is liable,³⁵ for great care is required of a carrier in starting its trains when passengers are alighting.³⁶ And it is negligence on its part to start a train after stopping at a station, without giving passengers a reasonable time to alight,³⁷ without sufficient warning,³⁸ and the mere ringing the bell

gence were peculiarly for solution by the jury." *Tallulah Falls R. Co. v. Harris*, 129 Ga. 305, 58 S. E. 838.

A carrier must stop its trains at the stations for a reasonable time to afford passengers an opportunity to alight in safety, but the length of time a train should stop varies with the circumstances. *Chicago, etc., R. Co. v. Lampman*, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

Where a train did not stop at a station for a reasonable time to enable the passengers to alight, the carrier was liable for injuries to a passenger attempting to alight, because of the failure of the carrier to exercise the degree of care imposed by law, irrespective of a violation by the trainmen of rules regulating the starting of trains. *Chicago, etc., R. Co. v. Lampman*, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

33. *McGlinchy v. Boston Elevated R. Co.*, 206 Mass. 7, 91 N. E. 882.

Where a passenger train has stopped at a station platform to let passengers alight, any movement of the train without sufficient warning before a reasonable time has elapsed to permit passengers to alight or board the train, which results in injury to any such passenger, is a violation of the duty the carrier owes passengers, whether the movement of the train be performed with ordinary care or negligently. *Midland Valley R. Co. v. Page*, 182 Fed. 125.

34. Duty reciprocal.—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

35. Georgia.—*Georgia R., etc., Co. v. Keating*, 99 Ga. 308, 25 S. E. 669; *Central R. Co. v. Whitehead*, 74 Ga. 441.

Kentucky.—*Illinois Cent. R. Co. v. Dallas*, 150 Ky. 442, 150 S. W. 536.

Texas.—*East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367; *Galveston, etc., R. Co. v. Berry*, 109 S. W. 393, 49 Tex. Civ. App. 521; *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.; *St. Louis, etc., R. Co. v. Kennedy* (Tex. Civ. App.), 96 S. W. 653; *Ft. Worth, etc., R. Co. v. Viney* (Tex. Civ. App.), 30 S. W. 252. And see case cited to preceding paragraph.

If the passenger is injured by sudden jerks of the train which do not allow him a reasonable time to alight safely, then there is a failure on the part of the carrier's servants to exercise the extraordinary care and diligence due the passenger. *Central R. Co. v. Whitehead*, 74 Ga. 441.

In *St. Louis, etc., R. Co. v. Byers* (Tex. Civ. App.), 69 S. W. 1009, affirmed in 97 Tex. 645, no op., it was held that the defendant company was guilty of negligence in not stopping its train a reasonable length of time for passengers to alight, and in starting its train while passengers were on the platform attempting to alight.

In *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179, 70 S. W. 335, affirmed in 97 Tex. 636, no op., it was held that, the defendant was negligent in not stopping its train a sufficient length of time to allow the plaintiff and his wife to alight, and in starting it again with a jerk so violent as to cause her to be thrown against some part of the car and to injure her, without fault on the part of either plaintiff or his wife.

36. *Missouri Pac. R. Co. v. Foreman* (Tex. Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647 no op.

37. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187; *San Antonio, etc., R. Co. v. Dykes* (Tex. Civ. App.), 45 S. W. 758; *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App.), 51 S. W. 275; *St. Louis, etc., R. Co. v. Turner* (Tex. Civ. App.), 84 S. W. 1094, affirmed in 101 Tex. 656, no op.

A railroad must exercise high care for the safety of a passenger while alighting, and to back the car while the passenger is alighting, without waiting a reasonable time is actionable negligence, if injury results. *Van Cleve v. St. Louis, etc., R. Co.* (Mo. App.), 118 S. W. 116.

38. *Atchison, etc., R. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478, citing *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990, affirmed in 85 Tex. 431; *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Texas, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 26 S. W. 154; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, affirmed in 93 Tex. 674, no op.; *Gulf,*

is not sufficient to relieve the company from liability to a passenger injured by such negligence.³⁹ But in every case the negligence of the carrier must be the proximate cause of the passenger's injury.⁴⁰ It has been held that where a passenger was directed to alight by way of the third car forward of the one in which she was sitting as soon as the train stopped, it became the duty of the carrier to stop the train long enough to enable her, by the use of ordinary care and diligence, to go to the car to which she had been directed, and a failure to do so was a breach of duty entitling her to recover damages occasioned thereby.⁴¹ The circumstances that as a train approached the station and its speed was reduced, a passenger, with a view of getting off, left his seat and went to the rear platform of the passenger car, and closed the door after him, and that the conductor afterwards went to the front door or into the coach and, not seeing the passenger and his companion, supposed they had left the train and thereupon ordered the train to move on, did not, it has been held, relieve the carrier of liability for its failure to hold the train at the station for a time reasonably sufficient to enable the passenger to alight, in consequence of which he was compelled to alight some five or six hundred yards from the station, sustaining injuries from which he died.⁴² But in a case in which it appeared that plaintiff, while asleep, was carried by the station at which he had intended to alight and for which he had a ticket to the next station, which was a small station located in the woods at a point where there was a branch track or crossing, but where no people lived, and at which no agent was kept, although trains were required to be stopped there and the time of their arrival registered; that the conductor had no passengers on board for that station; that plaintiff, without notifying the trainmen that he wished or intended to get off at that place, went to the platform at the rear of his car, stepped down on the steps, jumped off on the side opposite to the station building, slipped and fell under the train just as it was started and was injured, it was held that it was proper to direct a verdict for defendant.⁴³

etc., *R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128.

In *Galveston, etc., R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699, affirmed in 102 Tex. 582, no op., the court held that for a common carrier, without giving its passengers time to alight, to suddenly place its train in motion knowing at the time that one of its female passengers was in the act of stepping therefrom, so clearly showed the absence of that high degree of care due from such a carrier to its passenger as to make its negligence as a matter of law. Citing *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 76 S. W. 764, affirmed, no op.; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77, affirmed in 97 Tex. 628, no op.

Though it would ordinarily be negligence for railway company after stopping at a station for a passenger to alight to again put the train in motion before a sufficient and reasonable time to leave the train has elapsed; yet if after the lapse of such reasonable time the train is again put in motion without giving signal of an intention to move, by whistle or otherwise, such act would not be negligence, per se. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

Evidence held to show negligence on part of carrier.—*Texas Mid. Railroad v. Ritchey*, 108 S. W. 732, 49 Tex. Civ. App. 409; *Texas, etc., R. Co. v. Miller*, 79 Tex.

78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Houston, etc., R. Co. v. Harris*, 70 S. W. 335, 30 Tex. Civ. App. 179; *St. Louis, etc., R. Co. v. Turner* (Tex. Civ. App.), 84 S. W. 1094, affirmed in 101 Tex. 656, no op.; *St. Louis, etc., R. Co. v. Byers* (Tex. Civ. App.), 69 S. W. 1009.

39. Ringing bell insufficient.—*Texas, etc., R. Co. v. Bryant* (Tex. Civ. App.), 26 S. W. 167.

40. Carrier liable only where neglect of duty proximate cause of injury.—A railroad company, negligently failing to stop its train a reasonable length of time for its passengers to disembark, and to provide reasonable facilities for that purpose, is not liable for injuries sustained by a boy four years old, who, after the train had started, was put off by a passenger, where the act of such passenger was not the probable result of defendant's negligence. *Texas, etc., R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347.

41. Smith v. Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483.

42. Louisville, etc., R. Co. v. Mask, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564.

43. Nichols v. Chicago, etc., R. Co., 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304.

Passenger Alighting at Intermediate Stations.—On the ground that a railroad company owes the duty of allowing a reasonable time to alight from its trains to any passenger who wishes to do so, it has been held that the fact that a passenger gets off at an intermediate station, instead of at the station called for by this ticket, without informing the conductor of his intention to alight, does not necessarily prevent a recovery for injuries received in consequence of the train not being held long enough for him to get off,⁴⁴ and it is immaterial if the agent of the company sold the passenger a ticket to some other station than that which he called for and to which he was going.⁴⁵ But very likely the facts that a passenger has a ticket to a station farther on, and the conductor has not been informed and does not know of his intention to alight at an intermediate station, should be taken into consideration by the jury in determining whether the company was negligent in failing to hold the train at such intermediate station for a time sufficient to enable him to alight.⁴⁶

Liability for Injury to Passenger by Collision While Alighting.—For injuries sustained by reason of the running of a switch engine against a car from which plaintiff attempted to alight, plaintiff may recover, if the collision occurred before he had reasonable time to alight.⁴⁷

Liability of Carrier after Allowance of Proper Time to Alight.—It is only necessary for a carrier to show that it stopped the train a reasonably sufficient length of time to allow the passenger to alight. The carrier need not show that the passenger's failure to alight was caused by a failure on his part to use reasonable dispatch,⁴⁸ for a carrier which stops its train at a station for a length of time to enable passengers, in the exercise of ordinary dispatch, to alight, is not negligent in starting the train, unless it knows or has reason to believe that a passenger is attempting to alight.⁴⁹ Nor is a carrier liable for carrying a passenger beyond his destination in such a case.⁵⁰

§ 2466. Allowing Time to Board Street Car.—When a street car is stopped for the purpose of taking on passengers the car should not be started

44. *Waltons v. Pennsylvania R. Co.* (Pa.), 40 Pa. Super. 252; *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App.), 51 S. W. 275.

45. **Mistake of ticket agent.**—*Waltons v. Pennsylvania R. Co.*, 40 Pa. Super. Ct. 252.

46. See *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App.), 51 S. W. 275.

47. **Liability for collision.**—*East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367. See, also, post, "Collisions," §§ 2541-2550.

48. **Liability after allowance of proper time.**—*St. Louis, etc., R. Co. v. Rose* (Tex. Civ. App.), 93 S. W. 1105.

49. *St. Louis, etc., R. Co. v. Haynes* (Tex. Civ. App.), 86 S. W. 934; *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. 237. See post, "Notifying Passengers of Starting of Train," § 2478.

In an action for injuries to a passenger in attempting to alight, an instruction that if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to

alight without the knowledge of defendant's employees, and was injured in such attempt, she was not entitled to recover, was improperly refused. *Galveston, etc., R. Co. v. Mathes* (Tex. Civ. App.), 73 S. W. 411.

In an action for injuries received in getting off a car after it started to leave the station at which plaintiff wished to alight, it is error to refuse to charge that, if the train stopped long enough for a passenger to get off, the person in charge of the train would have a right to start it, unless he knew that some one desired to get off, where the jury may have understood that, though the train stopped a reasonable length of time, plaintiff was entitled to recover, if she was careful in her attempt to get off. *Texas, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 26 S. W. 154.

Starting car while passenger known to be alighting.—*Memphis St. R. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713; *Railroad v. Mitchell*, 98 Tenn. (14 Pickle) 27, 40 S. W. 72.

50. *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187; *St. Louis, etc., R. Co. v. Rose* (Tex. Civ. App.), 93 S. W. 1105.

before the passengers have had a reasonable time to board the car.⁵¹ If a person while exercising reasonable care is injured while boarding a street car by its sudden starting, and the servants in charge do not exercise the highest practical degree of care in starting the car, the company is liable for the injuries sustained.⁵² Where a passenger is injured in attempting to board a street car, the carrier is liable, in the absence of contributory negligence, if its servants in charge of the car know or should know that the plaintiff intends to take passage and do not afford him a reasonable opportunity to do so safely.⁵³ Thus, it has been held where a street car was suddenly, and without warning, backed upon the plaintiff as she was walking along the track in approaching the car to get on, that the carrier was liable for the injury.⁵⁴ It is negligence to move a street car at all before a passenger has reasonable opportunity to reach the platform; but, if he has such opportunity, the company is not liable unless the car is started with an unusual jerk, or unless the passenger be feeble, etc.⁵⁵ Even though a passenger is not as prompt in boarding a car as he should be, still, if before the car has started, he attempts to board, he may recover for injuries received in consequence of the sudden starting of the car; if the employees in control of the car have knowledge, or in the proper discharge of their duties, ought to have knowledge, of his presence.⁵⁶ Such questions are for the jury to decide.⁵⁷ This duty is, of course, equally incumbent upon ele-

51. *Delaware*.—*Reiss v. Wilmington City R. Co.* (Del.), 67 Atl. 153; *Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793; *Coyle v. People's R. Co.* (Del.), 7 Pen. 454, 80 Atl. 638; *Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040; *Butler v. Wilmington City R. Co.*, 2 Boyce's (25 Del.) 262, 78 Atl. 871.

Illinois.—*North Chicago St. R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958, 58 Am. & Eng. R. Cas. 230.

Maryland.—*Central R. Co. v. Smith*, 74 Md. 212, 21 Atl. 706, 48 Am. & Eng. R. Cas. 60.

Massachusetts.—*Rand v. Boston Elevated R. Co.*, 198 Mass. 569, 84 N. E. 841.

Michigan.—*Formiller v. Detroit United Railway*, 164 Mich. 653, 130 N. W. 347.

Minnesota.—*Steeg v. St. Paul City R. Co.*, 50 Minn. 149, 52 N. W. 393, 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379; *Sahlgaard v. St. Paul City R. Co.*, 48 Minn. 232, 51 N. W. 111.

Missouri.—*Bertram v. People's R. Co.*, 154 Mo. 639, 55 S. W. 1040; *Olfermann v. Union Depot R. Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; *Brady v. Springfield Tract. Co.* (Mo. App.), 124 S. W. 1070.

Nebraska.—*Omaha, etc., R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007.

New York.—*Black v. Brooklyn City R. Co.*, 108 N. Y. 640, 15 N. E. 389, 1 Silvernail Ct. App. 580, 34 Am. & Eng. R. Cas. 526; *Maher v. Central Park, etc., R. Co.*, 67 N. Y. 52, affirming 29 N. Y. Super. Ct. 155; *Wolfskiel v. Sixth Ave. R. Co.*, 38 N. Y. 49.

Pennsylvania.—*Walters v. Philadelphia Tract. Co.*, 161 Pa. 36, 28 Atl. 941.

It is the duty of the employees of a street surface railroad company to give

intending passengers a reasonable opportunity to get on the car. *Masterson v. Crosstown St. R. Co.*, 94 N. E. 1086, 201 N. Y. 499, reversing judgment in 120 N. Y. S. 1134, 136 App. Div. 908.

52. *Wellman v. Metropolitan St. R. Co.*, 219 Mo. 126, 118 S. W. 31.

53. *Johnston v. New York City R. Co.*, 104 N. Y. S. 1039, 120 App. Div. 456.

54. *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128.

55. *Samuels v. Louisville R. Co.*, 151 Ky. 90, 151 S. W. 37. See *Louisville R. Co. v. Pulliam*, 30 Ky. L. Rep. 1325, 101 S. W. 295.

In an action for injuries to a street car passenger caused by the sudden starting of the car, an instruction that if the passenger, after boarding the car in safety, fell by reason of the ordinary movements of the car in starting, a verdict must be rendered for the company, was not erroneous, for, if the ordinary and usual movements of the car in starting caused the passenger to fall, the company was not liable. *Howard v. Louisville R. Co.*, 105 S. W. 932, 32 Ky. L. Rep. 309.

A passenger injured by the starting of a street car can not recover unless the car was started in a violent, unusual, or reckless manner. *Louisville R. Co. v. Wilder*, 136 S. W. 892, 143 Ky. 436.

56. *Cohen v. West Chicago, etc., R. Co.*, 9 C. C. A. 223, 60 Fed. 698.

57. In an action for injuries to a passenger as she was boarding a street car, by the sudden starting thereof before she had gained the platform, whether the car was started too soon and whether the motorman was negligent in starting the car as he did held for the jury. *Lacour v. Springfield St. R. Co.*, 85 N. E. 868, 200 Mass. 34.

vated railways carrying passengers.⁵⁸

When Duty Arises.—The duty of a street car company to give a person a fair and reasonable chance to get aboard its car does not arise until the car has been brought to a stop or the person has been invited to board it.⁵⁹ And whenever and wherever street railway companies stop their cars, and they are so equipped as to indicate that they are ready to receive passengers, such indication is an invitation to any one desiring to become a passenger to enter.⁶⁰ If he desires to board such car at an unusual place and indicates his desire by an appropriate signal, and the signal be recognized and the car stopped or checked up to permit him to enter, the assent of the operator is again manifest.⁶¹ But, where a car stops or slows down at an unusual place by reason of the exigencies of city traffic, or as it approaches a crossing, and a person attempts to enter the car without the motorman or conductor knowing it, and in his effort to do so obtains an insecure foothold, and is thrown by the sudden start of the car, the railway company is not liable for his injuries, inasmuch as the person injured had not acquired the rights of a passenger.⁶² And the fact that a car approaching a crossing slows down after a person has signaled it to stop is not necessarily an invitation to such person to board the car, the motorman being bound to keep the car under control as it approaches the crossing.⁶³ If the passenger attempts to step on the platform, and is thrown down and injured by a sudden acceleration of speed, he is not entitled to recover, unless the motorman or conductor knows that he is in the act of boarding the car, or that the place where he attempts to board it is a usual stopping place.⁶⁴ But if street cars were in the habit of stopping on signal at a certain place, the failure to do so, resulting in injury to the person signaling, would constitute negligence.⁶⁵

§ 2467. Allowing Time to Alight from Street Car.—When a street car has been stopped for the purpose of setting down passengers, the car should not be started, or moved either way, until the passengers have been allowed a reasonable time to get off in safety,⁶⁶ and any movement of the street car after

58. *McKenna v. North Hudson County R. Co.*, 64 N. J. L. 106, 45 Atl. 776.

59. **When duty arises.**—*Schwartz v. New York City R. Co.*, 105 N. Y. S. 1, 55 Misc. Rep. 214; *Blair v. Philadelphia Rapid Transit Co.*, 36 Pa. Super. Ct. 319.

If a proposed passenger takes a stand at a point where a street car usually stops for passengers, and the car stops there, it is the duty of the conductor to give the passenger a reasonable time to get on the car safely. *Donnelly v. Buffalo, etc., Tract. Co.*, 40 Pa. Super. Ct. 110.

60. **When invitation exists.**—*Robinson v. Helena, etc., R. Co.*, 38 Mont. 222, 99 Pac. 837.

61. *Blair v. Philadelphia Rapid Transit Co.*, 36 Pa. Super. Ct. 319.

62. *Blair v. Philadelphia Rapid Transit Co.*, 36 Pa. Super. Ct. 319.

63. **Slowing down.**—*Howard v. Forty-Second St., etc., R. Co.*, 110 N. Y. S. 125, 125 App. Div. 776.

64. *Gomez v. New York City R. Co.* (App. Term), 105 N. Y. S. 108.

65. *Trieber v. New York, etc., R. Co.*, 119 N. Y. S. 493, 134 App. Div. 661, order affirmed in 94 N. E. 1099, 201 N. Y. 520.

66. **United States.**—*Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284, 58 Am. & Eng. R. Cas. 380.

Alabama.—*North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; *Birmingham R., etc., Co. v. McGinty*, 158 Ala. 410, 48 So. 491.

California.—*Wheaton v. North Beach, etc., R. Co.*, 36 Cal. 590.

Colorado.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

Delaware.—*Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793; *Butler v. Wilmington City R. Co.*, 2 Boyce's (25 Del.) 262, 78 Atl. 871; *Reiss v. Wilmington City R. Co. (Del.)*, 67 Atl. 153.

Georgia.—*West End, etc., St. R. Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324.

Illinois.—*Chicago, etc., R. Co. v. Mills*, 105 Ill. 63, 11 Am. & Eng. R. Cas. 128; *Chicago, etc., R. Co. v. Mumford*, 97 Ill. 560, 3 Am. & Eng. R. Cas. 312.

Indiana.—*Indianapolis Tract., etc., Co. v. Miller*, 43 Ind. App. 717, 88 N. E. 526.

Louisiana.—*Boikens v. New Orleans, etc., R. Co.*, 48 La. Ann. 831, 19 So. 737; *Conway v. New Orleans, etc., R. Co.*, 46 La. Ann. 1429, 16 So. 362; *Wardle v. New Orleans City R. Co.*, 35 La. Ann. 202, 13 Am. & Eng. R. Cas. 60; *Howell v. St. Charles St. R. Co.*, 22 La. Ann. 603.

Michigan.—*Lacas v. Detroit City R. Co.*, 92 Mich. 412, 52 N. W. 745; *Kirchner v. Detroit City R. Co.*, 91 Mich. 400, 51 N.

stopping to discharge a passenger in obedience to an authorized signal prior to expiration of a reasonable time is negligence, and in violation of the implied contract safety to carry and discharge him, imposed upon the carrier by law,⁶⁷ and where a passenger, owing to such negligent movement, is injured from any cause whatsoever, the carrier is liable.⁶⁸ This rule must also be observed by elevated railways,⁶⁹ and also interurban railways.⁷⁰ If those in charge of a

W. 1059; *Britton v. Street R. Co.*, 90 Mich. 159, 51 N. W. 276; *Werbowsky v. Fort Wayne, etc., R. Co.*, 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120; *Gardner v. Detroit St. R. Co.*, 99 Mich. 182, 58 N. W. 49.

Minnesota.—*Cooper v. St. Paul City R. Co.*, 54 Minn. 379, 56 N. W. 42, 58 Am. & Eng. R. Cas. 598; *Piper v. Minneapolis St. R. Co.*, 52 Minn. 269, 53 N. W. 1060.

Missouri.—*Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *Westerfelt v. St. Louis Transit Co.*, 222 Mo. 325, 121 S. W. 114; *Johnson v. St. Joseph R., etc., Co.* (Mo. App.), 128 S. W. 243; *Kinyoun v. Metropolitan St. R. Co.* (Mo. App.), 134 S. W. 15; *Jones v. Springfield Tract. Co.*, 137 Mo. App. 408, 118 S. W. 675.

Montana.—*Lehane v. Butte Elect. R. Co.*, 37 Mont. 564, 97 Pac. 1038.

Nebraska.—*Omaha, etc., Bridge Co. v. Levinston*, 49 Neb. 17, 67 N. W. 887.

New York.—*Mulhado v. Brooklyn, etc., R. Co.*, 30 N. Y. 370; *Masterson v. Cross-town St. R. Co.*, 94 N. E. 1086, 201 N. Y. 499, reversing judgment, 120 N. Y. S. 1134, 136 App. Div. 908.

North Carolina.—*Asbury v. Charlotte Elect. R., etc., Co.*, 125 N. C. 568, 34 S. E. 654; *Morrison v. Charlotte Elect. R., etc., Co.*, 123 N. C. 414, 31 S. E. 720; *Cawfield v. Asheville St. R. Co.*, 111 N. C. 597, 16 S. E. 703; *Kearney v. Seaboard, etc., R. Co.*, 158 N. C. 521, 74 S. E. 593.

Pennsylvania.—*Fairmount, etc., R. Co. v. Stutler*, 54 Pa. 375, 93 Am. Dec. 714.

Wisconsin.—*Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278, 18 N. W. 17, 16 Am. & Eng. R. Cas. 330.

A street railroad company is bound to stop its cars and wait a reasonable time for passengers to get off and to use all reasonable care to secure their safety, but it is not an insurer of safety. *File v. Wilmington City R. Co.* (Del.), 80 Atl. 623.

A street car company must stop its cars a reasonable time for passengers to alight at its usual stopping places; failure to do so being negligence. *Freeman v. Wilmington, etc., Tract. Co.* (Del.), 80 Atl. 1001.

An instruction is proper which tells the jury that if they believe from the evidence that the plaintiff signaled to the conductor to stop the car, that the car was stopped, and that the plaintiff while the car was at a standstill started to get off,

and while she was in that act, without notice to her, the car, at the signal of the conductor, was started with a jerk before she had time to alight, and that she did not have a reasonable opportunity to alight before the car was so started, and that by reason thereof she was thrown down and injured, etc., that the defendant was liable if they further believed that at the time plaintiff was in the exercise of due care for her own safety. *Chicago City R. Co. v. Crauf*, 136 Ill. App. 66, judgment affirmed, *Crauf v. Chicago City R. Co.*, 85 N. E. 235, 235 Ill. 262.

That a street car stopped in obedience to the signal of a passenger who desired to alight, and that while she was attempting to alight, while the car was standing still, without notice to her and before she had reasonable opportunity to alight and at the conductor's signal, the car started with a jerk, causing her injury, shows that the company was negligent as a matter of law. *Crauf v. Chicago City R. Co.*, 85 N. E. 235, 235 Ill. 262, affirming judgment *Chicago City R. Co. v. Crauf*, 136 Ill. App. 66.

A street railway company was liable for injuries to a passenger while alighting at a usual stopping place which had been announced by the conductor caused by the motorman negligently starting the car. *Louisville, etc., Tract. Co. v. Leaf*, 40 Ind. App. 214, 79 N. E. 1066.

It is negligence to start a street car while a passenger is alighting therefrom at the express or implied invitation of the carrier. *Burke v. Bay City Tract., etc., Co.*, 110 N. W. 524, 147 Mich. 172.

67. *Monroe v. United R. Co.* (Mo. App.), 133 S. W. 645.

68. Where a passenger received injuries while alighting from a car, owing to negligence in operating the car, by slipping on snow and ice in the street, and was run over by the car, a street railroad is liable therefor though a city is responsible for the existence of the snow and ice. *Ward v. Chicago City R. Co.*, 86 N. E. 1111, 237 Ill. 633.

69. *Stevens v. Kansas City Elevated R. Co.*, 126 Mo. App. 619, 105 S. W. 26; *Baker v. Manhattan R. Co.*, 118 N. Y. 533, 23 N. E. 885; *Ferry v. Manhattan R. Co.*, 118 N. Y. 497, 23 N. E. 822, 44 Am. & Eng. R. Cas. 331, affirming 54 N. Y. Super. Ct. 325.

70. *Interurban railways*.—*Toledo, etc., R. Co. v. McFall*, 8 O. C. C., N. S., 271, 18-28 O. C. D. 362.

street car know or have reason to believe that a passenger is about to alight, and with such knowledge permit the car to be started so as to cause him, while alighting, to be thrown down and injured, the company is liable for the injury if he is free from fault contributing to the injury.⁷¹ They must exercise such care as would be exercised by a careful and skillful man, under the same circumstances, to hold the car stationary.⁷² And where a passenger indicates to a conductor a desire to leave a car, though in the middle of the block, and the conductor, understanding the request, indicates his assent, and the car stops or slows down, so that the passenger, acting as a reasonably prudent person, attempts to alight, and while so doing is thrown off by a sudden increase in speed, it is negligence.⁷³ A passenger on a street car is entitled to this protection even although the car is stopped for some purpose other than that of allowing passengers to alight.⁷⁴ And since it is the duty of those in charge of a street car which has been stopped at a regular stopping place, to see and know whether persons are getting on or off by the regular and usual ways before the car is started ⁷⁵ the fact that a passenger, who is injured by the premature starting of the car while alighting, has made no special request to be allowed to get off, does not of itself relieve the carrier from liability; a passenger who attempts to alight from a street car while other passengers are getting off, and is injured by reason of the negligent starting of the car, may recover for the injuries received, although the car was not stopped at his instance, and although he did not ask or obtain permission from those in charge of the car to alight.⁷⁶ Possibly, however, the failure of a passenger to signify an intention of alighting may make a case for the jury on the question of contributory negligence.⁷⁷

Ordinance Designating Stopping Place.—Though a city ordinance requires street cars to stop on a certain side of a street to receive and discharge passengers, the company being accustomed to stop elsewhere, it is liable for injuries to a passenger from the negligent starting of the car while she is alighting at that place.⁷⁸

71. *El Paso Elect. R. Co. v. Ruckman*, 49 Tex. Civ. App. 25, 107 S. W. 1158.

Thus, it is held that if the employees of a traction company in charge of a car know that a passenger is in the act of alighting or preparing to alight when the car shall reach a proper place for a passenger to alight, then it is negligence suddenly to start the car forward before the passenger has alighted. *Crotzer v. Freeport R., etc., Co.*, 150 Ill. App. 470.

It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of alighting therefrom. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

A street car conductor, who starts his car at a time when he knows a passenger is alighting, is negligent as matter of law. *Jirachek v. Milwaukee Elect. R., etc., Co.*, 121 N. W. 326, 139 Wis. 505.

72. *Gardner v. Metropolitan St. R. Co.* (Mo. App.), 152 S. W. 98.

If a street car comes to full stop for any purpose and a passenger is in the act of alighting, it is negligence for the conductor to start the car before such passenger has had a reasonable opportunity to get off safely. *Ashtabula Rapid Transit Co. v. Holmes*, 67 O. St. 153, 65 N. E. 877.

73. *Cohen v. Sioux City Tract. Co.*, 141 Iowa 469, 119 N. W. 964.

A street railroad is required to bring the car to a complete stop, and hold it stationary until the departing passengers, in the exercise of reasonable care, may accomplish their departure in safety. *Bell v. Central Elect. R. Co.*, 103 S. W. 144, 125 Mo. App. 660.

74. *Patterson v. Omaha, etc., Bridge Co.*, 90 Iowa 247, 57 N. W. 880.

75. See *infra*, "Duty to See Whether Passengers Have Gotten on or Off," §§ 2472-2474.

76. *Chicago, etc., R. Co. v. Mills*, 105 Ill. 63, 11 Am. & Eng. R. Cas. 128. See *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192; *Cawfield v. Asheville St. R. Co.*, 111 N. C. 597, 16 S. E. 703.

Where a street car stopped at a place where it was customary for it to discharge passengers it was the duty of the conductor, who saw that a passenger was alighting, to detain the car until she had alighted, irrespective of the reason for the stop. *Parks v. St. Louis Transit Co.*, 96 S. W. 426, 119 Mo. App. 445.

77. *Rathbone v. Union R. Co.*, 13 R. I. 709, 13 Am. & Eng. R. Cas. 58.

78. *Parks v. St. Louis Transit Co.*, 119 Mo. App. 445, 96 S. W. 426.

§§ 2468-2469. Allowing Time to Reach Place of Safety—§ 2468. In General.—Undoubtedly a passenger getting on or off a carrier's vehicle must be afforded a reasonable time to reach a place of safety before the vehicle is started.⁷⁹ In such cases the carrier may be liable as a matter of law.⁸⁰ It is the duty of those in charge of the car or train to use reasonable diligence to ascertain if passengers are safely on before signaling to go ahead.⁸¹ And in some cases it is held that those in charge of a street car should exercise a high degree of care to ascertain whether a passenger has reached a place of safety before putting the car in motion.⁸² This duty is a continuing one from the initial attempt of the passenger to board the car until final accomplishment.⁸³ The time of stoppage should be such as to enable the passenger to reach a place of safety, either on the street or in the car before it is started, and the company is liable for injuries to a passenger caused by a disregard of the duty.⁸⁴

79. *Formiller v. Detroit United Railway*, 164 Mich. 653, 130 N. W. 347; *Keeley v. City Elect. R. Co. (Mich.)*, 133 N. W. 1085; *Brady v. Springfield Tract. Co. (Mo. App.)*, 124 S. W. 1070; *Miller v. Metropolitan St. R. Co.*, 125 Mo. App. 414, 102 S. W. 592.

The conductor of a street car who is aware that a person is attempting to board the car, or with his consent is about to do so, should not direct the starting of the car, if stationary, nor an increase of speed of the car, if moving, nor should he give the two-bell signal, if that would be understood by the motorman to mean that there was no longer any reason for not putting on power and increasing speed. *Orth v. Saginaw Valley Tract. Co.*, 162 Mich. 353, 127 N. W. 330.

A street car motorman opened the folding gate on the front platform for passengers to enter. A passenger, in the act of stepping on the platform, took hold of the gate just as the motorman closed it, catching her thumb and injuring it. Held, that the motorman having opened the gate to admit passengers, it was his duty to keep it open until plaintiff had had a fair opportunity to get into a position of safety. *Stevenson v. Joline*, 111 N. Y. S. 698, 127 App. Div. 181.

80. A street car stopped for the sole purpose of taking plaintiff as a passenger. He was incumbered with a heavy grip, and there was snow on the ground and car steps. The conductor was standing on the rear platform waiting for plaintiff to get on. Plaintiff had his grip in his right hand, and had hold of the railing with his left hand. When he had either one or both feet on the first car step, and before he had time to reach the platform, the conductor started the car, and he was thrown to the ground. It did not appear that his fall was caused by any cause except the starting of the car. Held, that the conductor was negligent as a matter of law. *Beattie v. Detroit United Railway*, 122 N. W. 557, 158 Mich. 243.

81. *Rand v. Boston Elevated R. Co.*, 198 Mass. 569, 84 N. E. 841.

Where the motorman and conductor of

a street car which a passenger had just boarded should have foreseen that it would be dangerous to start the car before the passenger had reached a safe place therein because of the proximity to the car of a wagon going in the same direction, it is negligence to so start the car. *Lockwood v. Boston Elevated R. Co.*, 86 N. E. 934, 200 Mass. 537, 22 L. R. A., N. S., 488.

82. *Jerome v. United R. Co. (Mo. App.)*, 134 S. W. 107.

83. **Continuing duty.**—*Formiller v. Detroit United Railway*, 164 Mich. 653, 130 N. W. 347.

84. **Time to reach place of safety.**—*Beattie v. Detroit United Railway*, 122 N. W. 557, 158 Mich. 243; *Akersloot v. Second Ave. R. Co.*, 4 Silvernail Ct. App. 71, 131 N. Y. 599, 30 N. E. 195, 52 Am. & Eng. R. Cas. 553, 15 L. R. A. 489; *Holmes v. Allegheny Tract. Co.*, 153 Pa. 152, 25 Atl. 640; *Gainesville Mid. Railway v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007.

A train which carried both freight and passengers was stopped at the platform of the station. The passenger coach did not reach the platform, which in height was nearly even with the floor of the ordinary railroad coaches. The conductor requested plaintiff to enter by way of the baggage car, which stood against the platform, and from there to walk to the rear end of the train to the ladies' car, which was the second from the baggage coach. After assisting her from the platform and when she had begun to walk to the rear the conductor gave the usual signal to start the train. At the moment she was stepping from that car to the next, unassisted by any one, the train moved with a jerk, causing her a misstep, in consequence of which she lost her balance and fell to the ground between the platforms of the adjoining cars and was seriously injured. It was held that the fact showed great negligence and wanton indifference to the safety of passengers and that plaintiff was entitled to recover damages for the injury received. *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514.

And the duty of a street car company to allow passengers a reasonable time to get off its cars is not discharged until the passenger, in the exercise of due diligence, is free of the car.⁸⁵ Though a passenger boards a "pay as you enter" car by the passageway intended for the egress of passengers, the conductor, causing the passenger to stop before reaching a place of safety after signaling the car to start, thereby imperiling the passenger's safety, and causing her to be thrown from the car, is guilty of actionable negligence,⁸⁶ there being no emergency to relieve the employee from a charge of negligence.⁸⁷

§ 2469. Time to Secure Seat.—There is some slight authority to the effect that this duty to allow passengers to reach a place of safety requires that the passenger be allowed a reasonable time to secure a seat in the vehicle.⁸⁸ It is held that, under the Georgia Code, a carrier is bound not to start its train until a passenger has a reasonable time to get from the platform of the car to his seat.⁸⁹ But, as a general rule, a train or street car may be started, in a proper manner, when a passenger has fairly entered the vehicle and without waiting for him to reach a seat, unless there is some special reasons why that should not be done,⁹⁰ and in such a case the passenger can recover only in case

85. *Finn v. Valley, etc., R. Co.*, 86 Mich. 74, 48 N. W. 696.

86. *Boice v. Des Moines City R. Co.* (Iowa), 133 N. W. 657.

87. A passenger attempted to enter a street car by the passageway intended for the egress of passengers, and the conductor told her to stop after he had given the signal for the starting of the car. Held, that there was no emergency relieving the conductor from the charge of negligence, if he did what a reasonably careful person under the circumstances would not have done. *Boice v. Des Moines City R. Co.* (Iowa), 133 N. W. 657.

88. *International, etc., R. Co. v. Cope-land*, 60 Tex. 325; *Gulf, etc., R. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325.

89. *Georgia Civil Code*, §§ 2268, 2270.—*Gainesville Mid. Railway v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007.

90. *Louisville, etc., R. Co. v. Hale*, 102 Ky. 600, 19 Ky. L. Rep. 1651, 44 S. W. 213. 10 Am. & Eng. R. Cas., N. S., 73, 42 L. R. A. 293; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Herbich v. North Jersey St. R. Co.*, 47 Atl. 427, 65 N. J. L. 381. See post, "Duty to See Whether Passengers Have Gotten On or Off," §§ 2472-2474.

Unless a passenger boarding a street car is crippled or under some disability, it is not negligence to start the car before he has obtained a seat. *Lexington R. Co. v. Britton* (Ky. App.), 114 S. W. 295.

A carrier is not bound to give a passenger with her three-year old daughter reasonable time after getting into the car to secure a seat before starting the train. *Illinois Cent. R. Co. v. Ball*, 150 S. W. 668, 150 Ky. 531.

A carrier is liable for injuries from a fall received by a woman who with a baby in her arms boarded a street car, which, before she reached a seat, started, only if

she required more than ordinary care, and if that fact could, by the exercise of the highest degree of care, have been discovered, and if, notwithstanding her condition and its knowledge, the carrier failed to allow her reasonable opportunity to take a seat before starting the car, and hence an instruction in substance telling the jury that, if her situation imposed upon the carrier the duty of exercising more than usual care, then she was entitled to recover, if the car was started before she was seated, was erroneous, placing too great a burden on the carrier. *Louisville R. Co. v. Wilder*, 136 S. W. 892, 143 Ky. 436.

Plaintiff, who was a robust woman weighing nearly 200 pounds, entered an electric street car at a regular stopping place, carrying in one hand an umbrella and a small hand bag. When she was fully upon the floor of the vestibule the conductor gave the starting signal, and as plaintiff was about stepping into the body of the car it started and she fell and was injured. Held, that there was nothing in her appearance to require the conductor to exercise special or unusual care, and that, under the settled rule in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give a starting signal after a passenger is fully and fairly upon the car, the conductor in such case was not chargeable with negligence which rendered the street railroad company liable for plaintiff's injury. *Boston Elevated R. Co. v. Smith*, 168 Fed. 628, 94 C. C. A. 84, 23 L. R. A., N. S., 890.

Street railway companies are not required to defer starting cars until all passengers are seated unless there is some special and apparent reason therefor. *Ottlinger v. Detroit United Railway*, 166 Mich. 106, 131 N. W. 528, 34 L. R. A., N. S., 225, Ann. Cas. 1912D, 578.

If the conductor of a street car should

the car is recklessly started.⁹¹ But while it is true, as a general proposition, that it is not negligence to start a train or street car before a passenger is seated, due care must be observed in putting the vehicle in motion before the passenger has been seated so as not to endanger the passenger, and if such care is not used the carrier is negligent.⁹² It may be laid down as a general proposition that where under the circumstances it is necessary for a passenger to reach a seat and be seated in order to be safe from danger when the car is to start, the car must stop until the passenger has been seated.⁹³ For instance, where it was known to the trainmen that a passenger boarding a train was a cripple, compelled to use a crutch and stick, it was held that the railway company was guilty of negligence in starting the train before she had reasonable time to enter the car and take her seat.⁹⁴ But the fact that a woman, who has the assistance of an escort, is encumbered with a number of children and is carrying a basket, is not sufficient to require the trainmen to delay starting the train until she is safely seated.⁹⁵ Nor does the fact that the passenger, who is accompanied by and is in the care of her parents, is an infant, call for the application of a different rule.⁹⁶

Mixed or Freight Train.—When a railroad company furnishes as the only means of transportation over its road a "mixed train" composed of a passenger coach and a number of freight cars, and when on account of the character and construction of such a train it can not start from a station, after stopping thereat, without its movement being attended with a jerk which may endanger the safety of those on board who are unseated, it becomes the duty of the company to use extraordinary diligence in protecting against such danger a passenger who has boarded the train, by stopping a sufficient length of time to give such passenger a reasonable opportunity to be seated. The company is, therefore, liable to the passenger for any injury he may sustain in consequence of its negligence in this particular.⁹⁷ On the other hand, it is the duty of the passenger in such a case to exercise ordinary care in obtaining a seat on the coach; and if the jolting of the train when starting was unavoidable, after it had stop-

have realized that a sudden starting of the car would throw down and injure a corpulent lady of fifty-seven years who was entering the car, and she was accordingly thrown down and injured, the railroad company was liable. *Benjamin v. Metropolitan St. R. Co.*, 151 S. W. 91, 245 Mo. 598.

^{91.} It is not the duty of operators of a street car to keep the car stationary until a passenger has seated himself, and a passenger injured while in the act of taking a seat, in consequence of the starting of the car, can not recover unless the car was recklessly started. *Birmingham R., etc., Co. v. Hawkins*, 44 So. 983, 153 Ala. 86, 16 L. R. A., N. S., 1077; *Howard v. Louisville R. Co.*, 105 S. W. 932, 32 Ky. L. Rep. 309; *Sauvan v. Citizens' Elect. St. R. Co.*, 197 Mass. 176, 83 N. E. 405.

A street car company, whose vehicle is started before incoming passengers have seated themselves, is liable if it is started so violently that they are injured. *Gabriel v. Metropolitan St. R. Co. (Mo. App.)*, 148 S. W. 168.

^{92.} *Minnesota.*—*Miller v. St. Paul City R. Co.*, 66 Minn. 192, 68 N. W. 862.

Missouri.—*Bertram v. People's R. Co.*, 154 Mo. 639, 55 S. W. 1040; *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251, 37 Am. & Eng. R. Cas.

206; S. C., 81 Mo. 325, 51 Am. Rep. 239, 21 Am. & Eng. R. Cas. 497, affirming 9 Mo. App. 478; *Miller v. Metropolitan St. R. Co.*, 125 Mo. App. 414, 102 S. W. 592.

Texas.—*Gulf, etc., R. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325.

Utah.—*Dickert v. Salt Lake City R. Co.*, 20 Utah 394, 59 Pac. 95.

In a case in which there was evidence tending to show that, before plaintiff had time to take a seat in the car which she had boarded, the train was started with a sudden and violent jerk, it was held that the question of defendant's negligence was properly submitted to the jury. *Sheffer v. Louisville, etc., R. Co.*, 22 Ky. L. Rep. 1305, 60 S. W. 403.

^{93.} **General statement.**—*Brady v. Springfield Tract. Co. (Mo. App.)*, 124 S. W. 1070.

^{94.} *Central, etc., R. Co. v. Holloway (Tex. Civ. App.)*, 54 S. W. 419.

^{95.} *Louisville, etc., R. Co. v. Hale*, 102 Ky. 600, 19 Ky. L. Rep. 1651, 44 S. W. 213, 10 Am. & Eng. R. Cas., N. S., 73, 42 L. R. A. 293.

^{96.} *Herbich v. North Jersey St. R. Co.*, 47 Atl. 427, 65 N. J. L. 381.

^{97.} **Mixed or freight train.**—*Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889.

ped a reasonable length of time to allow a passenger to be seated, an injury resulting in consequence of unnecessary delay of the passenger in obtaining a seat will be attributable to his fault, and the railroad company will not be liable therefor.⁹⁸

§ 2470. What Constitutes a Reasonable Time.—Whether a reasonable time has or has not been afforded passengers to get on or off the carrier's vehicle must depend upon all the circumstances of each case, as, for example, the number of passengers getting on or off, the age, sex and physical condition of the passengers, and the nature of the landing place.⁹⁹ For instance, a longer time would be required when there are many passengers to alight than when there are but few; in a dark night, with the landing place lighted, than when there is full light; at a difficult place to alight than where it is easy. And, as railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight.¹ The question as to what constitutes a reasonable time must, therefore, in nearly every case be left to the determination of the jury.² And, in determining the

98. Passengers corresponding duty.—*Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889.

99. Smitson v. Southern Pac. Co., 37 Ore. 74, 60 Pac. 907; *Simms v. South Carolina R. Co.*, 27 S. C. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571; *Southern R. Co. v. Mitchell*, 98 Tenn. (14 Pickle) 27, 40 S. W. 72; *Benson v. Wilmington City R. Co.*, 1 Boyce's (24 Del.) 202, 75 Atl. 793.

A very old and infirm woman was injured in alighting from defendant's train on which she had been a passenger. The train stopped the usual length of time, appeared to be a reasonable length of time for passengers to alight. Defendant's servants had no notice of the passenger's enfeebled condition, and though she claimed that the entrance of other passengers delayed her exit until the train had started, it appeared that these passengers were not directed or authorized to enter. Held, that defendant was not negligent in starting the train before the passenger alighted. *Nashville, etc., R. Co. v. Casey*, 56 So. 28, 1 Ala. App. 344.

It is the duty of a conductor, where a female passenger who is partially blind informs him of her infirmity and requests assistance in alighting at her destination, which he promises to give, to stop the train at such station a sufficient length of time to enable her without undue haste to leave the train in safety. *Southern R. Co. v. Hobbs*, 45 S. E. 23, 118 Ga. 227, 63 L. R. A. 68.

1. Keller v. Sioux, etc., R. Co., 27 Minn. 178, 6 N. W. 486.

So where a passenger attempting to board a train is obstructed by the presence of other passengers and compelled to wait on the step of the car, he may recover for injuries received by being knocked from the step by an obstruction

on the track, if the presence of the obstruction was owing to the failure of the carrier to exercise the degree of diligence which the law requires. *Georgia, etc., R. Co. v. Watkins*, 97 Ga. 381, 24 S. E. 34.

2. United States.—*McSloop v. Richmond, etc., R. Co.*, 59 Fed. 431.

Georgia.—*Killian v. Georgia R., etc., Co.*, 97 Ga. 727, 25 S. E. 384.

Illinois.—*Chicago, etc., R. Co. v. Dinsmore*, 162 Ill. 658, 44 N. E. 887, reversing 62 Ill. App. 473.

Kansas.—*Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768.

Kentucky.—*Louisville, etc., R. Co. v. Harmon*, 23 Ky. L. Rep. 871, 64 S. W. 640.

Pennsylvania.—*Moran v. Versailles Tract. Co.*, 188 Pa. 557, 41 Atl. 652; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 18 Atl. 759, 41 Am. & Eng. R. Cas. 154, 15 Am. St. Rep. 701.

Texas.—*Houston, etc., R. Co. v. Goodyear*, 28 Tex. Civ. App. 206, 66 S. W. 862; *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756.

Whether or not a passenger about to alight from a train and encumbered with hand-baggage or parcels was, under the circumstances, afforded by the company reasonable time and opportunity to leave the train in safety, is a question for determination by the jury and not by the judge. *Killian v. Georgia R., etc., Co.*, 97 Ga. 727, 25 S. E. 384.

In the absence of statute prescribing the time which the train shall stop at a station and of a statute providing that an omission on the part of the company to stop the train at a station for any particular length of time or for any purpose, is negligence, it is error to charge that it is negligence per se for a carrier to fail to stop the train a sufficient length

question, the jury may take into consideration, among other circumstances, the evident youth of the passenger,³ the passenger's advanced age and evident physical condition,⁴ unless the carrier's servants have no knowledge of the passenger's enfeebled condition,⁵ and the fact of the passenger being encumbered with packages or baggage,⁶ as well as the passenger's delay or negligence in taking advantage of his opportunity to enter or alight.⁷ And where a passenger was injured, while boarding an elevated railroad train, by being carried along between the train and a railing twelve inches from the train, and there was no evidence that the railing was defectively constructed, it was held that it was error to charge that, in determining whether the train was held a reasonable time to enable the passenger to get on, the jury had a right to consider whether the railing was reasonably safe.⁸ Applying the rule that the question as to whether the time is reasonable is for the jury, it has been held that the mere fact that a train is stopped the usual time is not sufficient to show

of time to allow a passenger to alight in safety, the question is one for the jury. *Central, etc., R. Co. v. McKinney*, 116 Ga. 13, 42 S. E. 229.

3. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479, 9 S. W. 467.

4. *Bertram v. People's R. Co.*, 154 Mo. 639, 55 S. W. 1040; *Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433, 4 S. W. 127.

As applied to a woman, aged seventy-six years and weighing two hundred pounds, the following instruction, taken as a whole, is not erroneous, to-wit: "It was the duty of defendant company to use all reasonable care and diligence for her safety while on and getting off of the train, and to give a reasonable time on arriving at the depot (her destination), to alight from the train in safety, and it was the duty of the company, or some agent or employee of defendant in charge of the train, to see that sufficient time was given for that purpose, and, if necessary, to assist her in making her exit." *Railroad v. Mitchell*, 98 Tenn. (14 Pickle) 27, 40 S. W. 72.

The persons in charge of a train are negligent, where, with knowledge, that a passenger boarding it is a cripple, compelled to use a crutch and stick, they start before she has reasonable time to enter the car and take her seat, thereby causing injury to her. *Central, etc., R. Co. v. Holloway* (Tex. Civ. App.), 54 S. W. 419, affirmed in 93 Tex. 726, no op.

5. *Nashville, etc., R. Co. v. Casey*, 1 Ala. App. 344, 56 So. 28.

The fact that a man was so old and feeble as to require the assistance of a conductor and others to enter one of its cars and be placed in a seat, coupled with his request to the conductor that the latter afford him sufficient time to alight, is notice to an interurban railway company which will render it liable for starting its car without affording him reasonable time to alight in safety. *Toledo, etc., R. Co. v. McFall*, 8 O. C. C., N. S., 271, 18-28 O. C. D. 362.

Where a passenger who, from sickness

or other cause, is unable to walk, requires assistance to get from the car, rendering necessary a longer delay at the station than usual, he should give timely notice of the facts to the conductor, in default of which the company will not be liable for carrying passenger a short distance beyond his station. *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478.

6. *Stegg v. St. Paul City R. Co.*, 50 Minn. 149, 52 N. W. 393, 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379; *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374, 34 Am. & Eng. R. Cas. 422; *Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351, 50 S. W. 613.

Where the carrier accepts upon its train a passenger encumbered with hand-baggage and parcels, it must have due regard for his condition in this respect when the time comes for him to leave the train and allow him a reasonable time, considering his condition, in which to alight. *Killian v. Georgia R., etc., Co.*, 97 Ga. 727, 25 S. E. 384.

7. **Delay or negligence.**—A train stopped at a station long enough for plaintiff and his family to pass from the front of the car, where they should have gotten on, to the rear platform, and to get on there. No reason was shown why they walked the whole length of the car and there was no evidence that they would not have had time to get safely seated had they got on in front. The testimony of all the witnesses but plaintiff's wife was that the train started slowly. No one saw plaintiff's wife fall, and she deposed before the trial that she did not know what caused her to fall from the train. At the trial she testified the train started off rapidly, and caused her to fall from the platform, but she was contradicted by her husband and brother and others. Held, that the evidence was sufficient to show negligence of the railway company. *Houston, etc., R. Co. v. Stewart*, 50 S. W. 580, 21 Tex. Civ. App. 33.

8. *Evans v. Interstate, etc., R. Co.*, 106 Mo. 594, 17 S. W. 489.

either negligence on the part of the passenger or due care on the part of the carrier.⁹ But where special findings of a jury showed that the train stopped three minutes, and nothing appeared from which the inference could reasonably be drawn that the train had not, in the ordinary and natural course of events, stopped a sufficient length of time to allow plaintiff to alight in safety, the court took judicial notice of the fact that, ordinarily, a stop of a passenger train for three minutes at a station, for the purpose of allowing passengers to get on and off the train, is reasonable and adequate, and refused to allow a judgment for plaintiff to stand.¹⁰

Allowance of Time for Alighting Passenger to Return for Baggage, Papers, Etc.—A railroad company does not perform its whole duty by stopping its train long enough for a passenger to alight. If he has so many bundles that he is required to return for the balance, and does so with reasonable dispatch, and with the knowledge of the conductor, the train should be held a reasonable time for him to alight with the balance.¹¹ And where a brakeman in charge of assisting passengers to alight, consented to a passenger's returning for a book, paper, etc., he should hold the train a sufficient length of time to enable the passenger to realight.¹²

§ 2471. Starting of Vehicle at Signal of Unauthorized Person.—A carrier, who is himself free from negligence, can not be held liable to a passenger who is injured by the premature starting of the vehicle in compliance with a signal which is given by an unauthorized person.¹³ But the fact that a

9. *Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768.

10. *Louisville, etc., R. Co. v. Castello*, 9 Ind. App. 462, 36 N. E. 299.

11. **Return for baggage.**—*Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351, 50 S. W. 613.

12. Plaintiff, after alighting from defendant's train at his destination, discovered that he had left his bankbook and papers on the seat, and on being assured by the brakeman, who was assisting passengers to alight, that he would have time to go back for the papers before the train started, went back, secured his package, and hurried to alight, and as he was attempting to do so the brakeman suddenly picked up his lantern and step box, and plaintiff fell or was knocked down and injured. It was the duty of the brakeman to assist passengers to alight, and signal the conductor when all the passengers for that station had got out of the car. Held, that plaintiff was still a passenger when injured, and though the carrier was not bound to hold the train in the first instance, the brakeman having granted plaintiff permission to re-enter the car, it was his duty to hold the train for a sufficient length of time to enable plaintiff to re-alight. *Hill v. St. Louis, etc., R. Co.*, 109 S. W. 523, 85 Ark. 529.

13. See *Ferry v. Manhattan R. Co.*, 118 N. Y. 497, 23 N. E. 822, 44 Am. & Eng. R. Cas. 331, affirming 54 N. Y. Super. Ct. 325.

There was no negligence of a street car company in the starting of a car, throwing a passenger who was alight-

ing, the starting signal, two bells, having been given, without authority, by another passenger, neither the motorman nor conductor having any reason to believe it would be so given, the motorman believing it was given by the conductor, the conductor instantly on hearing the signal calling to the motorman not to start, and the motorman then endeavoring to prevent the starting; the company, through its motorman and conductor, not being required to anticipate and take precautions against such an unauthorized signal. *Cary v. Los Angeles R. Co.*, 108 Pac. 682, 157 Cal. 599, 27 L. R. A., N. S., 764, 21 Am. & Eng. Ann. Cas. 1329.

Where a train was started when plaintiff was about to alight, in consequence of a signal to start being given by another passenger, and the plaintiff saw the act of the fellow passenger and remonstrated with him, but nevertheless alighted from the moving train, an instruction charging the carrier with liability for a failure to allow plaintiff a reasonable time to alight, without regard to whether the starting of the train was the act of defendant, was held to be erroneous. *Mississippi, etc., R. Co. v. Harrison*, 66 Miss. 419, 6 So. 319, 39 Am. & Eng. R. Cas. 449, 14 Am. St. Rep. 573.

A street railway company is not liable for injuries sustained by a passenger in alighting, where the signal to the motorman to start was given by another passenger. *Wagner v. New York City R. Co.* (App. Term), 107 N. Y. S. 807.

Where a passenger in boarding a car is injured as the result of the starting of the car on a signal by an unauthorized

signal to start is given by an unauthorized person does not exempt the carrier from liability, if the conductor or agents in charge, by the exercise of due care and diligence, can prevent the moving of the car and thereby prevent injury.¹⁴ Although a street railway company is not responsible for injuries resulting from the act of an intermeddler in the running of its cars, which its employees could not foresee and guard against, yet when such act of intermeddling consists in giving the signal to start the car in motion, and the conductor in charge, without seeing and knowing that a passenger has safely alighted before the car started, does not stop it as soon as can be, but allows it to continue in motion in obedience to the unauthorized signal, he will be held to have ratified and adopted the act of the intermeddler, and the company will be liable for the consequent injury as caused by an act of its employee's negligence.¹⁵ Where a passenger was injured, owing to the starting of the street car while she was alighting, the carrier was liable, though the signal to start was given by a passenger; the same passenger having previously given starting signals, which was known to the conductor, who at the time of the accident was paying no attention to the passenger, but was engaged in counting transfers.¹⁶ But although the third person may have done so previously, if the conductor has warned him not to do so again and has reasonable ground to think that the offense will not be repeated, the carrier will not be liable.¹⁷

§§ 2472-2474. Duty to See Whether Passengers Have Gotten On or Off—§ 2472. Difference between Obligation of Railroad and Street Railway Companies.—In one respect there is a marked distinction between the duties of ordinary railway companies in taking on and letting off passengers and those of street railway companies. In the case of an ordinary railway company, it is sufficient that passengers are allowed a reasonable time to board, or alight from, a train, and the law does not impose upon the carrier any duty to see and know that every passenger, who intends to do so, has gotten on or off; unless the carrier knows, or has good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed, and gotten on or off the train. But the duty of street railway companies is more onerous. It is not only the duty of the carrier by street cars to keep the car stationary for a time reasonably adequate to enable passengers to get on and off in safety, but he is required to see and know that they have in fact done so. This distinction is based upon the different conditions under which the two kinds of railways are operated.¹⁸ In the case of ordinary railroads, trains are run on schedules. They stop only at designated stations to receive and discharge passengers. The conductor knows in advance how many passengers are to alight at a given station. He may therefore determine with sufficient accuracy what would be a reasonable time for the train to stop to enable passengers for that station to alight, by the exercise of or-

passenger, the railway company is not liable for injuries sustained. *Cohen v. Philadelphia Rapid Transit Co.*, 77 Atl. 500, 228 Pa. 243.

14. *North Chicago St. R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958, 58 Am. & Eng. R. Cas. 230.

15. *Leavenworth Elect. R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

16. **Duty to anticipate act.**—*Blair v. Brooklyn, etc., R. Co.*, 126 N. Y. S. 468, 142 App. Div. 903.

17. In an action against a street railroad for injuries to a passenger through the sudden starting of the car while plain-

tiff was alighting therefrom, owing to the giving of the signal to start by another passenger, a boy about 14 years old, it appeared that on the boy's ringing the bell about a mile from the place of the accident the conductor at once warned him not to repeat the interference, which warning was observed until the point of accident was reached, though in traversing the intervening distance a number of stops were made to allow passengers to alight. Held, that plaintiff could not recover. *Fanshaw v. Norfolk, etc., Tract. Co.*, 61 S. E. 790, 108 Va. 300.

18. *Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

dinary diligence on their part. The law, therefore, imposes on him the duty of holding the train for such a reasonably sufficient time. It is not practicable for him to keep a watch upon all the exits from a train of cars. Not infrequently he has other things to do at stations where his train stops. The law, therefore, does not impose on him the duty of seeing and knowing that all of the passengers, intending to get on or off, have done so.¹⁹ But these reasons do not obtain with respect to the ordinary street railways. They have no stations, no regular stopping places, no schedules. The driver or conductor, can not know beforehand where any passenger intends to alight, or how many passengers desire to get off at any place where he is signaled to stop. When he is signaled to stop, he must then inform himself by looking and seeing as to how many of his passengers desire and intend to alight. Without this he can have no conception of the length of time the car should remain stationary. Having rendered his car immovable by applying the brakes, he has nothing else to do than to see who intends getting off, and to know that they are safely off before the car is again started. It is entirely practicable for him to do this. The only exits are under his immediate observation, and there is no other duty incumbent on him at the time to divert his attention from them and the alighting passengers.²⁰

§ 2473. Duty of Railroad Companies.—When the train of an ordinary railroad is brought to a standstill for a length of time reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part, there is no further duty resting upon the trainmen to see and know that every passenger who wishes to alight has done so, or that every person who wishes to take passage is safely on board.²¹ A carrier, having afforded a reasonable opportunity for passengers to alight and being without knowledge or reason to know of the perilous position of a passenger then attempting to alight, is entitled to act upon the presumption that passengers will exercise due care to avoid perilous positions,²² in the absence of something in the circum-

19. A conductor stopping at a regular station must hold the train a reasonably sufficient time to permit passengers to board, but his duty then ceases, unless he knows, or ought to know, that the movement of the train will probably result in injury. *Birmingham, etc., R. Co. v. Norris*, 59 So. 66, 4 Ala. App. 363.

20. *Alabama*.—*Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557; *Birmingham R., etc., Co. v. Lee*, 153 Ala. 79, 45 So. 292; *Birmingham Union R. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761.

Indiana.—*Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109.

Kansas.—*Leavenworth Elect. R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

21. *Alabama*.—*Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95; *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708.

Georgia.—*Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284.

Indiana.—*Lake Erie, etc., R. Co. v. Beals* (Ind. App.), 98 N. E. 453.

Iowa.—*Raben v. Central Iowa R. Co.*, 73 Iowa 579, 35 N. W. 645, 33 Am. & Eng. R. Cas. 520, 5 Am. St. Rep. 708.

Michigan.—*Michigan Cent. R. Co. v.*

Coleman, 28 Mich. 440.

Minnesota.—But compare *Keller v. Sioux, etc., R. Co.*, 27 Minn. 178, 6 N. W. 486.

Mississippi.—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478.

Missouri.—*Clothworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Straus v. Kansas, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384; *S. C.*, 86 Mo. 421, 27 Am. & Eng. R. Cas. 170.

North Carolina.—*Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544.

Wyoming.—*Chicago, etc., R. Co. v. Lampman*, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912 C, 788.

While a carrier's servants are bound to afford passengers a reasonable time to alight and must exercise reasonable care to ascertain whether persons are in the act of alighting before starting the train, they are not bound to know that all passengers intending to stop have alighted. *Louisville, etc., R. Co. v. Dilburn* (Ala.), 59 So. 438.

22. *Central, etc., R. Co. v. McNab*, 150 Ala. 332, 43 So. 222.

stances to cause them, in the exercise of reasonable diligence, to suspect that some one had not alighted, or was in the act of so doing, or was otherwise in a dangerous position if the train should start. And certainly a conductor is not bound to be on the lookout for passengers to get on board from both sides of the train when a platform has been provided for that purpose on one side only, and he is not at fault for not discovering a passenger who attempts to get on from the wrong side.²³ But possibly this rule has no application where a train, instead of being stopped, is merely slowed up to take on or set down passengers. It has been said, in effect, that when a reasonable opportunity to get on or off a train is not afforded passengers by stopping the train and holding it stationary, but they are expected to do so while the train is moving at a low rate of speed, the invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons who wish to board, or alight from, the train have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperiled thereby; in other words, it is not sufficient merely to maintain the low rate of speed sufficiently long for persons with diligence to get on or off.²⁴ While there is no obligation upon those in charge of a train to see that each intending or alighting passenger has gotten on or off the train when stopped for that purpose, if they in fact know, or have reason to know, that a passenger is in the act of boarding or alighting, and, in disregard of the probable peril in which such passenger will be placed, cause the train to move, and thereby inflict an injury, the carrier will be liable.²⁵ It has been held that if a passenger who has alighted from the train with part of his baggage, re-enters the train with the knowledge of the conductor for the purpose of getting the remainder of his baggage, it is the duty of a conductor to hold the train a reasonable time to allow him to get the baggage and alight from the train.²⁶

§ 2474. Duty of Street Railway Companies.—Where a street car has come to a full stop, reasonable care demands that it shall not be started without some effort of the conductor or motorman to determine whether this may be done with safety to passengers or intending passengers.²⁷ It is generally stated that street railways carrying passengers do not discharge their full duty in taking on and letting off passengers by merely waiting, before starting the vehicle, for a length of time which is reasonably sufficient to enable passengers, who are ordinarily prompt, to get on or off; that it is also the duty of the servants in charge of the car to use due care and diligence to see and know that no passenger is in the act of boarding or alighting, or is otherwise in a position which will be rendered dangerous by a movement of the car,²⁸ irrespective of the time

²³ *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440.

²⁴ *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708.

²⁵ *Alabama*.—*Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95.

Indiana.—*Lake Erie, etc., R. Co. v. Beals* (Ind. App.), 98 N. E. 453.

Kansas.—*Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768.

Kentucky.—*Louisville, etc., R. Co. v. Harmon*, 23 Ky. L. Rep. 871, 64 S. W. 640.

Missouri.—*Straus v. Kansas, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384; S. C., 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; *Swigert v. Hannibal, etc., R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322.

North Carolina.—*Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544.

Where a passenger is seen alighting, or could have been seen alighting, it is the duty of the carrier to allow him time to alight completely before starting the train. *Bockelcamp v. Lackawanna, etc., R. Co.*, 232 Pa. 66, 81 Atl. 93.

²⁶ *Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351, 50 S. W. 613.

²⁷ *Duty of street railways*.—*Foden v. Brooklyn Heights R. Co.*, 121 N. Y. S. 420, 136 App. Div. 765.

²⁸ *United States*.—*Dudley v. Front St. Cable R. Co.*, 73 Fed. 128.

Alabama.—*Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95; *Birmingham*.

ham Union R. Co. v. Smith, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761.

California.—Spearman v. California St. R. Co., 57 Cal. 432, 8 Am. & Eng. R. Cas. 192.

Illinois.—North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958, 58 Am. & Eng. R. Cas. 230; Chicago, etc., R. Co. v. Mumford, 97 Ill. 560, 3 Am. & Eng. R. Cas. 312.

Indiana.—Citizens' St. R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Anderson v. Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109; Caughell v. Indianapolis Tract., etc., Co. (Ind. App.), 97 N. E. 1028.

Kansas.—Leavenworth Elect. R. Co. v. Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

Michigan.—Britton v. Street R. Co., 90 Mich. 159, 51 N. W. 276.

Nebraska.—Omaha, etc., Bridge Co. v. Levinston, 49 Neb. 17, 67 N. W. 887.

North Carolina.—Cawfield v. Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

It was an electric railway company's duty to hold a car at a stopping place sufficient time to allow passengers to alight, and not to start it while a passenger was alighting; but it would have been a defense to an action for injury to him that the car had stopped a sufficient time, and that those in charge did not know that he was alighting. Birmingham R., etc., Co. v. McGinty, 158 Ala. 410, 48 So. 491.

It is the duty of the conductor of an electric street car, when it is stopped to allow passengers to alight, to exercise ordinary care to see that no passengers are alighting before starting the car again, and the mere lack of knowledge that a passenger is alighting will not relieve the carrier from its liability for resulting injuries. Montgomery v. Colorado Springs, etc., R. Co., 50 Colo. 210, 114 Pac. 659.

The law imposes upon a conductor the duty of knowing whether or not a passenger has alighted, and the further duty not to cause the car to be started until that operation has been accomplished. Chicago City R. Co. v. Crauf, 136 Ill. App. 66, judgment affirmed Crauf v. Chicago City R. Co., 85 N. E. 235, 235 Ill. 262.

Evidence in an action for injuries to a street car passenger that the passenger signaled the car to stop and after it stopped was in the act of alighting when the conductor gave the signal to start is sufficient to support a finding that it was negligence for the conductor to give a signal to start an overcrowded car without first ascertaining whether any one was in the act of alighting, even though he thought the car had stood still sufficient time for any one to alight. Hamilton v. Kankakee Elect. R. Co., 158 Ill. App. 422.

It was the duty of a motorman and conductor to know, and in law they did know, that a passenger was passing to the door to alight, and that to suddenly start the car while she was so doing, without warning, would put her in peril. Terre Haute Tract., etc., Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413.

Where a street car conductor signaled the car to stop, and it has slowed in response to the signal as if to stop at a regular stopping place, it was the duty of the conductor to see that, before he started the car forward, none of the passengers were in a position of peril caused by the conditions thus brought about. Louisville, etc., Tract. Co. v. Korbe (Ind. App.), 90 N. E. 483; Ft. Wayne, etc., Tract. Co. v. Olinger, 46 Ind. App. 733, 90 N. E. 652.

Where an interurban railway conductor was advised by a passenger that he wished to alight, and saw the passenger moving toward the rear end of the car, and knew or should have known that the car had slackened its speed as if about to stop at the passenger's request, and the motorman had been given the usual signal to stop to discharge passengers, the conductor and motorman were bound to see that the passenger was not in the act of alighting before starting the car, which had not come to a full stop, with unusual force and violence. Heinze v. Interurban R. Co., 117 N. W. 385, 139 Iowa 189, 21 L. R. A., N. S., 715.

Where one is boarding a street car that has stopped to permit him to board, and the car is suddenly started before he gets safely on it, the company is negligent and liable for any injury he may sustain; it being the company's duty to know that he is safely aboard before starting the car. Louisville R. Co. v. Pulliam, 101 S. W. 295, 30 Ky. L. Rep. 1325.

A street railroad company is liable to a passenger for personal injuries, where the passenger undertakes to alight from its car after it has stopped, and where its employees know, or by exercise of ordinary care should know, that the passenger was to leave the car, and while plaintiff was alighting from the car, and the company, without notice to the plaintiff, causes the car to suddenly start forward, thereby causing the passenger to be thrown and injured. Central Kentucky Tract. Co. v. Combs, 136 S. W. 1045, 143 Ky. 529.

Where a street car has been stopped to allow a passenger to alight, and the conductor, being inside, starts the car without knowing the condition of affairs on the platform, he is guilty of negligence, and the company is liable to a passenger injured by the starting of the car while he was alighting, though the conductor asked, "Is it all right back there?" and was answered in the affirm-

given for alighting,²⁹ and it is no excuse for his failure so to do that he is busy with other matters within the car.³⁰ A carrier's liability for injuries to a passenger caused by starting the car while he is alighting with care does not depend on the knowledge of its servants that he is in the act of alighting, where the car has been stopped in response to his request at a usual stopping place.³¹ Though a street car conductor's duty towards an alighting passenger is not discharged by merely waiting a reasonable time before starting the car, and he must exercise reasonable care to see that the passenger is off the car before starting it, he is not bound to see that the passenger has alighted, being required only to exercise the highest degree of care consistent with the proper transaction of the company's business.³² Thus, it is held that a carrier operating electric cars is bound to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground, before starting the car.³³ And it has been held that the conductor of an electric car, before giving the signal for his car to resume its course after stopping for passengers to alight, must look into the car,³⁴ or to all places of exit,³⁵ or otherwise assure himself³⁶ that no other passengers are in the act of alighting. It

ative. *Grant v. New Orleans R., etc., Co.*, 56 So. 897, 129 La. 811.

It is the duty of a street car conductor, before giving the signal to start the car after it has stopped to permit passengers to alight, to use reasonable care to ascertain if the passengers have alighted. *Vine v. Berkshire St. R. Co.*, 99 N. E. 473, 212 Mass. 580.

It is negligence for the conductor of a trolley car which has come to a stop at a street corner to take on passengers to start it until he has exercised due care to ascertain whether all the persons waiting have safely boarded the car. *Speer v. West Jersey, etc., R. Co.*, 65 Atl. 896, 74 N. J. L. 282.

An employee running a subway train held chargeable with a duty to look and see whether he could start it with safety to passengers getting on. *Lang v. Interborough Rapid Transit Co.*, 134 N. Y. S. 627, 76 Misc. Rep. 195.

It is the duty of a street car conductor to know when he starts his car that no person attempting to board is at that moment with one foot on the platform and the other on the ground, with his hand on the railing or otherwise in a position of danger, it being his duty to look around and see that all passengers are safely aboard, the passengers not being required to foresee a sudden starting of the car. *Snipes v. Norfolk, etc., Railroad*, 56 S. E. 477, 144 N. C. 18.

It is the duty of the conductor of a street car to ascertain whether all passengers are on or off before signaling to start the car; but, if this duty may be performed equally as well from inside the car as at any other point, the conductor need not at the time be on the platform. *Fanshaw v. Norfolk, etc., Tract. Co.*, 61 S. E. 790, 108 Va. 300.

It is the duty of a street car company, when its cars have stopped for passengers, to use the highest degree of care to see that all passengers, lawfully enter-

ing its cars, are in a place of safety thereon before starting, and if a passenger is injured from the consequence of starting the car at a time when, by the exercise of such care, it was known or might have been known to the servant of the company that he had not reached a place of safety, the company is liable. *Norfolk, etc., Terminal Co. v. Morris*, 101 Va. 422, 44 S. E. 719.

29. Time for alighting immaterial.—A street car conductor must use the highest degree of care to see that no passenger is alighting at the time the car is starting, irrespective of the time given for alighting. *Lake Erie, etc., R. Co. v. Beals* (Ind. App.), 98 N. E. 453.

30. Hurley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714.

31. Jones v. Springfield Tract. Co., 118 S. W. 675, 137 Mo. App. 408.

32. Millmore v. Boston Elevated R. Co., 80 N. E. 445, 194 Mass. 323.

33. Otto v. Milwaukee Northern R. Co. (Wis.), 134 N. W. 157.

34. Bommarius v. New Orleans R., etc., Co., 123 La. 615, 49 So. 213.

35. Where a street car is stopped for passengers to alight, it is the duty of the carrier's servants, not only to hold the car stationary a reasonable length of time for the passengers to alight, but to look to the places of exit to ascertain that no passenger is in the act of alighting before giving the signal to proceed. *Bell v. Central Elect. R. Co.*, 103 S. W. 144, 125 Mo. App. 660.

36. Where a street car stopped at a crossing in response to a signal that a passenger desired to alight, there was a fair inference that the operatives knew, or should have known, that some person desired to alight, and should have exercised care not to start until assured that no one was in the act of alighting. *Groschong v. United R. Co. (Mo. App.)*, 121 S. W. 1084.

A street car conductor has no right to

seems that a passenger who shows that the car stopped at a crossing to permit passengers to alight, and that he, while alighting, was thrown from the car by reason of the sudden starting thereof, establishes his right to recover.³⁷ Since in such cases a passenger may assume that the car will remain standing long enough to enable all that desire to alight to safely do so, the stopping of the car a reasonable time is not sufficient.³⁸ And so it has been held that it is the duty of a brakeman employed on an elevated railroad to know whether passengers are attempting to leave a car when he closes the gate thereof, and to act accordingly.³⁹ There is, of course, especial reason for exacting this duty of street railway carriers which convey passengers by horse cars.⁴⁰ It is imposed upon every carrier, regardless of the motive power, that is operated under the conditions peculiar to street railway companies.⁴¹ But the mere starting of a car with a sudden jerk causing injury to a passenger at a time when those in charge of it do not know, and have no reason to know, that the passenger is about to alight, does not constitute a cause of action.⁴²

As Dependent upon Stopping Place.—Where a street car has stopped at a regular stopping place,⁴³ at a place where it might be reasonably expected that passengers would alight, though the car did not stop to allow passengers to alight,⁴⁴ or at a point near a street crossing where passengers customarily get off though such point is not a regular stopping place, the carrier must exercise due care before again starting the car to see that passengers getting on or off will not be endangered by putting the car in motion.⁴⁵ If the place is not one where it is customary to receive passengers, but the car has stopped, and a passenger receives permission of the conductor to temporarily leave the car or is

assume because the car has been stopped for a time reasonably sufficient to enable passengers to alight that they have alighted, but is charged with the duty to see that no one is in the act of alighting when the car starts. *Murphy v. Metropolitan St. R. Co.*, 102 S. W. 64, 125 Mo. App. 269.

^{37.} *Ghio v. Metropolitan St. R. Co.*, 103 S. W. 142, 125 Mo. App. 710.

^{38.} **Reasonable time insufficient.**—*Louisville, etc., Tract. Co. v. Korb* (Ind. App.), 90 N. E. 483; *Ft. Wayne, etc., Tract. Co. v. Olinger*, 46 Ind. App. 733, 90 N. E. 652.

Though a street car passenger took a transfer to another line, justifying the assumption that she would remain in the car until the junction with such line was reached, she still had the right to alight at any intermediate stopping place, and if, while so alighting, the car was started on the conductor's signal, and she was injured thereby, and the conductor actually saw her starting to alight, or alighting when he gave the signal, or, by the exercise of the proper care imposed upon him, should have seen her so doing, the company is liable for her injuries, even though the signal was not given until the car had waited a reasonable time for passengers to alight and the other passengers had safely alighted. *Farrell v. Citizens', etc., R. Co.*, 137 Iowa 309, 114 N. W. 1063.

Though a car remained stationary for a time sufficient to have enabled a passenger to alight in safety by the exercise of reasonable diligence, this would not

justify the starting of the car while she was in the very act of stepping to the street, and the carrier would be liable for resulting injuries without regard to the violence of the start. *Green v. Metropolitan St. R. Co.*, 99 S. W. 28, 122 Mo. App. 647.

^{39.} *McGarry v. Boston Elevated R. Co.*, 195 Mass. 538, 81 N. E. 194.

^{40.} *Birmingham Union R. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761.

^{41.} *Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95.

^{42.} *Ely v. Southwest Missouri R. Co.*, 141 Mo. App. 708, 125 S. W. 833.

^{43.} *Alten v. Metropolitan St. R. Co.*, 133 Mo. App. 425, 113 S. W. 691.

The stopping of a street car at a usual stopping place is an invitation to alight, and the company's employees are negligent if they thereafter start the car without taking every reasonable precaution to see that passengers are not then alighting. *Parker v. United R. Co.* (Mo. App.), 133 S. W. 137.

^{44.} *Citizens' R. Co. v. Hall* (Tex. Civ. App.), 138 S. W. 434.

^{45.} *Monroe v. United R. Co.* (Mo. App.), 133 S. W. 645.

Where a car stops at a place where it is customary for persons to get on or off, it is the carrier's duty to use due care to determine, before moving the cars, that no person is in the act of boarding or alighting from the same. *Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

alighting with the knowledge of one in charge of the car, it is the duty of defendant's servants to exercise due care to know before moving the car that the passenger is not in the act of re-entering the car, or in a position which would be rendered perilous by moving the car;⁴⁶ or if the servants in charge of a car, see a passenger in the act of alighting when the car has stopped at a switch, it is their duty not to start the car until he has alighted in safety, though a regular stopping place has been established only a short distance further on;⁴⁷ but, if the place where a car is stopped is not the place where passengers are received, there is no breach of duty to one who is attempting to get on or off, if the car is started while he is in a perilous position, unless the servants of the carrier know that by such movement his position is rendered perilous.⁴⁸ And a stopping place may be of such a nature that those in charge of the car can not be held to be to blame for starting a car while a passenger was alighting, in the

46. *Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

Where one in charge of a street car knows a passenger is alighting, the duty to him is the same whether the stop is made at a regular stopping place or not. *Murphy v. Metropolitan St. R. Co.*, 102 S. W. 64, 125 Mo. App. 269.

Where a street car is stopped at a place not intended for use as a passenger station, and for another purpose than the admission and discharge of passengers, the carrier should not start the car while a passenger is alighting, with the knowledge and consent of the conductor. *Kinyoun v. Metropolitan St. R. Co.* (Mo. App.), 134 S. W. 15.

47. *South Covington, etc., St. R. Co. v. Core*, 29 Ky. L. Rep. 836, 96 S. W. 562.

48. *Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

The motorman has not done his full duty by ascertaining before he starts the car that no one is in the act of getting on the "platform or steps;" but if a passenger is getting on the car, though simply having hold of the handles thereof, it is his duty not to start. *Birmingham R., etc., Co. v. Lee*, 153 Ala. 79, 45 So. 292.

Where it was customary for passengers to board and alight from a street car at a certain point, it was the duty of the street car employees to use ordinary care to protect passengers alighting there. *Central Kentucky Tract. Co. v. Chapman* (Ky. App.), 124 S. W. 830.

If the place where a street car stopped, the crossing of a steam railroad, was a regular stopping place for passengers, or where passengers, with the knowledge of the carrier, were in the habit of entering or leaving its cars, it was the duty of the employees in charge, before starting, to ascertain whether passengers desiring to leave the car had done so; but, if it was not such a place, and the stop was merely to look out for any steam train, then those in charge of the street car had no reason to suppose that a passenger would attempt to leave at that point, and unless

they knew a passenger was so attempting to do, they were not negligent in starting without seeing whether she had alighted, and this, though she had, when getting on, notified the conductor that she wished to get off at the street next before the railroad crossing, and the car had not stopped there. *Central Kentucky Tract. Co. v. Chapman* (Ky. App.), 113 S. W. 438.

Where an open car with a footboard along each side of it for use of passengers in boarding it stopped at a regular stopping place for the reception of passengers, it was the duty of the conductor, before giving a signal to start, to look to see that no one was in a position to be injured should the same be started, and he had no right to assume from the fact that the car had been stationary a time reasonably sufficient to transact the business at that point that no one would be endangered by starting it. *Miller v. Metropolitan St. R. Co.*, 102 S. W. 592, 125 Mo. App. 414.

A street car made a momentary stop about a quarter of a block from its regular stopping place at a transfer point because another car ran in ahead of it. A passenger, without any notice to the conductor or motorman, and without knowing where the conductor was, and with knowledge that the car had not reached its regular stopping place, attempted to alight, and while doing so the car started and she was injured. There was no evidence of any signal by the conductor to the motorman either to stop or to start the car. Held, as a matter of law, not to show negligence in the operation of the car. *Foden v. Brooklyn Heights R. Co.*, 121 N. Y. S. 420, 136 App. Div. 765.

What would constitute a high degree of care in starting a street car stopped to turn a switch where passengers were not expected to alight might not constitute such a degree of care in starting a car stopped at a place for passengers to get aboard and alight, the amount of the diligence required depending on the hazard involved. *Rapid Transit R. Co. v. Strong* (Tex. Civ. App.), 108 S. W. 394.

absence of any signal from the passenger that he wished to alight or of any knowledge or reason to know that the passenger was attempting to alight or wished to alight.⁴⁹ And if neither the conductor nor the motorman was negligent in starting the car, the fact that it started with a "lurch," or "gave a lurch," would not help the passenger. The manner in which the car started could be material only in case the circumstances were such as to show that the conductor or motorman knew or had reason to know that he was attempting to alight or desired to alight and owed a duty to him not to injure him by an improper starting of the car.⁵⁰

Place of Boarding or Alighting.—Ordinarily, only passengers who enter or leave a car by the regular and usual way are entitled to have the driver or conductor exercise care to see that they are not in a position of danger when the car is started.⁵¹ The circumstances of the case may, however, be such that even passengers who enter or leave the car by a way other than the regular and usual one may be entitled to this protection. Thus where a passenger who, having paid his fare, was obliged to stand on the front platform owing to the crowded condition of the car, and, the car being derailed, had gotten off at the request of the driver to help in getting the car on the track, was injured, while getting on the front platform again by stepping over a guard or enclosure three feet high, in consequence of the car being started by the driver without signal or warning, it was held that, in view of the circumstances of the case, there was an obligation on the part of the driver to see that the passenger had an opportunity to get on the car again before it was started, and if he saw, or, by the exercise of proper care, might have seen the position of the passenger, and thereby have avoided the injury, the carrier was liable.⁵² So if the gate on the left-hand side of a street car should have been closed at the point a passenger got off on that side to prevent passengers from getting off on that side, if the conductor negligently left the gate open, he was bound to exercise ordinary care to observe both sides of the car to protect passengers in alighting.⁵³ Of course if the servants of a street railway have knowledge that a passenger is in the act of getting on or off when a car is started, the carrier will be liable on the same principle that ordinary railroad companies are held liable under similar circumstances.⁵⁴ Thus, it has been held that the conductor, as the carrier's servant, being in charge of its street car, it was responsible for his acts, constituting gross negligence, in starting the car with a cripple standing on the step outside the locked door.⁵⁵

§ 2475. Announcement of Stations or Stopping Places.—In some states it has been provided by statute that railroad companies shall have the names of

49. *Coneton v. Old Colony St. R. Co.*, 212 Mass. 28, 98 N. E. 602, 603, citing *Spaulding v. Quincy, etc., St. R. Co.*, 184 Mass. 470, 69 N. E. 217; *Oddo v. West End St. R. Co.*, 178 Mass. 341, 59 N. E. 1026, 86 Am. St. Rep. 482.

50. *Coneton v. Old Colony St. R. Co.*, 212 Mass. 28, 98 N. E. 602.

51. See *People's Passenger R. Co. v. Green*, 56 Md. 84, 6 Am. & Eng. R. Cas. 168.

Where a person, attempting to board a street car, was not in a position where the conductor ought to have seen him, the act of the conductor in not waiting for him to board the car, but in starting the car, after he had succeeded in grabbing the handle bar of the car only, was not actionable negligence. *Perkins v. New Orleans R., etc., Co.*, 127 La. 177, 53 So. 484.

A boy, without indicating to those in charge of a street car, which had stopped for the purpose of letting off a passenger, that he intended to take passage, attempted to get on by the front platform, and, while he was in the act of doing so, the car was started and he was injured. On the ground that no negligence on the part of the carrier appeared, a judgment of nonsuit was sustained. *Pitcher v. People's St. R. Co.*, 154 Pa. 560, 26 Atl. 559; *S. C.*, 174 Pa. 402, 34 Atl. 567.

52. *People's Passenger R. Co. v. Green*, 56 Md. 84, 6 Am. & Eng. R. Cas. 168.

53. *Central Kentucky Tract. Co. v. Chapman* (Ky. App.), 124 S. W. 830.

54. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

55. **Gross negligence.**—*Yancey v. Boston Elevated R. Co.*, 205 Mass. 162, 91 N. E. 202, 26 L. R. A., N. S., 1217.

stations announced as they are approached,⁵⁶ subjecting them to a penalty for failure to do so.⁵⁷ And in other states in which there seem to be no statutes on the subject, it has frequently been declared by the courts that, to enable passengers to leave the trains at the places of their destination, it is the duty of railroad companies to have the names of the different stations announced or to otherwise apprise the passenger as the trains approach or arrive at the stations.⁵⁸ And in some cases it is held that a carrier by its contract to carry passengers undertakes to give reasonably sufficient notice of stations,⁵⁹ and that it is liable for its negligence in this respect.⁶⁰ And it has been held that if a passenger on an elevated street railway informs the conductor of her destination, the place thus designated being a regular stop, it is his duty to call such designation or

56. Ky. Stat. 1894, § 784; *Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134; 1 How. Ann. Stat. Mich. § 3417; *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304; *Shannon's Tenn. Code*, § 3070; *Louisville, etc., R. Co. v. Collier*, 104 Tenn. 189, 54 S. W. 980.

A common carrier is bound to have the stations announced as the trains approach them. *Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134.

57. **Recovery of penalty.**—Under the Act of 1865-66, ch. 15 (Rev. Code, § 4927, b, c, d), which makes a railroad company liable to forfeit and pay a penalty of \$100, upon a failure of the company, during any one trip of the passenger cars, to announce the stopping place or station at which the train stops, only one penalty can be recovered up to the bringing of the suit. *Parks v. Nashville, etc., R. Co.*, 81 Tenn. (13 Lea) 1.

Effect of failure to announce stop.—Mere failure to announce station and duration of stop, as required of railroads by statute, is not such negligence, without proof that it was the proximate cause of the injury, as entitles a passenger to recover for injuries sustained in alighting from a train at a station. The statute prescribes the remedy for this default by *qui tam* action. *Louisville, etc., R. Co. v. Collier*, 104 Tenn. 189, 54 S. W. 980.

58. *Alabama*.—*Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

Mississippi.—*Dorrah v. Illinois, etc., R. Co.*, 65 Miss. 14, 3 So. 36, 30 Am. & Eng. R. Cas. 576, 7 Am. St. Rep. 629; *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

Pennsylvania.—*Brooks v. Philadelphia, etc., R. Co.*, 218 Pa. 1, 66 Atl. 872; *Case v. Delaware, etc., R. Co.*, 191 Pa. 450, 43 Atl. 319.

Texas.—*Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *Texas, etc., R. Co. v. Richardson* (Tex. Civ. App.), 143 S. W. 722.

When the conductor of a train takes

up the ticket of a passenger, he is required to take notice of his destination, and it is the imperative duty of the conductor to inform the passenger by calling the name of the station, or otherwise, on the arrival of the train at that place, and the passenger has the right to assume that this duty will be performed in the proper manner. *Louisville, etc., R. Co. v. Cook*, 38 N. E. 1104, 12 Ind. App. 109.

Duty to exercise reasonable care and skill to announce station.—*Atchison, etc., R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681; *Gulf, etc., R. Co. v. Bagby* (Tex. Civ. App.), 115 S. W. 858.

59. **Duty under carriage contract.**—*Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Central, etc., R. Co. v. Hoard* (Tex. Civ. App.), 49 S. W. 142; *Texas, etc., R. Co. v. Alexander* (Tex. Civ. App.), 30 S. W. 1113; *Missouri, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 32 S. W. 42; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *Texas, etc., R. Co. v. Pollard*, 2 Texas App. Civ. Cas., § 481; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.

60. Where through defendant's negligence in not calling the names of stations, a passenger is carried by her station, making it necessary for her to walk back from the point where the train stopped, defendant is liable for her injuries, notwithstanding the train stopped at the station. *Texas, etc., R. Co. v. Pollard*, 2 Texas App. Civ. Cas., § 481.

A passenger was hard of hearing, but such fact was not disclosed to the company or its employees, and she alighted at a wrong station, though the porter had twice announced its name. The plaintiff testified that the porter took her grip, and told her to sit still until the train stopped, which was denied by the porter, and that she left the car when the train stopped, and the porter deposited her grip on the ground. Held not sufficient to sustain a judgment for plaintiff for negligently setting her down at a wrong station. *Texas Mid. R. Co. v. Terry*, 65 S. W. 697, 27 Tex. Civ. App. 341.

otherwise notify her.⁶¹ But it would seem, however, that, in the absence of a statute requiring the arrival of trains at stations to be announced, the mere failure to announce a station is not of itself negligence, but that the question of the carrier's negligence must in each case be determined by the jury.⁶² And it has been held that the failure of a railway company to duly announce to passengers the arrival of its train at a regular station is no cause of action against it to a passenger carried beyond it when he was soundly asleep when the train arrived and departed, though he alleged that he was very easy to awake and the announcement of the station would have aroused him.⁶³ So if a passenger knows when a train stops at the depot where he wishes to alight, and fails to get off the train, it is immaterial whether the railroad employees were guilty of negligence or not in announcing the station.⁶⁴

Negligent Announcement Resulting in Injury.—If a carrier negligently announces, as the station to which a passenger is destined, a different station, and the passenger is thereby misled and induced to alight, or if the carrier negligently permits a passenger to leave the train at a station, knowing that such station is not the destination of the passenger, and knowing or having reason to believe that the passenger thinks such station to be his destination, without informing him of his mistake, it is liable for the damages proximately resulting from such negligence.⁶⁵ For a trainman, when he knew the train had not arrived at the station platform, and that it was not time for the passengers to alight, and that the train was liable at any moment to start suddenly while passengers might be obeying his instruction, to throw open the car door, call the station, and say "All change!" is negligence.⁶⁶

Sufficiency of Announcement.—A railway conductor is not bound to personally enter a car upon its arrival at a station to inform passengers for that station that they have reached their destination.⁶⁷ Ordinarily the duty of the carrier to the passenger, in respect to giving notice of the arrival of its trains at the stations upon its line, is performed when the carrier has caused the name of the station to be distinctly and audibly announced in each car, and given those desiring to leave the train reasonable time and opportunity to alight therefrom.⁶⁸ And a corresponding duty rests upon the passenger to take notice of

61. *Stevens v. Kansas City Elevated R. Co.*, 105 S. W. 26, 126 Mo. App. 619.

62. *Houston, etc., R. Co. v. Goodyear*, 28 Tex. Civ. App. 206, 66 S. W. 862. See *Central, etc., R. Co. v. Hoard* (Tex. Civ. App.), 49 S. W. 142.

It has been held that although a passenger, on boarding a street car, notifies the conductor of the place where she wishes to get off, it is sufficient for the conductor to make a reasonable stop at that place, and, in the absence of a custom to call out the names of the street, he is under no obligation to give the passenger express notice that the place has been reached, although the fact of the notice having or not having been given is a circumstance which may be taken into consideration as bearing upon the questions of negligence and contributory negligence. *Robinson v. Northampton St. R. Co.*, 157 Mass. 224, 32 N. E. 1.

63. **Passenger asleep.**—*Seaboard Air Line Railway v. Rainey*, 122 Ga. 307, 50 S. E. 88, 106 Am. St. Rep. 134, 2 Am. & Eng. Ann. Cas. 675.

64. **When passenger knows of arrival at destination.**—*Missouri, etc., R. Co. v.*

Miller, 20 Tex. Civ. App. 570, 50 S. W. 168.

A passenger, who knows that the station of his destination has been reached, must promptly alight, though the trainmen failed to call the station, and, where he fails to promptly alight, he can not rely on the failure of the trainmen to announce the station as furnishing him with a cause of action for carrying him beyond the station. *Gulf, etc., R. Co., v. Bagby* (Tex. Civ. App.), 127 S. W. 254.

65. *Texas, etc., R. Co. v. Richardson* (Tex. Civ. App.), 143 S. W. 722.

66. **Negligence resulting in injury.**—*Judgment* 102 N. Y. S. 1008, 118 App. Div. 553, affirmed. *Wolford v. New York, etc., R. Co.*, 85 N. E. 1118, 191 N. Y. 554.

67. **Sufficiency of announcement.**—*Southern R. Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. 42.

It certainly is not necessary that a personal warning be given to each individual passenger. *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *St. Louis, etc., R. Co. v. McCullough* (Tex. Civ. App.), 33 S. W. 285.

68. *Texas Mid. R. Co. v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697; *Houston,*

the usual announcement of stations, and if, by reason of negligence, he failed to hear the announcement, remains aboard and is carried past his destination, the carrier is not liable therefor.⁶⁹ A carrier is not required to see that the passengers do in fact depart from the train upon arriving at their destinations.⁷⁰ Hence, to require a carrier to call the station in a sufficiently loud tone of voice to appraise the passenger of the fact imposes a duty not required by statute and one not essential to the safety of passengers.⁷¹ However, the rule may be otherwise where the passenger's condition or the surrounding circumstances require a different and more personal notice of the arrival at the passenger's alighting place.⁷²

Promise of Employee.—As a general rule, the promise of an employee of a railroad company to give a passenger special notice of the arrival of a train at a station, not being within the scope of the employee's authority, does not bind the carrier.⁷³ There may, however, be exceptions to this rule where the passenger is in need of special notification, as, for example, when the whole attention of a woman passenger is occupied with a sick child in her care, and the conductor, at the time of making the promise, knows of the situation of the passenger.⁷⁴ But whether such a promise entitles the passenger to such noti-

etc., *R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698.

Where a passenger on a railroad train holds a ticket to a given point, it is the duty of the company to stop the train at the point of destination a sufficient length of time to allow the passenger to leave it with safety to his life and person; and if he is carried beyond his stopping place, by no fault of his, but by the failure of the company's agent to do his duty in that respect, he may recover any damages he may sustain. But it is not necessary to the performance of the ordinary duties of the conductor, in putting passengers off the train, that he should give them any other than the customary warning and opportunity to avail themselves of it. *Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284.

While a carrier must, as required by Ky. St., § 784 (*Russell's St.*, § 5333), announce the station, it need not insure that a passenger hear it, provided the announcement is made in such a manner that the persons in the car having ordinary hearing and paying ordinary attention will hear it. *Chesapeake, etc., R. Co. v. Robinson* (Ky. App.), 123 S. W. 308.

69. Corresponding duty of passenger.—*St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090; *Gulf, etc., R. Co. v. Bagby* (Tex. Civ. App.), 115 S. W. 858.

70. No duty to see passengers off of car.—*Chicago, etc., R. Co. v. Meyer*, 127 Ill. App. 314.

71. Where, in an action against a carrier for carrying a passenger beyond her station, the issue was whether the station was called, the passenger stating that it was not called, and the carrier proving that it was called, a charge that the carrier's employees were requested to call the station in a sufficiently loud tone

of voice to appraise the passenger of the fact was erroneous, as imposing a duty not required by statute and one not essential to the safety of passengers. *Missouri, etc., R. Co. v. Morgan*, 49 Tex. Civ. App. 212, 108 S. W. 724.

72. Where one who had suffered an attack of paralysis took defendant's train to go home and informed defendant's servants in charge of the train that he was ill and on his way home, and requested that he be called in order to get off at his destination, but he did not hear the call for such place, and was carried by, as a matter of law the carrier was under the duty of reasonable anticipation of injury from such negligence. *Nelson v. Chicago, etc., R. Co.*, 109 N. W. 933, 130 Wis. 214.

73. Effect of promise by conductor to notify passenger of arrival at station.—A railway company is not bound by promise of conductor to notify passenger of arrival at station, where customary announcement has been made. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *Missouri, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 32 S. W. 42; *St. Louis, etc., R. Co. v. McCullough* (Tex. Civ. App.), 33 S. W. 285; *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

74. Exceptional circumstances.—Where a station is duly called by the brakeman, and a passenger, relying on the promise of the conductor to notify her personally when the train arrived there, fails to hear it announced, and is carried past, her whole attention being occupied at the time by a sick child, the carrier is not responsible, unless the conductor had knowledge of the child's illness, or of the necessity that might require the mother's exclusive attention to its needs, when he made the promise. *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

fication, under the circumstances, is one of fact for the jury.⁷⁵

Duty Imposed on Sleeping Car Company No Defense.—The duty imposed on a sleeping car company to notify its patrons of arrival at destination does not relieve the carrier of the same duty.⁷⁶

§ 2476. **Awaking Sleeping Passengers.**—The duty of railroad companies to notify passengers that their stations have been reached is discharged, except as to passengers occupying berths in sleeping cars, by announcing the names of the stations, and they are under no obligation to awaken sleeping passengers.⁷⁷ Nor does the fact that in some previous instances the conductor had aroused sleeping passengers when their destination had been reached afford evidence of a custom binding upon the company.⁷⁸ Even though the conductor of a train may have promised a passenger to awaken him when his station is reached, the carrier ordinarily is not responsible for carrying the passenger past his station in consequence of the failure of the conductor to keep his promise.⁷⁹ It has been so held in a Mississippi case in which it appeared that a passenger who got on a train while sick with a fever, without making his condition known before or on entering the train, notified the conductor that he was sick and drowsy and wished to sleep, and was promised by the conductor that he should be awakened when his station was reached.⁸⁰ But that such a duty may be imposed by exceptional circumstances seems to be the true rule.⁸¹ Thus in a case in which it appeared that a passenger who was sick and unable to care for himself, had been received as a passenger by the ticket agent and conductor, with knowledge of his condition, it was held that, under the circumstances, the conductor was bound to exercise care to see that the passenger should be put off at his station, and if he was, through weakness and drowsiness, unconscious when the station was reached, the carrier was liable for the conductor's negligence in failing to awaken him, and for carrying him to a station beyond his

75. In a case in which the announcement of the station was made upon the approach of the train, but the train was stopped at a water tank before reaching the station, and a passenger, who was about to alight under the impression that the station had been reached, was informed by an employee of the company that the station had not been reached, directed to take her seat, and assured that he would notify her of the arrival of the train at the station, it was held that the question was for the jury whether the passenger was, under the circumstances, entitled to be notified when the train reached the station. *Missouri, etc., R. Co. v. Miller*, 20 Tex. Civ. App. 570, 50 S. W. 168.

76. **Duty imposed on sleeping car company no defense.**—*Pullman Co. v. Lutz*, 154 Ala. 517, 45 So. 675, 14 L. R. A., N. S., 907.

77. *Michigan*.—*Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304.

Pennsylvania.—*Fisher v. Paxon*, 182 Pa. 457, 38 Atl. 407, 8 Am. & Eng. R. Cas., N. S., 516.

Texas.—*Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496.

It is not the duty of a railway company to awaken a sleeping passenger to advise him that his destination is reached

and enable him to leave the train. *Seaboard Air-Line Railway v. Rainey*, 50 S. E. 88, 122 Ga. 307, 106 Am. St. Rep. 134, 2 Am. & Eng. Ann. Cas. 675.

A carrier is not liable for carrying a sleeping passenger beyond his station, notice of arrival thereat and time to alight having been given, it not being its duty to arouse him, and see that he gets off. *Texas, etc., R. Co. v. Alexander* (Tex. Civ. App.), 30 S. W. 1113.

It is the duty of a railroad company, which sells a passenger a ticket to a place on its line of road, and a sleeping-car ticket to an intermediate point, where the passenger is required to change cars, to awaken the passenger a sufficient time before reaching such point to allow an opportunity to dress and prepare to make the change. *McKeon v. Chicago, etc., R. Co.*, 69 N. W. 175, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910, 8 Am. & Eng. R. Cas., N. S., 219.

78. **Previous instances.**—*Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284.

79. *Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284; *Missouri, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 32 S. W. 42.

80. *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8, 18 Am. & Eng. R. Cas. 243, 48 Am. Rep. 74.

81. *Missouri, etc., R. Co. v. Kendrick* (Tex. Civ. App.), 32 S. W. 42.

destination, in consequence of which, and the absence of the attention and care to which he was entitled, his illness was increased so that he died.⁸²

Passengers occupying berths in sleeping cars are entitled to be awakened a reasonable time before their stations are reached so as to enable them to get ready to leave the train.⁸³

§ 2477. Assisting Passengers to Board or Alight.—A contract of carriage on the part of a carrier of passengers differs essentially, as a general rule, from that of a carrier of goods, since the latter assumes the duty not only of transporting to destination, but of unloading its cars as well. So it is universally held that, as to passengers able to help themselves in entering and leaving a train, a railway company is under no duty either to load or unload them, provided it furnished suitable means for safely boarding and alighting from its cars.⁸⁴ It has been said that it is not the duty of conductors to see to the debarkation of the passengers. They should have the stations announced; and they should stop the train sufficiently long for the passengers for each station to get off. When this is done, their duty to the passenger is performed. All assistance that a conductor may extend to women without escorts or with children, or to persons who are sick and ask his assistance in getting on and off the train is purely a matter of courtesy and not at all incumbent upon him.⁸⁵ It is true that ordinarily a carrier of passengers is under no obligation to furnish personal assistance to a passenger in alighting from its conveyance⁸⁶ and that there is no rule of law requiring railroad companies or other passenger carriers to assist passengers in every case to get on or off their vehicles;⁸⁷ yet it can not be stated as an invariable rule that carriers owe no duty to their passengers in this respect.⁸⁸

Rule Examined and Applied.—Ordinarily, a carrier who has provided safe and suitable means for entering and alighting from the vehicle and has stopped

⁸². *Weightman v. Louisville, etc., R. Co.*, 70 Miss. 563, 12 So. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671.

⁸³. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215; *McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477, 69 N. W. 175, 8 Am. & Eng. R. Cas., N. S., 219, 59 Am. St. Rep. 910, 35 L. R. A. 252.

⁸⁴. *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

⁸⁵. *New Orleans, etc., R. Co. v. Stat-ham*, 42 Miss. 607, 97 Am. Dec. 478.

⁸⁶. *Georgia*.—*Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68; *Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284; *Central R. Co. v. Whitehead*, 74 Ga. 441.

Kentucky.—*Louisville, etc., R. Co. v. Lee*, 140 Ky. 91, 130 S. W. 813.

Texas.—*Flory v. San Antonio Tract. Co.* (Tex. Civ. App.), 89 S. W. 278; *Ft. Worth, etc., R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962; *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.

In *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368; it was held that it might be conceded that, if appellants had had a proper platform at the station upon which passengers could have alighted, their duty as to the matter

would have been discharged, and that they were not called upon to render personal assistance.

⁸⁷. *Central R. Co. v. Whitehead*, 74 Ga. 441; *Lafflin v. Buffalo, etc., R. Co.*, 106 N. Y. 136, 12 N. E. 559, 60 Am. Rep. 433, reversing 36 Hun 638; *Simms v. South Carolina R. Co.*, 27 S. C. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571.

It can not be said as a matter of law that the failure of a carrier to assist a female passenger to alight from a train is negligence. *Ft. Worth, etc., R. Co. v. Spear* (Tex. Civ. App.), 107 S. W. 613.

It is held to be error to submit to the jury, as an independent ground of recovery, the negligence of defendant in failing to provide an employee to assist passengers to board its train. *Ft. Worth, etc., R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962.

⁸⁸. *Arkansas*.—See *St. Louis, etc., R. Co. v. Green*, 85 Ark. 117, 107 S. W. 168, 14 L. R. A., N. S., 1148.

Georgia.—*Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015; *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

Texas.—*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368.

the vehicle in a proper position to enable passengers to avail themselves of those means, is not bound to assist passengers to get on and off.⁸⁹ Thus, it has been held that where a passenger goes upon a train without first notifying the conductor of his sickness and inability to care for himself and stipulating for assistance, no duty rests upon the carrier to furnish him necessary assistance in alighting.⁹⁰ But without question under certain circumstances, the exercise of that high degree of care exacted from carriers of passengers may impose upon the carrier the duty of furnishing such assistance,⁹¹ as, for example, when the fact that a passenger needs assistance is known to the carrier;⁹² or where

89. Indiana.—*Ferguson v. Citizens' St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936; *Lake Erie, etc., R. Co. v. Beals* (Ind. App.), 98 N. E. 453.

Iowa.—*Raben v. Central, etc., R. Co.*, 73 Iowa 579, 35 N. W. 645, 33 Am. & Eng. R. Cas. 520, 5 Am. St. Rep. 708.

Minnesota.—*Jarmy v. Duluth St. R. Co.*, 55 Minn. 271, 56 N. W. 813.

Missouri.—*Yarnell v. Kansas, etc., R. Co.*, 113 Mo. 507, 21 S. W. 1, 18 L. R. A. 599; *Deskins v. Chicago, etc., R. Co.* (Mo. App.), 132 S. W. 45.

Wyoming.—*Chicago, etc., R. Co. v. Lampman*, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

Ordinarily, it is not the duty of employees of a carrier in charge of a passenger train to physically assist passengers in alighting therefrom, but to furnish reasonable opportunity and facilities for leaving the train, though the duty of rendering assistance may arise from special circumstances. *Central, etc., R. Co. v. Madden*, 69 S. E. 165, 135 Ga. 205, 31 L. R. A., N. S., 813, 21 Am. & Eng. Ann. Cas. 1077.

In *Raben v. Central, etc., R. Co.*, 73 Iowa 579, 35 N. W. 645, 5 Am. St. Rep. 708, 33 Am. & Eng. R. Cas. 520, it was held that the company was not liable for the failure on the part of its conductor to assist a female passenger, having two small children with her, to alight. See, also, *Raben v. Central, etc., R. Co.*, 74 Iowa 732, 34 N. W. 621.

90. New Orleans, etc., R. Co. v. Stat-ham, 42 Miss. 607, 97 Am. Dec. 478.

91. Indiana.—*Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477, 58 Am. & Eng. R. Cas. 232; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

South Carolina.—*Martin v. Southern Railway*, 77 S. C. 370, 58 S. E. 3.

Texas.—*Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.; *St. Louis, etc., R. Co. v. Kennedy* (Tex. Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op.; *Ft. Worth, etc., R. Co. v. Spear* (Tex. Civ. App.), 107 S. W. 613.

Virginia.—*Alexander, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

A carrier of passengers owes to the passenger, until he has safely alighted from its car, the highest degree of care

for his safety. If the full measure of such care in a given case required assistance to the passenger in alighting, it would be bound to furnish such assistance. But the legal duty to do so would exist because facts calling for its exercise existed. *Ft. Worth, etc., R. Co. v. Spear* (Tex. Civ. App.), 107 S. W. 613.

Whether extraordinary diligence requires that a passenger be assisted in alighting is dependent upon the circumstances and conditions surrounding the passenger, and the facts of the particular case. If, in the exercise of extraordinary care, it should become necessary for the safety of a particular passenger, in an emergency, that the passenger be assisted to alight, it would then become the duty of the carrier to assist the passenger. *Southern R. Co. v. Wright*, 6 Ga. App. 172, 64 S. E. 703.

A female passenger having been injured by the train starting while she was getting off, the company is not entitled to a charge that its contract was performed on the arrival of the train, if the station was announced, and the train stopped a sufficient time to give her an opportunity to alight, and that its servants were not bound to assist her in alighting. *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266.

92. Madden v. Port Royal, etc., R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65. See *Doolittle v. Southern R. Co.*, 62 S. C. 130, 40 S. E. 133; *Lake Erie, etc., R. Co. v. Beals* (Ind. App.), 98 N. E. 453.

The rule may be laid down as follows: it is not the duty of a railroad or a street railroad, to assist passengers to alight from its cars except where it has accepted as a passenger one who is unable, through disability, to care for himself, and such disability is known at the time of the acceptance, or where a passenger is too sick or disabled to safely alight without aid. *Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

Though a female passenger was carrying a valise, a parasol, and a fan when she attempted to alight from the carrier's vehicle, her condition was not one of such obvious infirmity or disability that she was entitled to the assistance of the carrier's servants. *Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

A street railway company's only duty to an alighting passenger who has sig-

a carrier voluntarily accepts a passenger, knowing that, by reason of sickness or physical infirmities, he is incapable of caring for himself.⁹³ And it has been held that where the conductor in charge of a train at the place where the passenger gets on is notified that the passenger is feeble and will require assistance, and he promises to inform the next conductor and says that it will be all right, the company is charged with notice, and the passenger is not chargeable with contributory negligence in failing to notify the next conductor of her condition and need of assistance.⁹⁴ But whether extraordinary diligence requires that a passenger be assisted in alighting is dependent on the circumstances and conditions surrounding the passenger of the particular case;⁹⁵ as, for example, the age and physical condition of the passenger, the difficulties of boarding or alighting, etc.,⁹⁶ and such questions are properly left to the determination of the

naled the car to stop is to stop until he has safely alighted; personal assistance not being required. *Bullitt v. Louisville R. Co.*, 134 S. W. 1153, 142 Ky. 670.

If, under any circumstances, a carrier is under a duty to render an infirm passenger physical personal assistance in alighting, yet no liability can be imposed upon it for a failure to do so where neither the company nor its employees have notice or knowledge of the passenger's infirmity. *Daniels v. Western, etc., R. Co.*, 96 Ga. 786, 22 S. E. 956; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015. See also, *Western, etc., R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913; *Central R. Co. v. Whitehead*, 74 Ga. 441.

Heavy baggage.—The duty to assist passengers alighting from trains carries with it as an incident under reasonable circumstances the duty to assist a lady traveling with heavy hand baggage. *Hasbrouck v. New York, etc., R. Co.*, 95 N. E. 808, 202 N. Y. 363, 35 L. R. A. N. S., 537, Ann. Cas. 1912D, 1150, affirmed judgment, 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478.

Blind passenger.—Railroad employees are bound to render assistance to a blind passenger attempting to alight, where his infirmity is known. *Georgia R., etc., Co. v. Rives*, 73 S. E. 645, 137 Ga. 376, 38 L. R. A., N. S., 564.

93. *Ferguson v. Citizens' St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936; *International, etc., R. Co. v. Gilmer*, 18 Tex. Civ. App. 680, 45 S. W. 1028.

Where a passenger who, by reason of physical disability, is unable safely to leave the car unassisted, explains her condition to the conductor, on surrendering her ticket, who promises to assist her, the company is negligent if such assistance is not given, and will be liable for injuries sustained in her attempt to leave the car unassisted on arrival at her destination, and failure of the company to furnish her assistance. *Mercer v. Cincinnati, etc., R. Co.*, 115 N. W. 733, 151 Mich. 566.

Where a railway company received a sick passenger, with the consent of the conductor of the train and the ticket

agent, who were informed of his illness, and of the necessity of his having assistance when he should arrive at his destination, but the conductor failed to have him aroused and put off there, but carried him thirty miles beyond where he was put off, alone, at a small station, at 2 a. m., and allowed to remain there forty hours before being returned to his destination on one of the company's trains, and his illness was so increased during his exposure that he died, the company is liable. *Weightman v. Louisville, etc., R. Co.*, 70 Miss. 563, 12 So. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671, distinguishing *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8, 48 Am. Rep. 74.

Where a passenger's age and infirmity is apparent from her appearance, it is the duty of the carrier's servants to assist her in alighting from or boarding the train, if such assistance is reasonably necessary for safety. *Morarity v. Durham Tract. Co.*, 70 S. E. 938, 154 N. C. 586.

94. *Foss v. Boston, etc., R. Co.*, 66 N. H. 256, 21 Atl. 222, 47 Am. & Eng. R. Cas. 566, 49 Am. St. Rep. 607, 11 L. R. A. 367.

95. *Southern R. Co. v. Wright*, 6 Ga. App. 172, 64 S. E. 703.

96. *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

Where access to trains at the station is easy, it is not required of the company's employees to assist passengers in getting on board. *Yarnell v. Kansas, etc., R. Co.*, 113 Mo. 507, 21 S. W. 1, 18 L. R. A. 599.

But where it stops its train at a place where passengers can get out only with difficulty, it is the duty of the conductor to assist them. *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

In an action by a passenger against a carrier, where plaintiff alleged, and introduced evidence tending to show, that she, far advanced in pregnancy, became ill while on board the train, that the carrier was negligent in failing on request to afford her an opportunity to leave the train to procure medical attention, and in failing to assist her in leaving it after knowledge of her condition, but that she succeeded in getting off, though suffering

jury.⁹⁷ What omissions in such a situation would amount to negligence are questions of fact for the jury, and under the system generally adopted where all matters of fact are required to be submitted to the jury, such a question is never for the court, unless the facts and circumstances are plainly such that admit of no issue on the subject.⁹⁸

Failure to Furnish Proper Place for Alighting.—The duty to render assistance to passengers may arise when it is especially difficult to board or alight from the carrier's vehicle. Thus, it has been held that where a woman passenger, who was incumbered with heavy clothing and baggage,⁹⁹ was compelled to alight, on a dark night during a snow storm, at a station where there was no platform, it was the duty of the carrier to assist her to alight.¹ Where a train is not stopped at the platform of the station, but at a place which is unsuitable or unsafe for the purpose of discharging a passenger it may be the duty of the carrier to give a passenger such instruction and assistance as will enable him to alight and reach the station in safety.² But where a train was run by a

extreme pain and about to be delivered, it was not error to refuse to charge that, if she was able to leave the train without assistance of the conductor, she would not be entitled to recover. *Central, etc., R. Co. v. Madden*, 135 Ga. 205, 69 S. E. 165, 31 L. R. A., N. S., 813, 21 Am. & Eng. Ann. Cas. 1077.

Instances in which failure to furnish assistance held to constitute negligence.—*San Antonio Tract. Co. v. Flory*, 100 S. W. 200, 45 Tex. Civ. App. 233; *Missouri, etc., R. Co. v. Buchanan*, 72 S. W. 96, 31 Tex. Civ. App. 209; *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593.

Plaintiff started to alight from her train at station on the usual side of the car and seeing a freight train there went to the other side. The train started. She had two valises. There was no one to assist her and no platform on either side. The train did not stop a reasonable length of time. She was injured in alighting. Held, plaintiff was injured through defendant railroad's negligence without her fault and should recover. *Gulf, etc., R. Co. v. Vinson* (Tex. Civ. App.), 24 S. W. 956.

In an action by a passenger for injuries sustained in alighting from the train, the evidence considered and held to sustain a finding that the injury was the result of defendant's negligence in causing its train to suddenly move while plaintiff was attempting to alight, without notice to her, and in the failure of the conductor to assist her in alighting after he saw that she needed assistance, and that plaintiff was not negligent. *St. Louis, etc., R. Co. v. Kennedy* (Tex. Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op.

97. Georgia.—*Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015.

Iowa.—*Allender v. Chicago, etc., R. Co.*, 43 Iowa 276.

South Carolina.—*Brodie v. Carolina Mid. R. Co.*, 46 S. C. 203, 24 S. E. 180; *Simms*

v. South Carolina R. Co., 27 S. C. 268, 3 S. E. 31, 3 Am. & Eng. R. Cas. 571.

Texas.—*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Campbell v. Alston* (Tex. Civ. App.), 23 S. W. 33.

It is always a question of fact, to be determined from all the circumstances, whether such duty arises in any given case. *Ft. Worth, etc., R. Co. v. Work* (Tex. Civ. App.), 10 S. W. 962.

It is for the jury to determine whether the duty of the carrier extended in a particular case to assist a woman laden with packages to alight from a train. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

Where, in an action for injuries to a female passenger while alighting from a street car, negligence was charged in that the car platform and steps were wet, muddy, and slippery, rendering them dangerous for ladies unassisted to alight, whether the carrier owed plaintiff a duty either to warn or assist her was for the jury. *Flory v. San Antonio Tract. Co.* (Tex. Civ. App.), 89 S. W. 278.

98. San Antonio Tract. Co. v. Flory, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op.

99. The duty to assist passengers boarding trains carries with it as an incident, under reasonable circumstances, the duty to assist a lady traveling with heavy hand baggage. *Hasbrouck v. New York, etc., R. Co.*, 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912 D, 1150, affirming judgment, 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478.

1. Alexandria, etc., R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289.

2. Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157.

station in consequence of the failure of the air brakes to work, and the trainmen were engaged in putting on the hand brakes, a passenger who, to avoid being carried past her destination, alighted from the moving train, did not, it has been held, establish negligence on the part of the company by showing that she was not assisted to alight.³ However, when a station platform is so much below the level of the lower steps of the car as to make it unsafe for passengers to alight without an intermediate stool or steps, the carrier must provide one, but need not assist the passengers in alighting.⁴ In order for a railroad company to claim immunity for its failure to have a proper platform at the station upon which passengers may alight and for the use of an appliance less safe, it is its duty at least to render such assistance to passengers as to make the use of the appliance as safe as a platform would have been.⁵ The cause of action in such cases arises out of the duty of every carrier of passengers not to expose its passengers to any danger in alighting, and not from the failure to provide safeguards.⁶ For example, when a train was not stopped at the regular place for taking on and setting down passengers but farther on at a place where the track was considerably higher than the ground at the side of the track, and where plaintiff, a woman, could not get on the train without assistance, it was said that it was the duty of the company to render her, by its servants, such assistance as may have been necessary.⁷ And when a street railway company stops its car in front of an excavation made by the city, to allow passengers to alight, and neither warns them of the danger nor assists them to alight, it is liable for injuries sustained by a passenger who steps off the car into the excavation.⁸ And when no platform is provided at a station and the only means of getting on and off is a movable stool or box, it may be the duty of the carrier to offer passengers assistance so that the use of the appliance may be rendered safe.⁹

Effect of Promise.—It has been said that if a passenger on a railroad train informs the trainmen that she will need assistance in alighting, and they promise to assist her, it is their duty to render her the promised assistance.¹⁰ But the effect of a promise by a carrier's servant to assist a passenger is probably governed by the same principles as promises to notify passengers specially that a station has been reached or to awaken them. As has been shown, the servant's promise does not, as a general rule, bind the carrier in either of these cases.¹¹ By analogy, the mere fact that a servant has promised to assist a passenger to board the carrier's vehicle does not make the carrier liable for a failure of the servant to give the promised assistance. And there seems to be some authority for the view that such a promise is not binding on the carrier.¹² Thus, it is said that in view of the general rule that a carrier does not owe this obligation to a passenger, it would seem that the carrier could not be held accountable for

3. *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511.

4. *Merryman v. Chicago, etc., R. Co.*, 113 N. W. 357, 135 Iowa 591.

5. In this instance a stool. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368.

6. **Duty not to expose passengers to danger.**—*Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

7. *Western, etc., Railroad v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655.

8. **Stopping car at dangerous place.**—*Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

9. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng.

R. Cas. 32, 3 L. R. A. 368; *McDermott v. Chicago, etc., R. Co.*, 82 Wis. 246, 52 N. W. 85.

10. *St. Louis, etc., R. Co. v. Baker*, 67 Ark. 531, 55 S. W. 941.

11. See, *supra*, §§ 2475 and 2476.

12. *New Orleans, etc., R. Co. v. Stat-ham*, 42 Miss. 607, 97 Am. Dec. 478.

A railroad company is not liable for taking a child seven years old beyond his station, notwithstanding the courteous promise of the conductor to look after the boy and to request his successor to do so, and the answer of the second conductor to the father that the boy was not on the train, the company's duty ending when the station was called out. *Gage v. Illinois Cent. R. Co.*, 21 So. 657, 75 Miss. 17.

a failure of its conductor to comply with his promise in this respect.¹³ There is, however, respectable authority for the proposition that when a passenger is manifestly aged, infirm or sick, or of defective eyesight, then it becomes the duty of the carrier to render to him such assistance, provided of course that the agents of the carrier know or by reasonable attention to their duties ought to discover, the fact of such infirmity.¹⁴ In a case in which the trial court charged that the fact that the porter on a train agreed to assist plaintiff, who was infirm and weak in her hands on account of rheumatism, to alight from the train, would not affect defendant's liability in any way, a judgment for defendant was sustained on the ground that the evidence wholly failed to show such a state of fact as would require the rendering of assistance to plaintiff.¹⁵

Extent of Assistance.—A promise by a conductor to a partially blind female passenger to assist her in alighting from the train when it reaches her destination is not an undertaking on the part of the conductor to enter the car in which she is riding, take charge of her bundles, and escort her from her seat down the aisle and out upon the platform, unless plaintiff is so helpless as to require this extraordinary attention.¹⁶

Presence of Husband to Assist.—Where a woman passenger is accompanied by her husband, apparently capable of assisting her, the duty of the carrier to give her assistance is suspended, and no recovery can be had for its nonexercise.¹⁷ And the fact that her husband is carrying a baby does not render him unable to assist her in alighting from the train, so as to make it the duty of the carrier's servants to assist her.¹⁸

Effect of Rules of Carrier.—Even though a railway's rules require conductors to assist lady passengers in alighting, nonconformity to the rule would impose no liability on the carrier unless known to and relied upon by a passenger to her hurt, such duty being wholly gratuitous.¹⁹

Passenger Leaving Train at Intermediate Station.—A passenger has the right, if he desires to exercise it, to leave the train and abandon it as a passenger at a station on his route short of his destination as called for in his ticket; and if this purpose is made known to the brakeman he is under the same duty to render such assistance to the passenger in alighting from the train as his physical condition requires that he should extend to the passenger if leav-

13. **Holding in view of general rule.**—And it has been held that although a conductor promises to assist a passenger to alight, the company is not bound thereby and is not liable for a failure to give the promised assistance. *St. Louis, etc., R. Co. v. McCullough* (Tex. Civ. App.), 33 S. W. 285.

14. **Broader view.**—*Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

A voluntary promise by a conductor to aid a passenger in getting off of a railroad car at a certain station does not impose upon the company any liability for a failure of the conductor, after reaching such station, to enter the car and assist the passenger from her seat to the place of exit from such car, where it does not appear that the conductor has any notice of any condition or circumstances of the passenger that would render such assistance necessary. *Western, etc., R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913.

15. *Daniels v. Western, etc., R. Co.*, 96 Ga. 786, 22 S. E. 956.

16. **Extent of assistance.**—*Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

As was held in the case of *Western, etc., R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 913, wherein it appeared that a conductor made a like promise to give assistance to a female passenger, such an undertaking does not amount to "a promise by the conductor to leave his other business and go into the car to assist [a] passenger from her seat to the platform and down the steps," but merely to a promise to assist the passenger, after she has reached the platform of the car, in alighting therefrom to the ground. *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

17. *Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

18. *Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

19. **Effect of rule of carrier.**—*Central, etc., R. Co. v. Carlisle*, 1 Ala. App. 514, 56 So. 737.

ing the train at the point called for in his ticket.²⁰ And the principle is applicable though the passenger's leaving the train short of his destination is the result of mistaken information given by a brakeman.²¹

§ 2478. Notifying Passengers of Starting of Train.—In giving signals to tardy passengers, who have needlessly neglected to board the train, the purpose is to prevent them from being left in consequence of their own want of promptitude. Ordinary diligence as to such signals, according to what is usual on like occasions, in like circumstances, is required on both sides,—on the side of the company in giving them, and on the side of passengers in looking, listening, or observing.²² In some cases it is held that it is the duty of a railroad company, through its agents, to give reasonable signals of the departure of its trains from its stations and depots, such signals as would ordinarily attract the attention of passengers and those interested in the movements of the cars of the railroad company.²³ And what constitutes ordinary diligence on the part of a railroad company in giving signals to passengers to board the train is a question for the jury.²⁴ But it is held, on the other hand, that in the absence of a statute requiring a signal of the starting of a train to be given by bell or whistle, if a train be stopped for a time reasonably sufficient for passengers, who exercise due diligence, to board or alight, it will not be negligence per se to put the train in motion again without giving notice by signal of the intention to do so.²⁵ And

20. Passenger leaving train at intermediate station.—*International, etc., R. Co. v. Anderson*, 15 Tex. Civ. App. 180, 53 S. W. 606.

21. A railroad company is liable for the negligence of a brakeman, resulting in injury to a passenger, while carrying such passenger, a physically disabled person, from a train, which he did at the request of persons having the passenger in charge, though the latter and her attendants left the train at a point short of their destination by reason of the mistaken statement of the brakeman that it was necessary for them to change cars at that point. *International, etc., R. Co. v. Anderson*, 53 S. W. 606, 15 Tex. Civ. App. 180.

22. Signals at starting.—*Central R., etc., Co. v. Perry*, 58 Ga. 461.

A railway company is bound to give reasonable signals of the departure of its trains from its stations, such as would ordinarily attract the attention of passengers and those interested in the movement of its cars. *Perry v. Central Railroad*, 66 Ga. 746.

23. Notice of starting train.—*Perry v. Central Railroad*, 66 Ga. 746.

So if the train stop at a wood and water station, and start again in an unusually short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a slave passenger, any one of these facts will be sufficient evidence of neglect or mismanagement, to charge the road for all damages received at the time by such negro. *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22.

24. Question for jury.—*Central R., etc., Co. v. Perry*, 58 Ga. 461.

25. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Gulf, etc., R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128.

There is no statute in force in Texas requiring a signal to be so given before a train is put in motion, after having stopped at a station where passengers are to alight. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

The starting of a train without the usual bell ringing or whistle from a flag station on a railway where trains do not usually stop unless signaled, whereby one who had left the train during its temporary stopping at midnight was injured in the effort to return to it, is not negligence per se. Where negligence did in fact exist should be determined by the jury from a consideration of other facts in evidence. *Galveston, etc., R. Co. v. Cooper*, 70 Tex. 67, 8 S. W. 68.

An instruction that "it is not negligence in itself to start a train from a passenger depot without ringing a bell or blowing a whistle, or saying 'All aboard,'" is properly qualified by the further statement that the law does not undertake to declare what act or omission amounts to negligence, but it is for the jury to determine from the evidence. *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990.

Plaintiff attempted to get upon a train which was standing still at a station and was partly filled with passengers. As the plaintiff stepped up on the steps of the car the train, without any signal or notice and without any examination by those in charge to ascertain whether any one was getting on or off, was started with a violent jerk, which threw the plaintiff from the car. It was held that

it has been said that in the absence of a custom to give signals for passengers to get off, a railroad company is not bound to give any signal for such purpose, after having stopped its train and kept it standing at the station a sufficient time to allow passengers to alight by the exercise of ordinary and reasonable diligence on their part.²⁶ Although it is not the duty ordinarily of a railroad company to give notice to passengers who are to alight from its cars at a station where the train has stopped, before putting such train in motion, that it is about to start such train, yet circumstances may arise which would create such duty, and require such notice, but the jury must be first required to find the existence of such circumstances before they can be allowed to find that the failure to give such notice was negligence on part of such company.²⁷ But it is said that where a train has been stopped at a wood station, only for the purpose of taking on wood, the carrier is under no duty to passengers on the train to inform them, by signal, that the train will start.²⁸ As to a sudden movement of trains, before allowing a reasonable time to board or alight, see ante, "When the Train or Street Car Is Stopped," §§ 2463-2469.

Object of Signal.—Relative to passengers who have needlessly lingered about the depot and neglected to board the train, the object of giving signals is to keep them from being left. The company, in giving signals to them for that purpose, is bound only to usual and ordinary diligence; and such passengers are themselves bound to exercise ordinary care and attention in looking or listening for and observing the signals.²⁹

Sufficiency of Signals.—When the starting of a train is announced by signal or otherwise, the announcement should be made a reasonable time before the train is started so that passengers who are in the act of getting on or off may have an opportunity to reach a place of safety.³⁰ Passengers who trust to signals to avoid being left, have a right to do so, but they are to be understood as trusting to such as are made in like circumstances, and on like occasions, in the

the question of negligence was for the jury. *Keating v. New York, etc., R. Co.*, 49 N. Y. 673.

Held to be negligence per se.—Failure to ring the bell or blow the whistle before leaving a station, as required by Code 1907, § 5473, is negligence per se. *McElvane v. Central, etc., R. Co.*, 170 Ala. 525, 54 So. 489, 34 L. R. A., N. S., 715.

26. If, after passengers have been allowed a reasonable time to get on or off, a train moves off without giving any signal, and a passenger is then in the act of alighting, none of the employees connected with the train knowing of his delay or of his exposed position, and he is injured in consequence of the movement of the train, the company is not liable for the consequences. *Atlanta, etc., R. Co. v. Dickinson*, 89 Ga. 455, 15 S. E. 534.

While a carrier is bound to stop its trains at stations for a time reasonably sufficient to allow passengers to alight, a train having stopped for such a reasonable time, the carrier owes no further duty to notify passengers of the starting of the train, unless its employees knew that passengers had not availed themselves of the opportunity to alight and were then in the act of so doing. *Gulf, etc., R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128.

27. Duty dependent on circumstances

—**Question for jury.**—*New York, etc., R. Co. v. Woods*, 9 O. C. C. 322, 6 O. C. D. 350, affirmed in 58 O. St. 710, 51 N. E. 1100; *Gulf, etc., R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128; *Gulf, etc., Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Texas, etc., R. Co. v. Mitchell* (Tex. Civ. App.), 26 S. W. 154; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, affirmed in 93 Tex. 674, no op.

28. *Malcom v. Richmond, etc., R. Co.*, 106 N. C. 63, 11 S. E. 187, 44 Am. & Eng. R. Cas. 379.

29. Object of giving signals.—*Central R., etc., Co. v. Perry*, 58 Ga. 461; *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253.

So where a passenger intending to board a train was injured by the engine of another company while attempting to catch the train, which had been started without a signal, the company operating the latter train can not be held liable for his injuries, as it could not have foreseen, nor was it bound to anticipate that as a result of its negligence in starting its train without a signal, the passenger would be injured by another engine. *Perry v. Central Railroad*, 66 Ga. 746.

30. *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942.

exercise of ordinary diligence. What are such signals, and by what means they should be made, and with what degree of distinctness, or loudness, are questions for the jury, under the evidence, and not for the court.³¹

§ 2479. Directions as to Boarding Trains.—A carrier, in directing a passenger which train to take to reach her destination, is required to give the passenger the highest degree of care and attention.³² It is the duty of a railroad company not to mislead the public by announcements, and if, because of a breach of this duty, a passenger is led to board the wrong train, an action will lie.³³ And it is negligence for the servants of a railroad company to tell passengers to get aboard a train which is not ready for their reception but which is to be drawn up a few feet to get it in the proper place for taking on passengers.³⁴ But a carrier is under no obligation to exercise special supervision and guidance over a passenger, a man of mature years in good health, having had considerable experience in traveling, who does not disclose the fact that he is ignorant of the situation of the tracks or station ground, or ask for any information or guidance in going from the station to the train upon which he was to be transported and by which he was injured, though the night was dark and cloudy and the station grounds were new and uncompleted.³⁵ It is, however, an understood principle that if guidance be furnished it must not be negligent.³⁶

§ 2480. Liability for Act of Fellow Passenger.—It has been held that a passenger on a street car who was injured, while alighting, in consequence of being pushed and jostled by other passengers, the conductor being at the time on the ground engaged in assisting the passenger's child to alight, had no action against the carrier.³⁷ Nor is a carrier liable where a passenger is injured in jumping from a train at a place where there is no platform, at the instance of a person on the train, unless such person is dressed in the uniform in which the employees of the company are dressed, or is an employee of the company.³⁸ But where disorderly passengers are close to another passenger as she was about to descend from the car to the platform and the situation was so obvious that it could not reasonably have escaped the notice of the carrier's servant had he been according to custom at the usual place to see passengers safely landed, the carrier can not escape the responsibilities for injuries received by the passenger by reason of such disorderly passengers because of the absence of its servant from his post of duty.³⁹

§§ 2481-2487. Misleading Invitations to Alight—§ 2481. In General.—The obligation of carriers to exercise care for the safety of passengers, requires that they should be careful to avoid doing anything which is calculated to mislead passengers as to the proper time and place for alighting. If a pas-

31. **Question for jury.**—*Central R., etc., Co. v. Perry*, 58 Ga. 461; *Stevens v. Central R., etc., Co.*, 80 Ga. 19, 5 S. E. 253.

32. **Directions as to boarding trains.**—*Yazoo, etc., R. Co. v. Smith (Miss.)*, 60 So. 73.

33. *Flint, etc., R. Co. v. Stark*, 38 Mich. 714.

34. *Detroit, etc., R. Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141.

35. **Special supervision.**—*Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026.

36. *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026.

And the fact that the passenger, in ap-

proaching the train which he was to board, by mistake thought that the station agent was on the opposite side of the main track on which the train was coming, and, in accordance with the agent's directions to "come on," crossed the track and was struck, did not render applicable the principle that, if guidance be furnished, it must not be negligent. *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026.

37. *Ferguson v. Citizens' St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936.

38. *Texas, etc., R. Co. v. Woods*, 40 S. W. 846, 15 Tex. Civ. App. 612.

39. **Injury caused by disorder among passengers.**—*Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042.

senger is reasonably induced to believe, from the conduct of those in charge of a train when taken in connection with all the circumstances, that he is invited to alight, and if, in the exercise of due care and caution, he undertakes to do so and is injured by reason of the place being inappropriate and unsafe, or by reason of the starting of the train while he is in the act of getting off, the carrier is chargeable with responsibility for its negligence.⁴⁰ In such cases there is no contributory negligence in accepting the invitation to alight.⁴¹ The invitation may consist, in exceptional cases, of the stopping of the train or car without an announcement of the passenger's station, or of the station coupled with a slowing up of the train, but it usually consists of the announcement of the station, the subsequent stopping of the train, and the failure of the carrier to warn the passengers against, or otherwise preventing them from alighting.⁴² Thus, it is said that where a street car slows up or stops at an unusual stopping place, in such a manner as clearly to invite a passenger to alight, and the passenger attempts to do so, using due and proper care, it is the duty of the persons in charge of the car not to start it suddenly and in such a manner as to endanger the passenger's safety.⁴³ In these cases the negligence of the carrier must depend upon all the facts and circumstances of the case, as, for example,

40. Where a passenger on a freight train was warranted in assuming that the place where the caboose stopped was the place at which she was expected to alight, it was the duty of the carrier to stop the train long enough for her to alight in safety, or to warn her of the danger resulting from the further movement of the train in time to avert injury, and it was immaterial whether the movement of the train producing injury was an incident to the ordinary operation of such trains, or was unnecessarily violent. *Southern R. Co. v. Burgess*, 42 So. 35, 143 Ala. 364.

Railway carriers of passengers must be extremely careful not to mislead passengers to believe that the halting of the train at a station is intended as an invitation to them to alight when it is not so intended, and, if the conduct of the carrier's servants in managing the train is such as to create that impression and a passenger attempts to leave the coach at a place where no facilities are provided for doing so, and is injured, the carrier is liable. *Kansas, etc., R. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603.

Where the carrier through its servants and agents so acts as to mislead a passenger with reference to the time, the place, and the safety of alighting, it is guilty of negligence for which a recovery will be sustained. *Baltimore, etc., R. Co. v. Mullen*, 120 Ill. App. 88, judgment affirmed in 75 N. E. 474, 217 Ill. 203.

Right to rely on conductor's directions.—Where a station was called by the conductor, and a woman who was a passenger on the train was told to get off, and no light or assistance offered to her in departing from the train, it being at night, it was held, that she had a right to presume that the conductor was directing her to get off at the usual place for depositing passengers, and that it was a safe and

suitable place to depart from the train and where she alighted at an unsafe place and was injured thereby, the railroad company was liable. *East Tennessee, etc., R. Co. v. Conner*, 83 Tenn. (15 Lea) 254.

41. **Liability for injury to passenger alighting at direction or suggestion of carrier's employee.**—A passenger is not guilty of contributory negligence in leaving the car where he is reasonably authorized to believe, from the language used, that it was the intention of the conductor that he should do so when the train stopped. *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384.

Where a passenger was negligently carried beyond her destination and the train was stopped for her to alight at a place not affording facilities to alight safely, or after stopping the train, the operatives urged her to hurry and jump and she did as directed, and the act was such as an ordinarily prudent person would have done under the circumstances, the company is liable for injuries resulting therefrom. *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416.

42. **What constitutes invitation.**—See post, "Announcing Name of Station," § 2482; "Stopping Train," § 2483; "Announcing Station and Stopping Train," §§ 2484-2486.

43. *Coyle v. People's R. Co.* (Del.), 80 Atl. 638; *Elliott v. Wilmington City R. Co.* (Del.), 6 Pen. 570, 73 Atl. 1040.

Notwithstanding that the usual stopping place of a street car may be on the further side of a street intersection, yet if it stops before crossing the street, and a passenger is led to believe that it is in obedience to her signal to give her an opportunity to alight, it would be negligence of the carrier's servants in charge knowingly to allow the car to start while the passenger is alighting so as to throw her to the ground. *Monroe v. United R. Co.* (Mo. App.), 133 S. W. 645.

whether the station had been announced, whether the train was brought to a standstill or merely slowed up, the circumstances under which the stop was made or speed decreased and whether the stop or low rate of speed was for a long or short period, whether the stopping place was safe or unsafe, whether it was day or night, and, if night, whether the stopping place was lighted, whether the passenger was familiar with the route and the practices of the carriers, etc.⁴⁴ But where a passenger is injured in jumping from a train at another's direction, at a certain place, the safety of such place for alighting is only incidentally involved, the carrier's liability being only in case its servants has so directed.⁴⁵ The question of the carrier's negligence must, therefore, in nearly every case be left to the determination of the jury.⁴⁶ The extent to which each case turns on its peculiar facts, renders futile any effort to lay down any general rules,⁴⁷ and nothing more than a grouping and setting forth of the cases under convenient headings will be attempted.

§ 2482. Announcing Name of Station.—Generally speaking, the announcement of the name of a station, being usually intended to inform the passengers that the train is approaching the point of their destination so that they may prepare to get off when the train stops, is not of itself an invitation to alight.⁴⁸ But it is rather a notice to passengers bound for that station to alight when the train stops there.⁴⁹ Where the name of a station was announced, and

44. See *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925.

On evidence tending to establish the allegations of a petition that the conductor of defendant's train stated that the train was at a station, in reliance on which plaintiff attempted to alight, when the train, not being at the station, but over a trestle, started, and plaintiff was injured, instructions confining the issue to the statement of the conductor, or to the sudden movement of the train, were properly refused, as such movement, though not of itself negligence, was to be considered in connection with the situation in which the conductor's negligence had placed plaintiff. *International, etc., R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

An instruction that plaintiff could not recover for an injury received in attempting to alight from a train in the night, acting on a statement of the conductor that the train was at a station, which was incorrect, if the danger of getting off the train was as open to his observation as to that of the conductor, was properly refused as misleading, since their situation and information in respect to the danger were unequal. *International, etc., R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

In an action against a railroad company for injuries sustained by a passenger while alighting from a train which was still in motion, an instruction that the suggestion of defendant's employees to alight would not alone justify plaintiff in alighting, but was a circumstance to be considered with all the other evidence to determine whether he was in the exercise of due care in attempting to alight, while perhaps on the weight of the evidence because stating that the suggestion of defendant's servants would not alone jus-

tify plaintiff in alighting, contains nothing of which defendant could complain. *Texas, etc., R. Co. v. Whitley*, 96 S. W. 109, 43 Tex. Civ. App. 346.

45. **Safety of alighting place.**—*Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846.

46. *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384; *Miller v. East Tennessee, etc., R. Co.*, 93 Ga. 630, 21 S. E. 153.

47. The jury must determine as a fact whether a passenger is authorized from the words or acts of the carrier's agent that it was intended he should alight from a car at a given time and place. *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384.

48. *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313; *England v. Boston, etc., R. Co.*, 153 Mass. 490, 27 N. E. 1; *Minock v. Detroit, etc., R. Co.*, 97 Mich. 425, 56 N. W. 780.

There is a difference between the ordinary announcement of a station as the train approaches it, so that the passengers may prepare to leave the train when it reaches the station, and the announcement after the train has stopped; in the latter case, it is equivalent to inviting the passengers for that station to leave the train. If the passenger in this case got out without such an announcement, it was his act; if he was deceived by the announcement, it was the company's act, so far as fault is concerned. *Central Railroad v. Thompson*, 76 Ga. 770.

49. *Houston, etc., R. Co. v. Dotson*, 38 S. W. 642, 15 Tex. Civ. App. 73.

The customary announcement of a station by the flagman of a passenger train, with the order, "All out for" such station, and his fastening back of the door of the

the door of the coach was opened and fastened back, but the train did not come to a stop, it was held that there was no negligence on the part of the carrier which would charge it with liability to a passenger who was injured in alighting from the train while it was still moving.⁵⁰ But in order to charge the carrier with negligence in cases of this class it is not always necessary that the train should actually be stopped; if the train is slowly moving so that it appears to a passenger, who is in the exercise of due care, that it has stopped, then, for all practical purposes, the case is the same as if the train has actually stopped.⁵¹ And if the train suddenly stops or moves forward in response to an authorized signal, where the passenger's position should have been known, the carrier is liable.⁵²

§ 2483. Stopping Train.—To charge a railroad with liability in cases of this character it is not always necessary that the name of the station should have been announced.⁵³ But on the other hand it is held that where a train

car, was not an invitation to passengers to get off, accompanied with an assurance that the train had arrived at the station, but was merely the imparting of information to such passengers as might desire to get off at the station, so that they could be in readiness to do so. *Illinois Cent. R. Co. v. Massey*, 97 Miss. 794, 53 So. 385.

50. *England v. Boston, etc., R. Co.*, 153 Mass. 490, 27 N. E. 1.

In an action by a passenger to recover for injuries sustained in falling from the platform of a car, where she had gone as the train approached her station and after the name of the station had been announced, but while the train was still in motion, the only act connecting defendant with plaintiff's injuries was the announcement, as required by statute, of the name of the station, and that a change of cars was to be made. It was held that there was no negligence on the part of defendant which could charge it with liability. *Payne v. Nashville, etc., R. Co.*, 106 Tenn. 167, 61 S. W. 86.

The announcement that the next stop was the station at which plaintiff desired to alight was not an invitation to him to alight while the train was in motion. *Morris v. Illinois Cent. R. Co.*, 127 La. 445, 53 So. 698, 31 L. R. A., N. S., 629.

The announcement of the next station by a porter on a railway passenger train, though made on the near approach to the station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops. *Illinois Cent. R. Co. v. Warren*, 149 Fed. 658, 79 C. C. A. 350.

51. *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907, citing *Bartholomew v. New York, etc., R. Co.*, 102 N. Y. 716, 7 N. E. 623, 27 Am. & Eng. R. Cas. 154. See post, "Preventing Passenger Leaving Moving Train," § 2514.

52. A passenger on a train came out on the platform preparatory to getting off in response to a call of "All off for S." As he was stepping off, as the train had almost come to a stop, the brakeman signaled the

engineer to go ahead and hallooed "All off for S," and the train jerked, throwing the passenger to the ground. The brakeman knew that the passenger was to get off the train at the station, and, at the time of signaling to go ahead he was in a place where he could easily have seen the position of the passenger. Held, that the brakeman's carelessness was the palpable cause of the injury, rendering the company liable therefor. *Darden v. Atlantic, etc., R. Co.*, 144 N. C. 1, 56 S. E. 512.

Where it was alleged that a passenger, after boarding a train to be carried to B., notified defendant's employees that he had never before ridden on a train, and asked that he should be informed when the train arrived at his station; that he was instructed to alight when the station should be announced; that, before reaching the station and while the train was in full motion, an employee of defendant entered the coach in which the passenger was riding and called out, "All out for B.;" that he went upon the platform, and, immediately, the brakes were applied, the speed of the train checked, and he was hurled from the platform, mangled and killed; it was held that the question of defendant's negligence was for the jury. *Doolittle v. Southern R. Co.*, 62 S. C. 130, 40 S. E. 133.

53. About the time when the train upon which deceased was a passenger usually arrived at the station where he was to get off, and at the place where the signal whistle for the station was usually sounded, the engineer caused the customary signal to be given and applied the brakes, but the brakes did not stop the train and it ran by the station and was stopped on a trestle bridge, three hundred and eighty-five feet beyond the usual stopping place. The night was dark and there were no lights about the place where the train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The deceased stepped from the car in which he was sitting and fell through the bridge. The station had not been called at the time the deceased left the train, but

is stopped a short distance from the station, and nothing is done by the carrier's servants to induce passengers to leave the train at that place, the carrier is not liable to a passenger who gets off and is injured.⁵⁴ The momentary stopping of a train for switching purposes at a point distant from any station or stopping place does not constitute an invitation to passengers to alight, and one attempting to do so without notice to the company's servants can not recover for injuries received while so doing.⁵⁵

§§ 2484-2486. Announcing Station and Stopping Train—§ 2484.

General Rule.—As a general rule it may be said that if a vehicle, shortly after the name of a station is announced, is brought to a full stop, a passenger may safely conclude, in the absence of notice, that the vehicle has arrived at the station, unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man that it has not reached the proper landing place, and the passenger who, acting under a reasonable belief that the vehicle has stopped at the point of his destination and exercising ordinary care, endeavors to get off, may recover for injuries received in consequence of the dangerous character of the place⁵⁶ or a sudden movement of the train without notice.⁵⁷ If, however, the surroundings and circumstances are such as would inform a man of ordinary care and prudence that the train has not reached the proper and usual place, the passenger is not justified in alighting, and injuries

there was evidence that it was not the custom of the company's employees to call the name of the station. A finding of negligence on the part of the company was sustained. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234, 49 Am. Rep. 168.

54. *Frost v. Grand Trunk R. Co.* (Mass.), 10 Allen 387, 87 Am. Dec. 668.

Negligence of a carrier is not to be inferred from the mere stopping of its train on a side track to permit another train to pass without informing the passengers that the stop was not at a station platform, when no station had been called, and no attendant circumstances existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place. *Ouellette v. Grand Trunk R. Co.*, 106 Me. 153, 76 Atl. 280.

The conductor of a train has the right to assume that a passenger will not attempt to leave the train before he reaches his destination, and, though the conductor knows that the passenger is ignorant and inexperienced, he is not bound to anticipate that he will attempt to leave the train before he is advised by the men in charge of the train that the train has reached his station. *Louisville, etc., R. Co. v. Cook*, 38 N. E. 1104, 12 Ind. App. 109.

55. **For switching purposes.**—Georgia, etc., *R. Co. v. Murray*, 113 Ga. 1021, 39 S. E. 427.

56. *Alabama.*—Richmond, etc., *R. Co. v. Smith*, 92 Ala. 237, 9 So. 223.

Ohio.—Pittsburgh, etc., *R. Co. v. Martin*, 2 N. P. 353, 3 O. Dec. 493.

Texas.—Texas, etc., *R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384.

Bringing a car to a full stop near the regular stopping place, after having given the usual signal indicating arrival at the

stopping place, is an implied invitation to the passenger to alight. *Terre Haute Tract, etc., Co. v. Payne*, 45 Ind. App. 132, 89 N. E. 413.

A train stopped on a dark night away from the platform, and a passenger's station was called. He was told by the conductor to hurry, as he would be carried by if he did not. So urged, he stepped from the car, and fell several feet into a pile of wood. Held negligence for which the company was liable. *International, etc., R. Co. v. Smith (Tex.)*, 14 S. W. 642.

57. *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538, 7 So. 119, 41 Am. & Eng. R. Cas. 143, 16 Am. St. Rep. 63, 7 L. R. A. 323; *Ward v. Chicago, etc., R. Co.*, 165 Ill. 462, 46 N. E. 365, reversing 61 Ill. App. 530; *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925.

Whether an interurban car stopped at a regular stopping place or not can make no difference, in an action for injury to a passenger thrown to the floor by a jerk of the car while passing to the door to alight, if the conductor announced that such stop was where she desired to alight, and permitted passengers to alight there. *Terre Haute Tract, etc., Co. v. Payne*, 45 Ind. App. 132, 89 N. E. 413.

The conductor in charge of a car called the name of a street. A passenger gave a signal for the car to stop. The car stopped before reaching its usual stopping place, but near to it, and the passenger attempted to alight, when the car suddenly started, causing injury to her. Held, that the passenger had the right to assume that the car had stopped for the purpose of letting her alight, and it was the duty of the conductor to learn whether any passengers were preparing to alight before starting the car. *Hufford v. Metropolitan St. R. Co.*, 109 S. W. 1062, 130 Mo. App. 638.

received in so doing must be attributed to accident or the passenger's negligence.⁵⁸ Railroads have frequently been held liable for injuries received by a passenger in alighting from a train in the dark, after the station has been announced and the train stopped, without any warning being given the passengers that the train has not stopped at the station.⁵⁹ But while the circumstances that it is dark, so that the passenger is not able to see that the train has not stopped at the station is often of controlling importance in cases of this kind, still, even in the daytime, the circumstances may be such that the announcement of a station, and the subsequent stopping of the train may be taken as an invitation to alight, and justify a recovery for injuries received in so doing.⁶⁰

Next Station.—A statement made by a brakeman to the passengers in a railroad car between stations, giving the name of the "next station," is merely an announcement, and not a call of the station; and, unless made when the train is immediately approaching a station, passengers for such station are not justified in treating it as an invitation to alight when the train next stops.⁶¹ Thus, it has been held that the announcing of the name of the next station, the station not having been called, and stopping the train, was not an invitation to alight, calling for a warning as to the character of the place where the train had stopped.⁶²

§ 2485. Injury to Passenger in Consequence of Dangerous Character of Stopping Place.—In a great many of the cases arising under the rule just set out, the passenger was injured in consequence of the unsuitable and dangerous character of the stopping place.⁶³ Thus, it has been held where the con-

58. *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538, 7 So. 119, 41 Am. & Eng. R. Cas., 143, 16 Am. St. Rep. 63, 7 L. R. A. 323.

59. *Indiana*.—*Louisville, etc., R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107. *Kansas*.—*Southern Kansas R. Co. v. Pavey*, 48 Kan. 452, 29 Pac. 593.

Maryland.—*Philadelphia, etc., R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 44 Am. & Eng. R. Cas. 345, 8 L. R. A. 673, 20 Am. St. Rep. 483.

Massachusetts.—See *Brooks v. Boston, etc., R. Co.*, 135 Mass. 21, 16 Am. & Eng. R. Cas. 345.

Texas.—*International, etc., R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384.

Where plaintiff's destination was called as the next stop, and a stop was then made at a siding before the station, and a trainman called the station, and plaintiff alighted in a ditch in the darkness, the carrier was negligent in not warning the passengers that the stop was not at the station. *Dye v. Chicago, etc., R. Co.*, 115 S. W. 497, 135 Mo. App. 254.

60. See ante, §§ 2452-2457.

61. **Next station.**—*Rehearing*, 156 Fed. 564, 84 C. C. A. 330, denied. *Diggs v. Louisville, etc., R. Co.*, 158 Fed. 97, 85 C. C. A. 565.

62. Three young men traveling together were passengers on a railroad train which approached Knoxville, Tenn., which was their destination, after dark. The trainmen had announced that the next station would be Knoxville, as required by

the state statute, but had not called the station, when the train stopped on a narrow trestle in order to make use of a Y in turning before entering the city. The next morning the bodies of the young men were found near together under the trestle. Upon the trial of a consolidated action against the railroad company to recover for their deaths, there was evidence that they left the car together, while on the trestle, and tending to show that they fell over the edge as they stepped off. Held, that neither the announcement of the name of the next station nor the stopping of the train thereafter before it was reached was negligence, nor was either an invitation to passengers to alight before the station was called, which imposed on defendant the duty of warning them or rendered it liable for the deaths of plaintiffs' intestates. *Diggs v. Louisville, etc., R. Co.*, 156 Fed. 564, 84 C. C. A. 330, 14 L. R. A., N. S., 1029, rehearing denied in 158 Fed. 97.

63. Where it was alleged that defendant's porter announced the name of a station, and opened the door to allow passengers to get on and off, and the train thereupon stopped; and plaintiff, thinking the station had been reached, got off, as he supposed, upon the platform, when in fact the train had not reached the station, but had stopped on a trestle; and, it being nighttime, and there being no lights, plaintiff, although exercising due care at the time, stepped out and fell into an excavation containing water, whereby he sustained bodily injuries; it was held that negligence on the part of defendant was

ductor of a train announced the name of the next station, and the train was stopped before arriving at the station, but no notice was given to the passengers that it had not reached the station, nor any request or direction given them to retain their seats, and a passenger stepped off in the darkness of the night, fall-

sufficiently alleged. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684.

In the case of *Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408, the plaintiff was on the car of the defendant railroad. The night was dark. The conductor stopped the train and announced the name of the station, "Cumberland." Plaintiff could not see whether there was any platform or not, or where he was going to alight, but in good faith, relying on the announcement made by the conductor, stepped off in the dark into a culvert twenty feet deep and was injured. The supreme court of Indiana in passing upon the question of contributory negligence in that case, by approving the instructions, say: "If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station, or it had been announced from the proper and usual place of making such announcements, he had the right to believe that the train had reached a proper stopping place and that he could safely alight, and if he did then alight and did so without knowing the danger of the place; and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured in so alighting, he will be entitled to a verdict."

The train on which plaintiff was a passenger was stopped at a street crossing a short distance from plaintiff's station, in response to a signal by a crossing tender of defendant, given to prevent the train from reaching the station at the time when a freight train, going in the opposite direction, would pass on a track between the train and the station. The conductor of the train, having no warning of the intended stop or of its cause, promptly proceeded to ascertain the cause, and, having done so, caused the train to move slowly to the station. The stop was but momentary. It was dark, and there was no moon. Plaintiff, thinking the station had been reached, got out, and was injured by the freight train. It was, and long had been, the custom for passengers to board and leave the train at the station where plaintiff supposed the train had stopped on both sides, and plaintiff had been accustomed to getting on the side on which he alighted when he was injured. In plaintiff's action to recover for the injuries sustained, he had judgment, and the judgment was sustained on the ground that the question of defendant's negligence was for the jury. *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 1 Atl. 9.

On the approach of a train to the sta-

tion, a porter called out the name of the station and the train was brought to a standstill. The plaintiff, a season-ticket holder, accustomed to stop there, stepped out of the carriage in which he was seated, and falling upon an embankment was injured. The train had overshot the platform. It was night and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the train was to be backed. *Brett, J.*, said: "I agree that to call out the name of the station, before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshoot the station, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events the jury may from the facts infer negligence." *Weller v. London, etc., R. Co.*, L. R., 9 C. P. 126, 8 Moak's Eng. 441.

In another English case, the action was brought by the executrix and wife to recover for injuries suffered by her husband which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform, similar to but narrower than the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger, who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the exchequer chamber to the house of lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. *Bridges v. North London, etc., R. Co.*, L. R., 6 Q. B. 377, 2 L. R. 7 H. L. 213.

Whether the railway company, having stopped the train immediately after the conductor called out the station, failed in extraordinary diligence towards the plain-

ing through the bridge upon which the train was standing, the negligence of the carrier was a question for the jury.⁶⁴

§ 2486. Injury to Passenger by Movement of Train.—In yet other cases of this character the injury to the passenger resulted from the starting of the train while he was in the act of alighting. Where a brakeman called the station and opened the door of the car, and the train came to a stop and started up again without giving a reasonable time for a passenger to alight, and he was thrown from the train and killed, the carrier was liable.⁶⁵ The name of the station which was plaintiff's destination was announced while the train was in motion, and soon thereafter it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and while standing thereon the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the nighttime. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result."⁶⁶

tiff by not warning him that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place, and whether the plaintiff, a youth of seventeen years, was negligent in so alighting without first assuring himself that the station had been reached or that the place was safe, are questions more proper for submission to a jury than for determination by the court on a motion for a nonsuit. *Miller v. East Tennessee, etc., R. Co.*, 93 Ga. 630, 21 S. E. 153.

^{64.} *Philadelphia, etc., R. Co. v. Edelstein (Pa.)*, 1 Monag. 205, 16 Atl. 847; *Philadelphia, etc., R. Co. v. McCormick*, 124 Pa. 427, 16 Atl. 848.

Where the conductor passed through a car and announced that the passengers would change cars at Wawa, and soon after the car stopped, not at Wawa, but on a bridge, and the plaintiff, it being dark, stepped off and was killed, it was held that the question of defendant's negligence was for the jury, the court observing that "the deceased had a right to suppose that the train had stopped at the station. Having stopped at a place of peril for passengers to alight at a time when they had a right to suppose from the notice previously given that the train had reached the station, proper attention to the safety of the passengers would have required some warning to them to retain their seats." *Philadelphia, etc., R. Co. v. McCormick*, 124 Pac. 427, 16 Atl. 848.

^{65.} *Illinois Cent. R. Co. v. Dallas*, 150 Ky. 442, 150 S. W. 536.

Plaintiff was a passenger on defendant's road. When the train had arrived within a short distance of the destination, the brakeman called out the name of the station. The train stopped a few moments at a crossing of another road, short of the

station. The night was dark. The plaintiff, thinking he had reached the station, arose from his seat, and attempted to get off, just as the train was beginning to move slowly forward, and he was injured. It was held that he was entitled to recover. *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 322, 21 Am. & Eng. R. Cas. 374, 51 Am. Rep. 598.

^{66.} *Central R. Co. v. Van Horn*, 38 N. J. L. 133. In *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489, plaintiff was a passenger on defendant's train; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark. There was no depot at W., or station light, or anything to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and as her evidence tended to show, after the proper interval, so as to run the distance to W., the train came to a full stop; it had in fact run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; plaintiff then arose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, it was held that it was a question for the jury whether, in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station, that the train had not come to a final stop but would back up, and that the plaintiff was justified under the circumstances in supposing she had reached her destination and in attempting to leave the car; at least that the question of con-

§ 2487. Announcing Station and Stopping Train, as Required by Law, at Crossing.—In some of the cases in which it appeared that the name of the station had been announced and the train subsequently stopped at a crossing in compliance with a statutory requirement, some importance seems to have been attached to the fact that the carrier was, by law, required to stop the train at the crossing. Where the next station was announced just as the train was leaving one station, and the train, on reaching a place where another railroad crossed the track, came to a stop in compliance with a statutory requirement to do so, plaintiff, supposing that her station had been reached, attempted to alight and was injured by the starting of the train. A judgment for defendant was sustained, the court saying that a railroad company is under no obligation to guard against an exodus of passengers at an intervening railroad crossing, merely because it has given the name of the next station after its last preceding stop; it has a right to expect that passengers will remain in the cars until stations are called, as is the common custom on railroads, or, if they do not, that they will inform themselves of their whereabouts.⁶⁷ Plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, on reaching a crossing. Plaintiff hurried to leave the car, went down the steps where there was no platform or other convenience for landing, and as she was stepping off the cars were suddenly started to go forward to the depot, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable. Campbell, J., said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore

tributory negligence on her part was proper for the jury.

In a case in which the evidence for plaintiff tended to prove that, as the train upon which plaintiff was a passenger approached her station, at about nine o'clock in the evening, the whistle was sounded and the train stopped; that the brakeman came into the car, of which she was the only occupant, and said to her, "I will help you out with your things now;" that she arose, with a valise and some packages in her hands, and followed the brakeman, who opened the door and held it back while she passed out to the front platform, and who crossed over the coupling to the baggage car; that, while he was there standing with his side toward her looking toward the engine, she started down the steps, and, as she reached the third step, the train, which had remained stationary about fifteen seconds, suddenly started with a jerk, throwing her off and injuring her; it was held that the question of defendant's negligence was properly submitted to the jury. *Smitson v. Southern Pac. Co.*, 60 Pac. 907, 37 Ore. 74.

In an English case, plaintiff, a woman, took passage on a train from St. Mary Cray to Bromley. As the train approached Bromley the name of the station was called out, and shortly afterward the train stopped, but not until it had carried the plaintiff's car beyond the platform. The plaintiff got up from her seat and

started to descend from the car where it was. Just as she was stepping from the train, it was backed suddenly for the purpose of bringing all the cars abreast of the platform, and the plaintiff fell and was injured. It was held that she was not entitled to recover. Mr. Justice Blackburn said: "It appears that the train was coming up to the station, and some official on the platform called out 'Bromley—Bromley!' Calling the name of the station, I understand, and have always understood, to mean this, that it is an intimation to all who are traveling by the train that the station at which the train is about to stop is that particular station. Calling out the name of the station is not an invitation to alight." *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66, 43 L. J. Q. B. 8, 29 L. T. N. S. 397, 22 W. R. 153, 7 Moak's Eng. 119.

But this case has, it seems, been virtually overruled by the house of lords in *Bridges v. North London R. Co.*, L. R. 7 H. L. 213, 9 Moak's Eng. 165, the facts of which have been stated above. See *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 322, 21 Am. & Eng. R. Cas. 374, 51 Am. Rep. 598. The case is also in conflict with *Weller v. London, etc., R. Co.*, L. R. 9 C. P. 126, 8 Moak's Eng. 441, which will be found set forth above.

⁶⁷ *Minock v. Detroit, etc., R. Co.*, 97 Mich. 425, 56 N. W. 780.

get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform, appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distances mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this."⁶⁸ But if to the announcement of a station and the stopping of the train at a crossing, as required by law, are added other acts which amount to an invitation to passengers to alight, and the surrounding circumstances are such that the passengers, though in the exercise of due care, can not know, and they are not informed by the carrier's servants, that the station has not been reached, a jury may properly find the carrier guilty of negligence.⁶⁹

§ 2488. Duty to Warn Passengers of Danger.—Where the act of alighting from or boarding a train or street car is attended with dangers which the passenger can not reasonably be expected to discover for themselves, the carrier should properly warn them,⁷⁰ and in such cases the jury should decide as

68. *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, 18 Am. & Eng. R. Cas. 176.

69. In a case in which the evidence justified the jury in finding that, after plaintiff's station had been called, the train stopped, as required by statute, at a railroad crossing, and the car doors were thrown open and so left; that, although it was daylight so that there was practically no difficulty in seeing when a person was once outside and clear of the car, it was snowing and the wind blowing at the time, and the car windows were so obscured thereby that passengers could not look out and learn when the platform and station were reached; that plaintiff, supposing that the station had been reached went out on the platform of the car and on the steps on the side opposite to the station platform, and the steps of the car being slippery by reason of the snow and ice, instead of looking out looked down so as not to step on the slippery places; that just as she was placing her feet on the second step the train was started, although without disturbing her equilibrium; that she then noticed that there was no platform or station, thought that the train had pulled by them, became frightened and dizzy and was falling, when she jumped or threw herself from the steps, clear of the car, so that she would not fall under it, and was seriously injured; it was held that the question of defendant's negligence was properly submitted to the jury. *Larson v. Minneapolis, etc., R. Co.*, 85 Minn. 387, 88 N. W. 994.

70. **Duty to warn passenger.**—Plaintiff, a passenger on a street car, alighted at night from the "sidewalk side" of a car and was injured by stepping into a gutter between the car track and the sidewalk,

which gutter was similar to those ordinarily maintained in streets in country towns. Held, that the conductor of the car was entitled to assume that plaintiff was familiar with the existence of the gutter, and was therefore not guilty of negligence in failing to warn her of its existence. *Thompson v. Gardner, etc., St. R. Co.*, 78 N. E. 854, 193 Mass. 133.

Where, owing to the varying widths of a railroad company's cars, the space between the platform of a car and the station platform varied, it was the duty, of the railroad company to use reasonable care to prevent accident by giving warning to one moving in the midst of a crowd of passengers seeking to board one of the narrower cars of the space between the platform of the car and station. *Woolsey v. Brooklyn Heights R. Co.*, 108 N. Y. S. 16, 123 App. Div. 631.

If a conductor saw that it was dangerous for a passenger to alight on account of shooting between other passengers, he was bound to warn him of the danger; and, if the passenger was ignorant of the danger, the carrier is liable for the conductor's breach of such duty. *Penny v. Atlantic, etc., R. Co.*, 69 S. E. 238, 153 N. C. 296, 32 L. R. A., N. S., 1209.

A railroad company which has provided a safe exit from its cars, while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was provided in part at least for that purpose, is liable for injury received by a passenger using such unsafe exit without warning from the company's servants. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811.

to the carrier's negligence.⁷¹ It has been said that it was certainly an act of carelessness on the part of the conductor of a train, which has stopped at the station to let off passengers, to leave his train before the passengers had reasonable time to get off the cars, when he knew that a switch engine was to be coupled to it, without giving them any notice of the danger to which they might be subjected.⁷² If, for any reason, it is dangerous to leave a car by one of the platforms or from one side of the car it is the duty of the carrier to warn the passengers, or to take proper precautions to prevent passengers from attempting to alight therefrom, and a failure to do either may justify a finding of negligence.⁷³ If the conductor is at that platform, his failure to give warning thereof to an alighting passenger is negligence; and the carrier is negligent if none of its employees are at the platform to warn passengers of danger in alighting there, or in not directing them to get off at another platform.⁷⁴ Where a train is stopped, for the purpose of letting off passengers, at an unusual place, which is unsafe and dangerous, and the circumstances are such that the character of the place is not open to the observation of the passengers, they should be warned of the dangerous character of the surroundings.⁷⁵ And where a stock shipper is compelled by illness to leave the train at his first opportunity, which is known to those in charge, it is negligence for them to knowingly permit him to leave the way car while it is standing on an open bridge when it is so dark that he is unable to see his surroundings or ascertain the danger.⁷⁶ In a case in which it appeared that plaintiff had been injured, while alighting from defendant's street car, by stepping into an excavation in the street, alongside of which the car had been stopped after dark, it was said that plaintiff should have been warned of, and assisted over, the excavation.⁷⁷

Warning as to Sudden Movement of Train.—Where a passenger on a freight train is warranted in assuming that he is at the proper place to alight, the carrier should hold the train long enough for him to safely alight or warn him of danger from any sudden movement of the train.⁷⁸

Passenger Knowing of Peril.—Where a passenger knows of an opening between the car and station platforms, the railroad company is not liable for failure to give warning thereof.⁷⁹

Duty to Warn Passenger to Leave Moving Car.—See post, "Preventing Passenger Leaving Moving Train," § 2514.

71. What omission on the part of a carrier to warn passengers of a dangerous place of exit, or assist them in alighting, is negligence, is for the jury. *San Antonio Tract. Co. v. Flory*, 100 S. W. 200, 45 Tex. Civ. App. 233.

72. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367.

73. *McDonald v. Illinois, etc., R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263.

If alighting passengers can leave a train on either side and one side is more dangerous than the other, the carrier must have some employee present to advise the passengers. *Kearney v. Seaboard, etc., R. Co.*, 74 S. E. 593, 158 N. C. 521.

74. *Rearden v. St. Louis, etc., R. Co. (Mo.)*, 114 S. W. 961.

75. *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706.

In an action to recover for injuries sustained by plaintiff in alighting from a street car, which, instead of being stopped,

as requested, at the usual stopping place where the ground was practically on a level with the track, was stopped a short distance beyond where the ground was from two to eight inches below the level of the track, it was held that the trial court properly refused an instruction to the effect that, if the conductor had no special information as to the condition of the place, he was under no obligation to give her information in regard thereto. *Bass v. Concord St. Railway*, 70 N. H. 170, 46 Atl. 1056.

76. **Stock shipper compelled to leave train.**—*Otto v. Chicago, etc., R. Co.*, 87 Neb. 503, 127 N. W. 857, 31 L. R. A., N. S., 632.

77. *Richmond, etc., R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404, 44 Am. & Eng. R. Cas. 418.

78. **Warning as to sudden movement of train.**—*Southern R. Co. v. Burgess*, 143 Ala. 364, 42 So. 35.

79. **Where passenger knows of peril.**—*Woolsey v. Brooklyn Heights R. Co.*, 108 N. Y. S. 16, 123 App. Div. 631.

Sufficiency of Warning.—The duty of a subway company to inform persons boarding its trains of existence of a space between the car platform and the platform of the station is fulfilled, and the company is guilty of no negligence, where the guard on the train utters the words "Watch the step!" in such a manner that a person paying ordinary attention to what is going on about him would naturally hear the warning.⁸⁰

§ 2489. Misdirection as to Arrival or Departure of Train.—Where a prospective passenger has been misinformed by the ticket agent as to the departure of a train, and the agent fails to hold the train for him, the carrier is not liable for an injury arising out of his endeavor to board the moving train, unless the failure to delay the train for him was negligence and such negligence the proximate cause of the injury.⁸¹ Where there is no proof that a railroad agent, after informing plaintiff, a prospective passenger what time a belated train, would arrive, either knew or consented to plaintiff's leaving the depot and getting breakfast at a restaurant some distance away, and the train arrived before the time stated, and plaintiff ran from the restaurant and endeavored to board the train as it was pulling out of the station, and was injured in so doing, no inference of negligence can be drawn from the agent's failure to delay the train at the depot that plaintiff might take passage thereon.⁸² Nor were such acts, even though negligent, the proximate cause of the passenger's injury.⁸³ There is a class of cases in which it is held to be negligence to fail to give sufficient time for a passenger to return and take passage, and that the passenger, not being guilty of contributory negligence, in attempting to get upon a moving train, may recover for injuries resulting from the negligence of the company. But in all such cases, it will be found that there is an express or an implied consent to the passenger's absence and promise to await his return; the agent of the company knowing of the passenger's absence and diversion of journey. In the doctrine here stated, the passenger's absence is not shown to have been known to the carrier's agents, and there appears no express or implied contract to await his return.⁸⁴

80. Sufficient warning.—*Wertheimer v. Interborough Rapid Transit Co.*, 102 N. Y. S. 706, 52 Misc. Rep. 540.

81. Misdirection as to arrival or departure of train.—*Southern Kansas R. Co. v. Emmett* (Tex. Civ. App.), 139 S. W. 44.

82. No inference of negligence.—*Southern Kansas R. Co. v. Emmett* (Tex. Civ. App.), 139 S. W. 44. But see this case for a strong assisting opinion on this subject.

83. Southern Kansas R. Co. v. Emmett (Tex. Civ. App.), 139 S. W. 44.

84. See post, "Allowing Passengers to Alight Temporarily at Intermediate Station," § 2515.

"The distinction between the two classes of cases is illustrated by the case of *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785, and the same case as later tried and determined. See (Tex. Civ. App.), 46 S. W. 834." *Southern Kansas R. Co. v. Emmett* (Tex. Civ. App.), 139 S. W. 44.

